John Hurd

A

F. Hargrave

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

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MVSEVM
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A

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(Z) Court *Cuſtomary*. Who are *Judges*.

See Tit. Copyhold, and Tit Manor.

1. THERE is a Cuſtomary Court, conſiſting of Copyholders, or Cuſtomary-holders, for without them it cannot be, and this Court may be held without any free Tenant, or other Suitors, beſides the Copyholders or Cuſtomaryholders, and of this Court the Lord or Steward is Judge. Co. Lit. 58.

(A. a) The *Tourn* of the Sheriff.

1. THE Sheriff's Tourn is incident to the Office of Sheriff. Co. 4. Vitton 33. b. The Tourn is the King's Court, and of Record. 2 Inſt. 143.

2. *By Magna Charta* 9 H. 3. *cap.* 35. *The Sheriff ſhall keep his Tourn at the uſual Place, and that only twice a Year in the due and cuſtomed Place, viz. once after Eaſter, and once after Michaelmas.*

3. *Weſtm.* 2. 13 E. 1. *cap.* 13. *The Sheriffs in their Tourns, and elſewhere, when they have to inquire of Malefactors, by the Precept of the King, or of their Office, ſhall make their Inqueſt by lawful Men, at leaſt* 12, *who ſhall ſet their Seals to their Inquiſitions, and the Sheriffs ſhall take and impriſon thoſe whom by ſuch Inquiſitions they ſhall find Guilty, as they have uſed to do; and if they ſhall impriſon others, ſuch Perſons impriſoned ſhall have their Action by Writ of Impriſonment againſt the Sheriff, as againſt any other Perſon. And ſo it ſhall be obſerved of every Bailiff of Liberty.*

4. 1 E. 3. *cap.* 17. *Sheriffs and Bailiffs of Franchiſes, and all others who take Indictments in their Tourns, or elſewhere, ſhall take ſuch Indictments by Roll indented, whereof one Part ſhall abide with the Indictors, ſo that one of the Inqueſt may ſhew one Part of the Indenture to the Juſtice, when he ſhall come to make Deliverance.*

5. *Indictment* was in the Sheriff's Tourn *four Days after the Month of Eaſter*, and it was very much debated, whether the Indictment was void or not, becauſe the Statute ſays, that he ſhall loſe his Tourn. Br. Indictment, pl. 27. cites 6 H. 7. 2. Note, that by Award, an Indictment taken in the Sheriff's Tourn after the Month of St. Michael is void; becauſe the Statute is, that it ſhall be held within a Month after Eaſter, and after Michaelmas, otherwiſe he ſhall loſe his Tourn, and conſequently, if there is no Tourn, then the Indictment taken after before the Sheriff in no Tourn is void. Br. Indictment, pl. 9. cites 38 H. 6, 7.

6. The Sheriff's Tourn wherein the Sheriff had the Directory, was in the Meeting of the Freemen in ſeveral Parts of the County; and this was anciently, and now is called by that Name, which, ſimply conſidered, *is but a Hundred Court*, or the Sheriff's Tourn to keep the Hundred Court. It was *ordered to be kept twice every Year*, viz. *at Ladyday and Michaelmas, or ſoon after; unto this Court all the Freeholders of the*

Hundred repaired, and there they, the Biſhop and Sheriff, executed the ſame Power and Work for kind as they did in the County Court. In this Court all the Suits in the Hundred Court depending had their Determination, and others had their Commencement and Proceedings, as well the Pleas of the Crown as others. Some have conceived it to be a County Court, or ſuperior thereto, but there being no Ground thereof, I conceive it to be no other than a Viſitation of the County by Parcels or in Circuit. Bacon of Government 66, 67. cap. 24.

(B. a) [*Tourn.*] *Who* ſhall be *bound to come to it.*

Fitzh. Leet, pl. 1. cites S. C that a Man ſhall not be bound to come to two Leets by reaſon of his Reſiance.

1. IF a Man hath a Leet of all the Reſiants within the Precinct of his Manor which is within the Hundred, **yet theſe** Tenants **ſhall be bound to come to the Sheriff's Tourn.** 18 H. 6. 13.

Before the making of this Statute, the Sheriff in his Tourn, and the Lords of Leets, did uſe to amerce Archbiſhops, Biſhops, Priors, Earls, Barons, Religious Men and Women, if they came not to the Tourns, or to the Leets of others, becauſe for Suit Real no Diſtreſs can be taken, but for the Amercements for Default of Suit, which this Act doth remedy; for now, ſeeing it is hereby provided, that the Perſons above-named ſhall not need to come to Tourns &c. therefore for their not coming they cannot be amerced. 2 Inſt. 120, 121.

2. *Stat. Marlb.* 52 H. 3. *cap.* 10. *For the Tourns of Sheriffs it is provided, that Archbiſhops, Biſhops, Abbots, Priors, Earls, Barons, nor any religious Men or Women, ſhall not need to come thither, except their Appearance be required thereat for ſome other Cauſe;*

And it is worthy of Obſervation, that *by the Common Law, Parſons of Churches, that had Curam Animarum*, the better to perform their Function, *were not compellible to come to Tourns or Leets*, and if they were diſtrained to come thither, they might have a Writ, Cum ſecundum Conſuetudinem Regni noſtri Perſonæ Eccleſiaſticæ ratione Terrarum & Tenementorum ſuorum Eccleſiis ſuis annexorum ad veniend' ad Viſum Franc' Pleg' in Cur. noſtra, vel aliorum quorumcunque &c. whereby it appeareth that this Writ is grounded upon the Common Law, being the general Cuſtom of the Realm; but other Clerks (that be no Parſons of Churches with Cure) under which Name all Eccleſiaſtical Perſons, regular and ſecular, are contained, if they be diſtrained to come to Tourn or Leet, they ſhall have a Writ reciting this Statute to be diſcharged thereof, which Writ beginneth, Cum de Communi Conſilio proviſum ſit quod Viri Religioſi non habeant neceſſe venire ad Tournum Vicecom' &c. 2 Inſt. 121.

3. Par. 2. *But the Tourn ſhall be kept as it hath been uſed in the Times of the King's noble Progenitors.*

This Tourn of the Sheriff is Curia Vicecom' Franci Plegii, (as it hath been ſaid) and therefore this Act extendeth to all Leets and Views of Frank-pledge of all other Lords and Perſons. 2 Inſt. 121.

Here Hundredum is taken pro Viſu Franci Plegii, ſo as the Senſe is, that he which hath Tenements in the Tourn, and in ſome other View of Frank-pledge of ſome other Lord, or in diverſe Views of Frank-pledge, he ſhall not need to come to any other but where he is converſant, and Hundreds here are named, becauſe Sheriffs (as hath been ſaid) kept their Tourns in every Hundred. 2 Inſt. 122.

4. Par. 3. *And they that have Hundreds of their own to be kept, ſhall not be bound to appear at any ſuch Tourns, but in the Bailiwicks where they be dwelling.*

Here Baliva is taken for the Tourn or Leet where he is converſant. 2 Inſt. 122.

5. Par. 4. *And the Tourns ſhall be kept after the Form of the great Charter, and as they were uſed in the Times of King Richard and King John.*

6. *Tenant*

6. *Tenant in Ancient Demeſne* ſhall not be bound to come to the Leet or Tourn of the Sheriff. Br. Leet, pl. 38. cites the Regiſter. But Brooke ſays, Quære of Leet.

(C. a) The *Juriſdiction* of the Tourn. *In reſpect of the Thing.*

1. NOthing **ſhall be enquired before the Sheriff in his Tourn,** but Actions popular, Affray, Blood ſpilt. 4 H. 6. 10. Br. Preſentment in Courts, pl. 7. cites S. C. & S. P. by Martin. —— Fitzh. Tourn de Viſcount, pl. 1. cites S. C.

2. As **an** Aſſault **made** upon a Man, **is not inquirable there, becauſe it** is but a Tort to a particular Perſon, of which Treſpaſs lies. 4 H. 6. 10. Br. Preſentment in Courts, pl. 7. cites S. C. & S. P. by Martin.——Br. Leet pl. 15. cites S. C. & S. P. by Martin, and yet he agrees to the contrary of Affrays, and therefore Brooke ſays, Quære of Aſſaults; for the Law ſeems the ſame of the one as of the other. ——Fitzh. Tourne de &c. pl. 1. cites S. C.——Br. Preſentment in Courts, pl. 17. cites 8 E. 4, 5. that the Sheriff cannot inquire of Aſſault in his Tourn, and if he may inquire of it, the Defendant ſhall not have Anſwer, but ſhall make Fine &c.

3. **The** Stoppage of a Water **which is** to the Nuſance of all the People of the Country, **may be enquired of there, for this is popular.** 4 H. 6. 10. Common Nuſances done to a Number of People are inquirable in the Tourn. Br. Leet, pl. 15. cites S. C.——Br. Preſentments in Courts, pl. 7. cites S. C. & S. P. by Martin.——Fitzh. Tourn de &c. pl. 1. cites S. C.

4. So **of a** Bridge, **over which the People ought to paſs.** 4 H. 6. 10. Fol 543.

Br. Preſentments in Courts, pl. 7. cites S. C. & S. P. by Martin.——Fitzh. Tourn de &c. pl. 1. cites S. C.

5. **He may enquire of the** Death of a Man **before him and the Coroner. Statute of Marlbridge, cap. 24.**

6. **He hath not Conuſance of** Bread and Drink **in a Tourn.** 18 H. 6. 13. b. 18 Fitzh. Leet pl. 1. cites S. C. accordingly.——It ſhall be preſented in a Leet, but not in a Tourn; Per Cur. for the Sheriff's Tourn is no Leet, and ſuch Things as are omitted in a Leet ſhall be preſented in the Tourn. F. N. B. 160. (A) in the new Notes there, (d) cites 18 H. 6. 12, 13.—Br. Leet. pl. 25. cites 4 E. 4. 31. Contra, and that the Sheriff may enquire in his Tourn of Bread and Drink, and cites Preſentments in Courts, pl. 16 which is S. C. but S. P. does not appear there; but S. P. is in the Year Book accordingly. Mich. 4 E. 4. 31. b. pl. 12. by Choke.——2 Inſt. 72 cites S. C. and ſays, that for want of the Knowledge of Antiquity, it was obiter there denied, that the Tourn and the Leet was of one Juriſdiction, and as ſo an Inſtance given, that the Leet has Conuſance of Bread and Ale, viz. of the Aſſiſe thereof, and that the Tourn has not, it is clear that the Breach of the Aſſiſe of Bread and Ale is preſentable in the Tourn as a common Nuſance, and therewith agrees conſtant and continual Experience, and Reaſon proves, that the Derivative cannot have Conuſance of that which the Primitive had not, unleſs given by ſome Act of Parliament; herewith agrees the Stile of the Tourn, and the Authority of later Books, and cites 4 E. 4. 31. 22 E. 4 22. 12 H. 7. 18. 28 H. 8. Dier 13. b.

7. But **vide Statutum Walliæ, in Magna Charta, fol.** 6. **That the Sheriff may enquire** de Aſſiſa Panis & Cerviſiæ **non obſervata, & de eam infringentibus.**

8. If

8. If the Sheriff finds in his Tourn, that a Man hath encroached upon the King's Highway, he hath Power to abate it. 29 E. 3. 21. b.

As if insufficient Tanning of Leather or ſuch like, for which a Penalty is given by the Statute, be preſented in the Sheriff's Tourn, it is void and coram non Judice, and the Party ſhall not be put to Anſwer, quod nota. Ibid.——Br. Preſentments in Courts, pl. 30. cites S. C. ——Br. Juriſdiction, pl. 98. cites S. C.

9. *No Inquiry* ſhall be made in thoſe Courts *but of Offences inquirable by the Common Law*, unleſs the *Statute makes expreſs Mention*, that it ſhall be inquir'd in the Tourn or Leet; for otherwiſe thoſe Courts have not the Judgment of it. Br. Judgment, pl. 146. cites 1 R. 3. 1.

10. Of *Nuſances* &c. which *are by the Common Law*, the Sheriff may inquire in his Tourn. Br. Juriſdiction, pl. 98. cites 1 R. 3. 1.

11. *In Writ of Treſpaſs* &c. the *Defendant pleads*, that *his Franktenement*, or the like, *where Franktenement ſhall come in Debate in County*, there the Matter *ſhall proceed*. Br. Juriſdiction, pl. 98. cites the Regiſter.

12. *But* contra *if it come in Iſſue there upon Plaint without Writ*, there it ſuffices to remove the Plea. Ibid.

2 Hawk. Pl. C. 57. cap. 10. S. 14. ſays, it is certain, that the Statute of Magna Charta, cap. 17. doth neither reſtrain the Sheriff's Tourn nor the Court Leet from taking Indictments or Preſentments, or awarding Proceſs thereon, in the ſame Manner as before. But this Power of awarding ſuch Proceſs, having been abuſed by the Sheriffs in the Tourns, was taken from all of them, (except thoſe of London) but not from any Court Leet, by 1 E. 4. cap. 2.

13. The Authority of the Sheriff *to hear and determine Theft or other Felonies by the Common Law, (except the Death of a Man)* in the Tourn, is wholly *taken away* by this Statute of Magna Charta, cap. 17. howbeit, his Power to take Indictments of Felonies and other Miſdeeds within his Juriſdiction is not taken away by this Act. 2 Inſt. 32.

14. The *Tourn and Leet are of one and the ſame Juriſdiction*; For Derivativa Poteſtas eſt ejuſdem Juriſdictionis cum Primitiva. 2 Inſt. 71.

15. Both Eccleſiaſtical and Civil Cauſes were decided in the Hundred, County, and Sheriff's Court, before the Conqueſt; But *William the Conquer ordered, that no Eccleſiaſtical Plea ſhould be holden before a ſecular Judge*. 2 Inſt. 488.

16. *Tithes* were anciently determined in the Sheriff's Tourn. 2 Inſt. 661. cites many Books &c. to prove it.

17. The Sheriff in the Tourn may take *Recognizances for* keeping *the Peace*. 4 Inſt. 263, 264. cap. 54.

18. Any Matters done at the Sheriff's Tourn which is within the Leets Juriſdiction is not void, and *coram non Judice*, but only an Infringment of the Franchiſe. 12 Mod. 180. Per Holt Ch. J. Hill. 9 W. & M. The King v. Hewſon.

(D. a) [The Juriſdiction of the Tourn.] In reſpect of the Place.

1. If a Thing be to be done within a Franchiſe, where there is View of Frankpledge, in which Default of not repairing a Cauſey, or other Matter, and all other Things within Franchiſe, are preſentable, the not repairing the Cauſey, or other Matter, is not preſentable in the Tourn of the Sheriff, becauſe it is out of his Juriſdiction, being

ing it is out of his Jurisdiction, being in the Franchise. 29 E. 3. 21. a. b. adjudged. 28 E. 3. 95. b.

2. But if there be a Default in the Lord of the Franchise, in not causing the Causey to be amended, this may be presented in the Sheriff's Tourn without any Warrant by Writ, for that the Franchise was derived originally out of the Tourn. * 10 H. 4. 4. 4. † 28 E. 3. 95. b. H. 17 Ja. B. R. between ‡ *Loader and Samuel*, per totam Curiam, upon Evidence at the Bar. Contra || 29 E. 3. 21.

*Fitzh. Leet, pl. 13. cites S. C. —— S. C. cited Co. Litt. 168. b. —— † Fitzh. Barre, pl. 289. S. C.

‡ Cro. J. 551. pl 13. S. C. adjudged for the Plaintiff in Treſpaſs of taking his Beaſts; for to entitle the Tourn, this Default in the Leet ought to have been particularly pleaded, and ſhewn to the Court. —— Mo. 893. pl. 1257. Hill. 14 Jac. C. B. the S. C. but S. P. does not appear. —— A Thing not preſented in the Leet ſhall be preſented in the Tourn of the Sheriff, and for Default there, in B. R. when it comes into the Country. Br Leet, pl. 4. cites 41 E. 3. 26. —— Br. Preſentments in Courts, pl. 1. cites S. C. & S. P. by Belknap. —— If a common Nuſance &c. done within the Juriſdiction of the Leet, be not preſented in the Leet, the Sheriff in his Tourn cannot enquire of it, for *that which is within the Precinct of the Leet is exempt from the Tourn*, otherwiſe there might be a double Charge; *but* in that Caſe *a Writ may be directed to the Sheriff to inquire thereof* &c. againſt the Opinion of Fineux in 12 H. 7. if his Opinion be not miſreported; And by the Book of 29 E 3. this Writ is not taken away by the Statute of 28 E. 3. cap. 9. made the Year before, which was then freſh in the Judges Memory. 4 Inſt. 261.

|| Fitzh. Avowry, pl. 247. cites S. C.

3. But this may be preſented in the Sheriff's Tourn by Preſcription, 29 E. 3. 21. without Doubt.

Fitzh. Avowry, pl 247. cites S. C.

For more of the Tourn of the Sheriff, ſee 4 Inſt. 259. 260. cap. 53.—Prynn's Animadv. on 4 Inſt. 189, 190.—Preface to 9 Rep. 2. b.—And ſee 2 Hawk. Pl. C. 55. to 72. as to the following Points; 1ſt, The original Inſtitution of the Court. 2dly, At what Time, and in what Place it muſt be holden. 3dly, What Perſons owe Suit thereto. 4thly, What Authority the Sheriff (or his Steward) hath as Judge of it. 5thly, What kind of Offences are inquirable in it. 6thly, Within what Place ſuch Offences muſt ariſe. 7thly, By what Jurors, and in what Manner Indictments in it ought to be found. 8thly, In what Manner they are to be proceeded upon. 9thly, In what Manner they are to be traverſed and determined.

(D. a. 2) County Court.

See Tit. Court (I) pl. 3.

1. 6 *E.* 1. *cap.* 8. *Stat. Glouceſter* ENacts, that *Sheriffs ſhall plead in their Counties Pleas of Treſpaſs, as they have been accuſtomed; but as touching* Wounds and Maims *a Man ſhall have his Writ as before.*

Hereby it appears, that this Court has *no Juriſdiction* to hold Plea *of Wounds and Maihems*, but thoſe Pleas muſt be determined in the King's higher Courts, but of Battery (without Wounding or Maiming) this Act proves, that the County Court has Juriſdiction. 2 Inſt. 312. ad finem.

If the Plaintiff counts in *Treſpaſs* &c. *to the Damage of* 40 s. and the *Jury finds the Damages under* 40 s. yet the Plaintiff ſhall have no Judgment, though in Truth the Cauſe de Jure did belong to the Inferior Court. 2 Inſt. 312.

2. *Plaint of Replevin* by the Sheriff ſhall be *before the Sheriff in full County, and not out of the Court*; for the Suitors are Judges, and the Sheriff is Miniſter, and the *Proceſs ſhall be awarded by the Suitors*, per Catesby, but Pigot contra; for if the taking be the Day after the County, the Sheriff may take Plaint, and make Replevin immediately, and

otherwiſe it ſhall be Miſchief to ſtay till the County [Court;] and by him and Brian this has been uſed throughout England for ever; and per Brian, *Plaint* cannot be made *in Court Baron*, but *ſedente Curia*; and per Pigot, *Withernam* cannot be but *in full County*. Br. Plaint, pl. 21. cites 21 E. 4. 66.

3. The Government of the County in Times of Peace conſiſted much in the Adminiſtration of Juſtice, which was done in the publick Meetings of the Freeholders, and their Meetings were either in one Place, or in ſeveral Parts of the County, in each of which the Sheriffs had the managing of the Acts done there. *The Meeting of the Freemen in one Place was called Folkmote by the Saxons*, (ſaving the Judgment of the Honourable Reporter) Coke Inſt. 2. p. 69. *and of later Times the County Court*, the Work wherein was partly for Conſultation and Direction concerning the Ordering of the County for the Safety and Peace thereof, ſuch as were Redreſs of Grievances, Election of Officers, Prevention of Dangers, &c. and partly it was judicial, in hearing and determining the Common Pleas of the County, the Church Affairs, and ſome Treſpaſſes done therein, but not Matters Criminal, for the *Biſhop was Judge therein together with the Sheriff*, and by the Canon he was not to intermeddle in Matters of Blood; yet neither was the Biſhop's nor Sheriff's Work in that Court, other than Directory or Declaratory, for *the Freemen were Judges of the Fact*, and the other did but edocere Jura Populo; yet *in ſpecial Caſes, upon Petition, a Commiſſion iſſued forth from the King to certain Judges of Oyer to join with the others in the hearing and determining* of ſuch particular Caſes; but in Caſe of Injuſtice, or Error, the Party grieved had *Liberty of Appeal to the King's Juſtice*. Nor did the Common Pleas originally commence in the County Court, unleſs the Parties dwelt in ſeveral Liberties or Hundreds in the ſame County, and Caſe any Miſtake were in the commencing of Suits in that Court, which ought not to be, upon Complaint the King's Writ reduced it to its proper Place, and in this alſo the King's own Court had no Pre-eminence. In thoſe ancient Times this County was to be holden but twice a Year by the Conſtitution of King Edgar, but upon urgent Emergencies oftner, and that either by the King's eſpecial Writ, or if the emergent Occaſions were ſudden and important, by extraordinary Summons of ringing the Moot-bells. Unto this Court all the Freemen of the County aſſembled to learn the Law, to adminiſter Juſtice, to provide Remedy for publick Inconvenience, and to do their Fealty to the King before the Biſhop and Sheriff upon Oath, and in the Work of adminiſtring Juſtice, Cauſes concerning the Church muſt have the Precedency, ſo as yet the Canon Law had not got any Footing in England. Bacon of Government, 66, 67. cap. 25.

Mirror, p. 147.

Ll. Canut. Mirror, cap. 1 S. 15.

Mirror, cap. 5. S. 1.

Ll. Canut. Ll. Edgar.

Council Brit. p. 197. Tit. 22. Ll. Edw. cap. 35.

Ll. Edw. cap. 35.

Ll. Edw. cap. 4.

2 Inſt. 139. S. P.

4. The *Sheriff may hold Plea by Replevin by Plaint of any Value.* 2 *Inſt.* 312.

5. *So if* the Replevin be *by Writ*, but this is in Nature of a Commiſſion. 2 Inſt. 312.

The Juſticies does not enlarge the Sheriff's Juriſdiction to other Actions, but only enables him to hold Pleas of greater Sums than by his ordinary Juriſdiction he can do; Arg. and therefore the Action being brought in the County Court for Tithes, it was inſiſted, that this is not Debitum ex Contractu, but ex Delicto founded upon a Statute, whereof the Sheriff has no Power to hold Plea, and therefore prayed a Prohibition; but

6. *So by a Juſticies* the Sheriff may hold Plea of a Debt of 1000*l. or of a Treſpaſs Vi et Armis*, and the Proceſs is an Attachment, &c. not a Capias, but is but in Nature of a Commiſſion, and doth not enlarge the Judicature of his Court, for *the Words of the Writ do not, nor cannot make the Sheriff a Judge of that Court in that Particular Caſe, but the Suitors muſt be the Judges* as at Common Law, which cannot be altered but by Act of Parliament. The Plaintiff may remove this Plea without Cauſe ſhewed, but the Defendant cannot without ſhewing of Cauſe. 2 Inſt. 312.

but the Court ſaid, that this was a very conſiderable Caſe, and therefore directed a Suggeſtion and Declaration upon it, that the Defendant might plead or demur, and ſo the Caſe might come judicially before the Court. Lev. 253. Mich. 20 Car. 2. B. R. Biſhop v. Corbet.

7. If in the County Court, or other Inferior Court, the Plaintiff ſhall *divide a Debt of* 20 l. *into ſeveral Plaints under* 40 s. the Defendant may plead the ſame to the Juriſdiction of the Court, or may have a Prohibition to ſtay ſuch indirect Suit. 2 Inſt. 312. in Principio.

For more as to this Tit. ſee Prohibition (B) per totum.

8. In County Courts *the Suitors are the Judges.* 2 Inſt. 225.

Nor will a Juſticies make the Sheriff a Judge of that Court, by Virtue of the Words in the Statute of Glouceſter, cap. 8. for that were to alter the Juriſdiction and Judicature of the Court, whereof by Common Law the Suitors are Judges, which cannot be altered but by Act of Parliament. 2 Inſt. 312. —— 4 Inſt. 266. cap. 55. S. P.

9. *Treſpaſs* quare *Vi et Armis*; the Defendant Inſultum fecit upon the Plaintiff was brought in the County Court, and Judgment there given for the Plaintiff; But it was reverſed here upon a Writ of Falſe Judgment, becauſe the *County Court, not being a Court of Record, cannot fine* the Defendant, as he ought to be, if the Cauſe go againſt him, becauſe of the Vi et Armis in the Declaration, but an Action of *Treſpaſs without thoſe Words will lie* in the County Court well enough. Mod. 215. pl. 2. Trin. 28 Car. 2. C. B. Wing v. Jackſon.

10. On a Motion for an Attachment againſt F. & Al' for a Riot &c. at a Meeting of the County of Eſſex, for the Election of a Coroner, the Diſpute aroſe on the Sheriffs offering to adjourn it from C. to D. The Gentlemen apprehended, as they were Judges of the Court, i. e. Suitors, they might adjourn only, and that the Sheriff could not. Ch. J. and two Judges held that the *Power of adjourning* on the Occaſion, on Election of Verderors, Knights of the Shire &c. was in the Sheriff, it was his Court, and ſo called in Acts of Parliament, &c. But Eyre doubted, but admitted that the Sheriff had Power to appoint the Meeting, yet when the Court was aſſembled (it being no more than an Aſſembly of People to exerciſe a Juriſdiction) they made a neceſſary Part, and the Sheriff alone could not adjourn. Trin. 5 Geo. B. R. The King v. Fitz. But Eyre afterwards mutavit Opinionem.

11. Beſides the Tenants of the King, which held per Baroniam, and did Suit and Service at his own Court, and the Burghers, and Tenants in Ancient Demeſne, that did Suit and Service in their own Court in Perſon, (and in the Kings Court by Proxy,) there was alſo a certain Set of *Freeholders*, that did Suit and Service at the County-Court; theſe were ſuch *as anciently held of the Lord of the County, and by the Eſcheats of Earldoms fell to the King or ſuch as were granted out to hold of the King, but with particular Reſervation, to do Suit and Service before the King's Bailiff*, becauſe it was neceſſary the Sheriff or Bailiff of the King ſhould have Suitors at the County Court, that the Buſineſs there might be diſpatched; theſe Suitors are the *Pares of County Court*, and indeed the Judges of it, as the Pares were the Judges in every Court Baron, and therefore the Sheriff or King's Bailiff having a Court before him, there muſt be Pares or Judges, and the Sheriff himſelf is not a Judge, and yet the Stile of the Court is, Curia Prima Comitat' E. C. Milit' Vic' Com' præd' tent' apud B. &c. So it appears by that, that the Court was the Sheriff's by the old Feudal Conſtitutions, and yet the Lord was not the Judge, but the Pares only; ſo that even in a Juſticies, which was a Commiſſion to the Sheriff to hold Plea of more than was allowed by the natural Juriſdiction of a County Court, the Pares only were Judges, and not the Sheriff, becauſe it was to hold Plea in the ſame Manner as they uſed to do in that Court. According to the *Conſtitution of Alfred, there were to be* 12 *at leaſt of the Pares Curiæ of the County Court,*

to

to give a Verdict; for if there were not 12 at leaſt conſenting in one and the ſame Sentence, the Plaintiff failed, and he could have no Judgment of the Pares Curiæ, and this was the original of the Decemvirale Judicium in England. Gilb. Hiſt. Exch. 76, 77, 78. cap. 5.

(D. a. 3) Held. At what Time, and Place.

This is altered by the Statute 2 E. 6.

1. 9 *H.* 3. *cap.* 35. *COUNTY Courts are to be held from Month to Month, or longer, if formerly ſo uſed.*

2. 11 *H.* 7. *cap.* 15. *Directs how Plaints are to be entred, and the Sheriff &c. ſhall make a ſufficient Precept to the Bailiff of the Hundred to attach, ſummon, or warn the Defendant to appear and anſwer the ſaid Plaints. Bailiff not doing his Duty to forfeit* 40 *s. Juſtice of Peace may convict the Sheriff of fraudulent Practice.*

By this Act every County of England, concerning the Time of keeping the County Court, is governed by one and the ſame Law, and there is to be accounted 28 Days to the legal Month in this Caſe, and not according to the Month of the Kalendar. 2 Inſt. 71.

3. 3 *E.* 6. *cap.* 25. *They are to be held every Month, and no otherwiſe.*

4. 7 *and* 8 *W.* 3. *cap.* 25. *They are to be held at the uſual Place, and on a Wedneſday.*

S P. and Sheriff may grant Replevins out of it by the Statute W. 2.

5. The Huſtings, in Truth, *is the County Court* of the City; per Holt. Ch. J. 12 Mod. 396. Paſch. 12 W. 3. in Caſe of Freeman v. Bluet.

per Holt Ch. J. 12 Mod. 320. Mich. 12 W. 3. in a Note there.

For more of the County Court, See Crompt. Juriſdiction of Courts, 231. to the End. —— 4 Inſt. 266. cap. 55. —— Prynn's Animadv. on 4 Inſt. 189. 190.

(E. a) Court Baron.

1. THE Court Baron is the Court of the Lord of the Manor. Co. 4. Mitton 33. b.

4 Inſt. 268. cap. 57. S. P. although the Plea be holden by Force of a Writ of Right.

2. The Suitors are Judges, and the Steward but as a Regiſter. 6 H. 4. Placito 3. Co. Lit. 58. Co. 4. Mitton 33. b.

——The *Suitors* are Judges in County and Court Baron, *as well in Writ of Right and Juſticies, as in Suits by Plaint*, and not the Sheriff nor Steward. Br. Judges, pl. 15. cites 39 H. 6. 5. Per Cur.

In Court Baron the *Suitors are Judges*, and in the Leet the Steward is Judge; Per Fineux and Keble. Br. Court Baron, pl. 9. cites 12 H. 7. 16.

A Woman may be a Free-Suitor to the Lord's Courts, but tho' it be generally ſaid, that the Free-Suitors are Judges in thoſe Courts, it is intended of Men only. 2 Inſt. 119.

A Court Baron cannot be holden but before the Suitors, and ſometimes before the Bailiff and Suitors, as by Writ. But by Plaint it ſhall be before the Suitors only, but in no Caſe without the Suitors; Reſolved per tot. Cur. Cro. E. 792. pl. 35. Mich. 42 & 43 Eliz. C. B. in Caſe of Pell v. Towers. ——Noy. 20. S C. & S. P.

A Preſcription to have a Court Baron before his Steward is not good; For it ought to be Coram Sectatoribus; Per tot. Cur. But peradventure he might have preſcrib'd to have a Court to be holden before his Steward, but not a Court Baron. Cro. J. 582, pl. 2. Mich. 18 Jac. B. R. Armyn v. Appletoft.

The

The *King cannot alter the Juriſdiction* or Judicature of the Court Baron, County or Hundred, which are Courts at the Common Law, *nor appoint new Judges there*, but he may appoint new Courts, and authoriſe new Judges. 6 Rep. 11. b. Paſch. 25 Eliz. B. R. Jentleman's Caſe.——On a *Writ of Right* or upon a *Juſticies*, in an *Admeaſurement of Dower* &c. the Suitors are Judges, and not the Lord or his Bailiffs, or the Sheriff, though the Writ be directed to them, becauſe the Court Baron is the Lord's, as the County Court is the Sheriff's; By theſe Writs the Courts are not made Courts of Records, but are of the ſame Nature as before; a Writ of Falſe Judgment lies in ſuch Caſe, and not a Writ of Error. 6 Rep. 11. b. 12. a. Paſch. 25 Eliz. B. R. Jentleman's Caſe, cites 34 H. 6. 35. 39 H. 6. 5. a. 7 E. 4. 23. a. 6 E. 4. 3. b. 12 H. 7. 16. &c.

3. **In a Court Baron they** cannot hold Plea of Debt or Treſpaſs, **where the Debt or Damage amounts** to 40 s. **Co. Lit.** 118. **Vide for this the Statute of Glouceſter, cap.** 8. Its firſt Inſtitution was for the Eaſe of the Tenants, and for ending of Debts and Damages under 40 s. at Home, as it were at their own Doors. 4 Inſt. 268, cap. 57.

4. **In a Court Baron they** cannot **hold Plea** of Treſpaſs Vi & Armis, **Co. Lit.** 118. becauſe **this Court** cannot impoſe a Fine. Br. Juriſdiction, pl. 115. cites 8 E. 4. 15. S. P.

5. **Vide Hengam Magna, cap.** 3. **de Jurisdictione Curiæ Baronis, fol.** 9.

6. *Every Manor has a Court Baron incident to it*, and every Man, as well of the Manor, as a Stranger, may be impleaded there in Debt or Treſpaſs if they come within the Manor, and *Proceſs* ſhall be as at Common Law, that is to ſay, *Summons*, *Attachment*, *and Diſtreſs*, and ſuch Returns as are good at Common Law, are good there, and *Goods attach'd there ſhall be forfeited to the Lord*; And the ſame of Iſſues return'd there upon Default of the Parties. Per Billinge, Wangforde and Nedham. Br. Court Baron, pl. 1. cites 34 H. 6. 49. But Brook ſays, it ſeems there that Trin. 37 H. 6. is the contrary of the Attachment, Per Aſhton, Danby, Moyle, Davers and Choke, but this is not reported in 37 H. 6.

7. In *Admeaſurement of Paſture*, and in every *Vicontiel*, as in Juſticies &c. to the Sheriff, the Suitors are Judges, and not the Sheriff; Per Littleton, Choke and Needham. Br. Judges, pl. 27. cites 7 E. 4. 23. Br. Court Baron, pl. 12. cites S. C.——Br. Juſticies, pl. 3. cites S. C.

8. Court Baron ſhall be held *in one Place certain*; Per Brian. Quære inde; For otherwiſe it is uſed. Br. Court Baron, pl. 8. cites 8 H. 7. 3.

9. *Precept by Parol in a Court Baron to diſtrain* for Amercement, or the like, is good without Writing; Per Cur. quod nota. Br. Court Baron, pl. 25. cites 16 H. 7. 14. Br. Proceſs, pl. 184. cites S. C. that Precept by Parol in Court Baron is good without Writing.——In a Court Baron the Plaintiff muſt allege a Preſcription to diſtrain. Brownl. 36. Anon.

10. A Court Baron is *incident to a Manor*; And was ſaid, Arg. that therefore the Lord of the Manor *cannot grant over the Court Baron*, neither if he grants the Manor can he reſerve the Court Baron, becauſe it is incident. Br. Incidents, pl. 34. cites 19 H. 8. Br. N. C. pl. 7. cites S. C.——4 Inſt. 268 cap. 57. S. P.——Brownl. 175. Anon. S. P. Trin. 13 Jac. Brown v. Goldſmith. S. P.——Hett. 35. Mich. 13 & 14 Eliz. and therefore it is not loſt, though no Court has been holden Time out of Mind.——S. P. by Croke J. Bulſt. 55. and cites the Caſes in Br.

11. Action was removed out of Court Baron, inaſmuch as there were *only four Suitors*. Br. Suits, pl. 17. cites the Regiſter.——*Brooke ſays*, Quære inde, for *it ſeems that* the plural Number, viz. *two*, *ſuffices*, and ſo A Court Baron *cannot be held without two Suitors*. Br. 31.

Compriſe, &c. pl. 31. cites 32 H. 8. it was ſaid for Law in the Star Chamber, in the Time of H. 8. between *Brown* J. and *Lion* Grocer of London.

—If there is only one Suitor that is no Manor. Br. Manor, pl. 5. cites S. C.

Court Baron may be *held* in any Place within the Manor, but not without, and ſo of a Leet in any Place within the Liberty or Franchiſe, and though *no Court has been held* in the Manor Time out of Mind, yet by this it is not loſt; For it is incident to the Manor of Common Right. Dal. 61. pl. 15. 6 Eliz. Anon.

12. The Court Baron *muſt be holden on ſome Part of that which is within the Manor*, for if it be holden out of the Manor it is void, *unleſs a Lord being ſeis'd of two or three Manors, hath uſually, Time out of Mind, kept, at one of the Manors, Courts for all the ſaid Manors*, then by Cuſtom ſuch Courts are ſufficient in Law, albeit they be not holden within the ſeveral Manors. And it is to be underſtood, that *this Court is of two Natures*; the firſt is by the Common Law, and *is call'd a Court Baron*, as ſome have ſaid, for that it is the Freeholder's or Freeman's Court; for Barons in one Senſe ſignify Freemen, and of that Court the Freeholders that be Suitors are Judges, and this may be kept from three Weeks to three Weeks; *The ſecond is a Cuſtomary Court*, and *that doth concern Copyholders*, and therein the Lord or his Steward is the Judge. Now, as there can be no Court Baron without Freeholders, ſo there cannot be this kind of Cuſtomary Court without Copyholders or Cuſtomary-holders. And as there may be a Court Baron of Freeholders only without Copyholders, and then is the Steward the Regiſter, ſo there may be a Cuſtomary Court of Copyholders only without Freeholders, and then is the Lord or his Steward the Judge. And when the Court Baron is of this double Nature, the Court Roll containeth, as well Matters appertaining to the Cuſtomary Court, as to the Court Baron. Co. Litt. 58. a.

——Ow. 35. Anon. S. P. ſometimes in but ſeems only a Tranſlation of Dal.——It may be held ſometimes in one Place, and another; Per Windham J. Cro. E. 39. Paſch. 27 Eliz. C. B.——A Court *for admitting Copyholders, and where no Pleas are holden*, may be held *out of the Precinct of the Manor*. Arg. Quod fuit conceſſum per totam Curiam, Le. 289. pl. 394. Trin. 26 Eliz. B. R. in Ld. Dacres's Caſe.

4 Inſt. 268 cap. 57. S. P. ——But See pl. 18. in the Note there.

13. The Court Baron is *not a Court of Record*. 2 Inſt. 143. and Ibid. 311.

14. The *Stile* of the Court *is*, *Curia Baronis E. C. Militis Manerii ſui prædicti* (having the Manor's *Name written in the Margin*) tent' tali Die &c. coram A. B. Seneſchallo ibidem. 4 Inſt. 268. cap. 57.

15. Court Barons were *ordained to determine Injuries, Treſpaſſes, Debts, and other Actions, where the Debt or the Damages are under* 40 *s.* and alſo, becauſe the Lords of the Manors, and Court Barons, have given their Tenants their Lands and Tenements before the Statute of Weſtm. 3. to hold of them, and alſo becauſe Homagers of Court ought to inquire in this Court, that their Lords ſhall not loſe their Services, Cuſtoms, or Duties. And alſo it was ordained to make their Suits there, and ſo ſhew themſelves obedient to their Lords, and that nothing be done within the Manor to be any Annoyance, or hurtful to the Inheritances of the Lords of the Manors, which ſhould not there be inquired of, and preſented for the Lords of the Manors. Kitch. of Courts, 6, 7.

It was ſaid in this Caſe at the Bar, that the Form of Pleading in the Book of Entries is, That the Court was

16. A Court Baron *by Preſcription may be pleaded to be held before the Steward, Arg. cites* 6 *E.* 4. *but if there be no Cuſtom* or Preſcription to warrant it, then *it muſt be Coram Seneſchallo & Sectatoribus*, according to 4 H. 6. and Gawdy ſaid, that every Court Baron is to be holden before the Suitors, if there be no Preſcription to the contrary. Godb. 68, 69. pl. 83. Mich. 28 & 29 Eliz. B. R. in Caſe of Lovel v. Goliton.

holden before the Steward if the Action be for Debt or Treſpaſs for Amercements, or ſuch perſonal Things; *But if* the Action is brought *for Things Real*, then *it is Coram Sectatoribus*. Ibid. 69.——The Suitors are Judges in Real Cauſes, but not in Perſonal; Per Suit J. Godb. 49. in pl. 60. Mich. 28 & 29 Eliz. B. R. Anon.

18. It

17. It is the common Courſe throughout the Realm, that the *Amerce-ments in a Court Baron are aſſeſs'd by the Steward.* Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. Rowleſton v. Alman.

18. A Man cannot have a Court Baron *by Preſcription*, it being incident to the Manor; but he may by Preſcription *enlarge the Authority thereof*, as to hold Plea above 40 s. &c. Per tot. Cur. Cro. E. 792. pl. 35. Mich. 42 & 43 Eliz. C. B. Pell v. Towers.

Noy 20. S. C. and S. P. and that where the Court Baron by Preſcription may hold Pleas to the Value of more than 40 s. it is then a Court of Record; and if there be Error it ſhall be redreſſed by a Writ of Error, and not by a Writ of Falſe Judgment.

19. The Court *by Cuſtom may be held before the Steward*, as the Court of Weſtminſter; Per Cur. And per Vaughan it is held before the Steward, though the Suitors are Judges. 2 Jo. 22, 23. C. B. Eure v. Wells.

20. *Debt* was brought *for a Fine* ſet upon the Defendant by the Homage at the Court Baron, *grounded upon a Cuſtom to make Laws* for regulating their Common, and inflicting a Penalty on ſuch as did incloſe at inconvenient Times; and a Wager of Law was offer'd there, and Judgment is there for the Defendant; For of common Right the Homage has no Right to impoſe a Penalty for ſuch *private Offences*, but it is *only by Cuſtom* that they can do it; cites 5 Co. Chamberlain of London's Caſe. Mo. 276. Leon. 203. The Caſe indeed is not well reported, but upon comparing the Books together, it appears the Wager of Law was not admitted in that Caſe. Per Holt Ch. J. 12. Mod. 614. Hill. 13 W. 3. in Caſe of the City of London v. Wood, cites Co. Ent. 118.

21. A Court Baron *conſiſts of the Lord, Tenants, Steward and Bailiff*, within the Manor, and is *ſometimes called the Copyholder's Court*, eſpecially when it is for Trial of Titles of their Lands, for taking and paſſing Eſtates, Surrenders, Admittances and Grants; and herein *the Lord or his Steward is Judge*, (as the Cuſtom of the Place is) yet *the Court is ſometimes called the Freeholder's Court*, when the Actions and Proceedings are for Trial under 40 s. and is ſomething like a County Court, and the Proceeding much the ſame, and was without Doubt granted to the Lord originally by the King; but now moſt are by Preſcription, and are commonly held once in three Weeks, and may be as often as the Lord or Steward thinks fit, who is ſupreme Judge in Law and Equity, and is obliged to regiſter all Records of the Court, and other Proceedings between Lord and Tenant, and between Tenant and Tenant, and to be indifferent between them; and when ſuch Court is to be kept the Lord or Steward ſends his Warrant at ſix or more Days Notice, according to Cuſtom. Scroggs of Courts 39.

22. When a Court Baron ſhall be held. See Court (G) pl. 5.

(F. a) [*Court Baron.*] What Things it may do.

1. IF a Man recovers in a Court Baron, they have not Power to make Execution to the Plaintiff of the Goods of the Defendant, but they may diſtrain him, and retain the Diſtreſs till Satisfaction. * 4 H. 6. 17. ‡ b. 22 Aſſ. 72.

* Br. Court Baron, pl. 6 cites S. C. & S. P. per tot. Cur. accordingly; of the Court

But Brooke ſays, Quære of this Matter; for it is uſual to tax the Sum by the Suitors aſſigned by the Steward, and then to award a Levari Facias, which is in Nature of a Fieri Facias; but

but Brooke adds, Quære if by Cuſtom, or by the Common Law? —— Br. Court Baron, pl. 7. cites S C. but Brooke ſays, where the Uſe is to make *Levari Fac' this is good by Cuſtom*, as it ſeems to him, but then *it ought to be pleaded* accordingly, as it ſeems.

‡ Br. Execution, pl. 80. cites S. C. accordingly, but Brooke ſays it ſeems, that where it is otherwiſe uſed it is well, as by Levari Facias. ——— Fitzh. Execution, pl. 110. cites S. C. by Thirne, and alſo cites 4 H. 6. accordingly. —— Adjudged, that a Bailiff of a Court Baron, upon Judgment there given, and a Levari Facias awarded, cannot ſell the Goods, and ſo levy the Monies, without ſpecial Cuſtom. Noy 17. Hill. 3 Jac. B. R. Trye v. Burgh. ——— Ibid. cites 4 H. 6. 17. and 38 E. 3. 3. that he may deliver the Goods to the Recoveror, and that the Lord may ſell a Diſtreſs taken for a Fine. ——— You may add any thing to a Court Baron by Preſcription, as to ſell Goods taken in Execution upon a Judgment; Per Walmſley. Noy 20. in Caſe of Pell v. Towers.

Br. Executions, pl. 26. cites S. C. & S P. by Huls, and

2. **Upon a** Recovery of Damages in **a Court of** Ancient Demeſne, upon a Writ of Right, **if Execution be granted, the Bailiff of the Court may take and** ſell the Cattle of the Defendant. 7 H. 4. 27.

that in ſuch Caſe he may take the Beaſts of the Defendant in any Land held of the Manor, though it be Frank-Fee Land, Quod non fuit negatum.

3. P. 6 E. 1. B. R. Rot. 8. **per Judicium Curiæ, Curia Baronis** non habet poteſtatem placitandi de aliqua Tranſgreſſione in parco vel in Chacea de feris Beſtiis, niſi quis inveniatur cum Manuopere.

* Fol. 544

4. **Hill. 7 E. 1. B. Rot. 13. Juratores dicunt, quod Alicia, quæ fuit** Uxor Adæ **poſt Mortem** Adæ finem fecit cum T. W. de quo præd' Ada tenet ſua (*) Tenementa, per 22 *s.* pro dote ſua habenda, & **poſtea**, quia præd' Alicia dixit, quod prædict' T. W. injuſte prædict' Pecuniam ab ea extorſit, amerciavit ipſam in Curia ſua primo ad dimidiam Marcam, and poſtmodum ad 10 s. pro Defamatione illa; **upon which Verdict Judgment is given. Et** quia prædict' T. W. non potuit nec debuit de Jure in Curia ſua de Aliqua Defamatione placitare, nec aliquem pro ea amerciare, conſideratum eſt, quod prædicta Alicia recuperet Pecuniam prædict' ſic extortam verſus prædict' T. W. & T. W. in Miſericordia.

S. P. Br. Court Baron, pl. 10. cites 1 E. 4 10.

5. It was admitted in **a** *Replevin*, that upon Recovery of 38 s. in a Court Baron, the Officer may *deliver to the Plantiff the Beaſts of the Defendant* in Execution. Br. Court Baron, pl. 5. cites 38 E. 3 3.

6 Where a Man makes Fine in Court of Record, there in Court Baron, the Party for ſuch Offence ſhall be *amerced*. Br. Court Baron, pl. 20. cites F. N. B. 73.

7. *Parol* was *removed* out of Court Baron *becauſe there was only four Suitors*. Br. Court Baron, pl. 20. cites the Regiſter, fol. 11. and F. N. B. fol. 239.

8. *Treſpaſs Vi & Armis* does not lie in Court Baron, but there the Party may have Superſedeas. Ibid.

9. If a Man *divides a Debt* of 20 *l.* or the like, in a Court Baron, into ſeveral petit Sums under 40 s. of this the Party may have Superſedeas; and it ſeems, that of this the Defendant may wage his Law by Conſcience, for there is no ſuch Contract, and Action of Damages above 40 s. does not lie in a Court Baron. Br. Court Baron, pl. 20. cites F. N. B. 239.

10. In *Treſpaſs* in County, or Court Baron, if the *Defendant pleads his Franktenement*, or the like, or claims the Plaintiff to be his Villein, or the like, the Court ſhall ceaſe, and if they proceed Writ of Falſe Judgment lies. Br. Court Baron, pl. 21.

Cro. E. 255. pl. 13. Gomerſale v. Wayts, S. C. adjudged, *and though it was in the King's Manor and Court Baron, yet the Beaſts could not be ſold.* —— Bulſt. 52. Hewett v. Norborough, S. P.

11. In a Court Baron *no Goods can be forfeited for Default of Appearance upon the Diſtreſs*; for Diſtreſs is only in nature of a Pledge to be ſafely kept; And in Court Baron the *Proceſs is Diſtreſs infinite only, and not an Attachment*; Per Cur. and cited 33 and 34 H. 6. And Judgment accordingly. Yelv. 194. Mich. 8. Jac. B. R. Gomerſall v. Medgate.

S. P. and ſeems to be S. C. and though this being the King's Manor, it was urged, that this was not merely a Court Baron, but a Court of Record, and that it is Curia Domini Regis Manerii ſui de Dunſtable, yet all the Judges contra Williams held the Goods not forfeited, and the Sale not good, and Judgment was entered for the Plaintiff. —— 2 Roll Rep. 493. Hill. 22 Jac. B. R. in Caſe of Turberville v. Tipper, it was agreed, that the Proceſs in Court Baron is Summons, Attachment, and Diſtreſs.

(F. a. 2) Original of Hundreds, and Hundred Courts.

1. COunties were too great to meet upon every Occaſion, and every Occaſion too mean to put the whole County to that Charge and Trouble, and this induced Subdiviſions; the firſt whereof is that of the Hundred, now, and alſo anciently ſo called, but as ancient (if not more) is the Name Pagus; For the Hiſtorian tells us, that the Germans, in the executing their Laws, a Hundred of the Freemen joined with the Chief Lord per Pagos Vicoſque, and in raiſing of Forces a Hundred were ſelected ex ſingulis Pagis, which firſt were called Centenarii, or Hundredors, from their Number, but uſed for a Title of Honour like the Triarii. And as a 2d hereunto I ſhall add that Teſtimony of the Council at Berkhamſtead, which ſpeaking of the Reduction of Suits from the King's Court ad Pagi vel Loci Præpoſitum, in other Places it's rendred to the Governors of the Hundred or Borough; And at this Day in Germany their Country is divided into Circuits Centen or Canton, and Centengriecht, and the Hundredere, they call Centgraven or Hundred-Chiefs, whether for Government in Time of Peace, or for Command in Time of War, the latter whereof the Word Wapentake doth not a little favour; amongſt theſe one was, Per Eminentiam, called the Centgrave or Lord of the Hundred, and thereunto elected by the Freemen of that Hundred, and unto whom they granted a Stipend in the Nature of a Rent, called Hundred-Settena, together with the Government of the ſame. The Diviſion of the County in this Manner was done by the Freemen of the County, who are the ſole Judges thereof, if Polydore's Teſtimony may be admitted, and it may ſeem moſt likely, that they ruled their Diviſion at the firſt according to the Multitude of the Inhabitants, which did occaſion the great Inequality of the Hundreds at this Day. *The Government of the Hundred reſted at the firſt upon the Lord and the Hundredors*, but afterwards, *by Alfred*, they were found inconvenient, becauſe of the Multitude, and *were reduced to the Lord or his Bailiff, and* 12 *of the Hundred*, and theſe 12 were to be ſworn, neither to condemn the Innocent, nor acquit the Guilty. This was the Hundred Court which by the Law *was to be holden once every Month, and* it *was a mixt Court of Common Pleas, and Crown Pleas*; for the Saxon Laws order, that in it there ſhould be done Juſtice to Thieves, and the Trial in divers Caſes in that Court is by Ordeal. Their Common Pleas were Caſes of a Middle Nature, as well concerning Eccleſiaſtical Perſons and Things, as ſecular, for the greater Matters were by Commiſſion, or the Kings Writ removed. All Frecholders were bound to preſent themſelves hereat, and no ſooner did the Defendaut appear, but he anſwered the Matter charged againſt him, and Judgment paſſed before the Court adjourned, except in Caſes where immediate Proof was not to be had, albeit it was holden unreaſonable in thoſe Days to hold ſuch haſty Proceſs, and therefore the Archbiſhop of York prefers the Eccleſiaſtical, or Canonical way before this. Laſtly, in their Meeting, as well at the Hundred County Court, they retained their ancient Way of coming armed. Bacon of Government, 63, 69. cap. 25.

2. *In King Alfred's Time the Kingdom was* in Groſs, and then *divided into Counties and Hundreds*, and all Perſons then came within one Hundred or other, and then the King's Relations had the Government of them, and therefore they were called Conſanguinei, and ſo are the Earls, Lord Lieutenants &c. at this Day; and then, when the Office became troubleſome, there were ordained Vicecomites, which Name remains to this Day, and the others continue to be called Conſanguinei, but have no Power in the County, having only the Honorary Name of Earls, or Comites of ſuch or ſuch a County &c. And for the better Government of theſe Counties, the Vicecomites had two Courts, but out of thoſe the King granted Petty Leets, and Court Barons, but the Tourn of the Sheriff had the ſuperintendent Power, they being derived out of the Sheriff's Tourn, as in Dy. 13. And then, afterwards, the King granted away ſome Hundreds in Fee-ſimple, and ſome Franchiſes, and the laſt excluded the King utterly, but the Hundreds granted in Fee were not wholly exempt. On this aroſe ſome Confuſion, and the Parliament hereon took Notice, that the Execution of Juſtice was by this much interrupted, and therefore came the *Statute of* 9 *E.* 2. that Sheriffs ſhould be ſufficient Perſons, and have Lands in the County, and ſo be able to anſwer both the King and Country, and that Bailiffs and Farmers of Hundreds ſhould be ſufficient Men. And at this Time Hundreds were grantable for Years. Then came the *Statute of* 2 *E.* 3. *cap.* 4, and 5. that Sheriffs ſhould continue but for one Year, but this took not away the whole Inconvenience, for the Crown ſtill granted away Bailiwicks and Hundreds for Lives at Rents on ſuch exceſſive dear Rates, that made them endeavour to make up their Money by unlawful Means, and thereon came the Statute of 2 *E.* 3. *cap.* 12. and 14 *E.* 3. *cap.* 9. By the firſt it was enacted, that all Hundreds and Wapentakes granted by the King, ſhall be again annexed to the County, and not ſevered; and by the other Statute, that all ſhould be annexed, and the Sheriff ſhould have Power to put in Bailiffs, for which he will anſwer, and no more ſhall be granted for the future; And one Reaſon of this was, becauſe the King granted away Hundreds, and abated not the Sheriff's Farm; Arg. 2 Show. 98, 99. pl. 98. Paſch. 32 Car. 2. B. R. in Caſe of Cade v. Ireland.

(G. a) The *Hundred* Court *Juriſdiction.*

See Tit. Hundred.

Br. Cuſtoms, pl. 28. cites S. C.

1. **In an Hundred Court they may** ſwear 12 Freemen to preſent a a Thing. 39 E. 3. 35. 6.

2. **In an Hundred Court they** cannot hold Plea of Debt or Treſpaſs **where the Debt or Damages amount** to 40 s. **Co. Lit.** 118.

3. **In an Hundred Court they** cannot **hold Plea** of a Treſpaſs Vi & Armis. **Co. Lit.** 118.

Br. Cuſtoms, pl. 28. cites S. C. but ſays it was neither denied nor affirmed, but that the Cuſtom may be allowable.

4. By Uſage a Man may be amerced for not bringing a Porpoiſe, or other Royal Fiſh, that he finds **in the Pariſh,** to the Manor of the Hundred, **where he ſhould have 12 d. for his Labour, though the Lord of the Hundred hath a Property in the Thing for which the Amercement is.** 39 E. 3. 35. b.

5. Note,

5. Note, that *for Amercement* in the Hundred the *Lord may diſtrain the Beaſts of the Offender* throughout *all the Hundred*, *tho' they are not in the Land of the Party*. Br. Court Baron, pl. 13. cites 2 H. 4. 24.

6. Hundred can*not try Iſſue by Inqueſt*; For the Lord cannot compel his Franktenants to ſwear. Br. Court Baron, pl. 23.

5. This is *no Court of Record*, and the *Suitors are hereof Judges*; Of the Antiquity and Juriſdiction hereof, vide Magna Charta, and as the Leet was derived out of the Tourn *for the Eaſe of the People*, ſo *this Court* of the Hundred, for the ſame Cauſe, *was derived out of the Court of the County*, *and is a Court Baron in his Nature*. 4 Inſt. 267. cap. 56. 2 Inſt. 143. and Ibid. 311. S. P.

8. The *Stile* of this Court *is Curia E. C. Militis Hundredi ſui de B. in Com'. Buck. tent'. &c. Coram A. B. Seneſchallo ibidem.* 4 Inſt. 267. cap. 56.

9. By the *Statute of* 14 *E.* 3. *Hundreds* (except ſuch as then were of Eſtates in Fee) *are rejoined* (as to the Bailiwick of the ſame) *to the Counties*, and all Grants made to the Bailiwick of Hundreds, ſince that Statute, are void, and the making of the Bailiffs thereof belong to the Sheriff, for the better Execution of Juſtice, and of his Office; And ſo it was reſolved by the Lord Treaſurer Lea, and all the Barons of the Exchequer, and ſo decreed in the Exchequer Chamber between Forteſcue of Buckinghamſhire, and the Sheriff of the ſame Tourn, 2 Car. the Plaintiff having of late divers Hundreds granted to him for Life in the County of Bucks, reſerving a Rent, which the Sheriff diſallowed, and put in Bailiffs of his own; And a Commandment was given to the Court by the Attorney General, to avoid the like in other Counties, for that they were againſt Law, and belonging to the Office of the Sheriff, and were Occaſions of Delays and Hindrances of Juſtice. See the Statute of W. 2. cap. 36. againſt Procurement of Suits in this Court. 4 Inſt. 267. cap. 56.

10. In the Hundred Court the *Suitors are the Judges*, and not the Lord, tho' the Writs (when the Proceedings are by Writ) are directed to him, which is, becauſe the Court is his, and the Profits belong to him, and he is to ſee Juſtice done. 6 Rep. 11. Paſch. 25 Eliz. Jentleman's Caſe.

11. One ſued in B. R. for Coſts given in the Hundred Court which was under 40 s. and declared, that the Court was held before the Steward Secundum Conſuetudinem Manerii prædicti. Exception was taken, that the Steward is not Judge in ſuch Court, but the Suitors; But per Cur. a *Steward by a Cuſtom may be Judge in a Hundred Court*, and that ſo it had been held; And here the Plaintiff has declared upon the Cuſtom, the Declaration being Secundum Conſuetudinem Manerii; and a Man may ſue here in B. R. for a Sum under 40 s. As if 10 s. Coſts be given in any Suit here, he may ſue for them in B. R. Le. 316. pl. 444. Paſch. 30 Eliz. B. R. Anon.

12. It *was argued* by Mr. Holt, *that* the *Execution in the Hundred Court is by Diſtringas*, *and not by Levari Facias*, and divers Books were cited to that Purpoſe; *ſed non allocatur*; *For where the Books ſpeak of a Diſtringas*, *it is intended of a Levari Facias*, becauſe a Diſtringas, and ſo in Infinitum, would be endleſs in an Execution. 2 Lev. 81. Hill. 24 and 25 Car. 2. B. R. in Caſe of Doe v. Parmiter. 3 Keb. 126. pl. 44. S. C. per Cur. accotdingly. —— Levari Facias is not the proper Proceſs of a Hundred Court, but a *Diſtringas*; but *Levari* may be *by Cuſtom*; Per Holt Ch. J. Trin. 1 Ann. B. R. Anon. ——— S. P. and generally all the Hundred Courts in England have ſuch a Cuſtom; but the true Common-Law-Proceſs is a Diſtringas. 7 Mod. 1. Paſch 1 Ann. B. R. Anon. ——— 1 Salk. 201. pl. 3. S. P. and ſeems to be in S. C. 7 Mod. 44.

13. In Treſpaſs the Defendant juſtified by *Levari Facias awarded by the Steward*, *and ſealed by him in a Hundred Court* held before the Steward and Suitors; Per Cur. The Sealing of Proceſs by the Steward is ſuf-

ſufficient, *but the Court being ſaid to be Coram Seneſchallo & Sectatoribus, it is ill*, and Judgment for the Plaintiff on Demurrer; *But Coram Sectatoribus per B. Seneſchallum* [had been well enough] 3 Keb. 117, pl. 29. Hill. 24 Car 2. B. R. Doe v. Parmiter.

14. *Treſpaſs for taking his Horſes*; The Defendant *juſtifies by* Virtue of *a Recovery in a Hundred Court before J. S. Seneſchallum Domini Regis, and that a Levari Facias iſſued out, and by Virtue thereof he prout Miniſter Curiæ did ſeiſe the Horſes upon that Execution.* The Plaintiff *replies, and ſets forth the Statute of* 14 E. 3. 9. *and avers, that this Hundred was not granted in Fee at the Time of making of that Statute*; and the Queſtion intended was, How far that Statute ſhould extend, and what Hundreds ſhould be annexed to the Sheriffwick by that Statute? Baldwin pro Quer' agreed, that the King might have Hundreds, and ſo might a Subject, but then they muſt be ſuch as were in the Hands of a Subject in Fee at the Time of the making of that Statute. Atkins ſaid, Lord Ch. J. Hale's Opinion was, in this Caſe, that it extends to ſuch only as had been granted out ſince the Statute 10 E. 1. But per tot. Cur. that cannot come in Queſtion here; for here being a Court de facto, the Plaintiff ſhall not in this Action try the Title of the Owner, and it is all one as it there be a Diſſeiſor of a Manor, and a Recovery in that Court Baron, the Officer may well juſtify executing the Proceſs; for he that is in Poſſeſſion is Dominus pro Tempore, *and if they would try the Title it might be by Quo Warranto, or Action on the Caſe*; and for that Reaſon they all gave Judgment for the Defendant. Freem. Rep. 204. pl. 207. Mich. 1675. Ward v. Bent.

For more of the Hundred Court, See Crompt. Juriſdiction of Courts, 231. to the End. — 4 Inſt. 267. cap. 56. — And See tit. Hundred.

(H. a) *Piepowders.*

1. TO every Fair **a Court of Piepowders** belongs of Right. 17 E. 4. cap. 2.

2. **Mirror de Juſtices, Fol. 3. cap. 1. Sect. 3. That** from Day to Day **the Right of Strangers, Plaintiffs, in Fairs and Markets be haſten'd, as of Duſt, according to the Law of Merchants.**

But notwithſtanding ſuch Oath made by the Plaintiff, the Defendant may offer an Iſſue to the contrary. 17 E 4. Cap. 2. Par. 9

3. 17 Ed. 4. cap. 2. **reciting,** That divers Perſons coming to Fairs be grievouſly vexed and troubled in the Court of Piepowders by feigned Actions, and alſo by Actions of Debts, Treſpaſſes, Feats, and Contracts, made and committed out of the Time of the ſaid Fair, or the Juriſdiction of the ſame, contrary to Equity and good Conſcience **&c. be it** enacted, That no Miniſter of any ſuch Court **of Piepowders** ſhall hold any Plea, without Oath made by Plaintiff or his Attorney, that the Contract, or other Feats contained in the Declaration were made within the Fair, and within the Time of the Fair, and within the Juriſdiction and Bounds of the ſaid Fair. 1 R. 3. cap. 6.

This Statute was made perpetual by the 1 R. 3. cap. 6.

6 Rep. 12 a cites S C. accordingly, and 7 E. 4. 23. a.

4. The *Steward is Judge* of this Court; For it is a *Court of Record.* Br. Juriſdiction. pl. 111. cites 6 E. 4. 3.

—— Br. Error, pl. 162. cites 6 E. 4. 3. and 7 E. 4. 23. that of Error in Court of Piepowders lies Writ of Error, and not of Falſe Judgment, which proves that it is a Court of Record, and this per Littleton, quod non negatur. —— 4 Inſt. 272. cap. 60.

5. This

5. This Court is *a Court of Record if it may hold Plea* of any Sum *over* 40 *s.* adjudged and affirmed in Error. Jenk. 132. pl. 70. cites 13 E. 4. 8. D. 133. F. N. B. 18. S. C. cited 2 Buls. 23.

6. In the Court of Piepowders the *Plaintiff or his Attorney ſhall be examined by Oath if the Matter ariſes within the Fair, and the Defendant may plead* that it ariſes in *a Foreign Place.* Br. Juriſdiction. pl. 119, cites 1 R. 3. cap. 6.

7. This Court is * incident to every Fair and Market, as a Court Baron, to a Manor, and is † derived of two Latin Words, as is apparent, and ſo called, becauſe that for Contracts and Injuries done concerning the Fair or Market there ſhall be as ſpeedy Juſtice done for Advancement of Trade and Traffick, as the Duſt can fall from the Foot, the Proceeding their being *de Hora in Horam*; And therefore Bracton ſaith, *Item propterea qui celerem debent habere Juſtitiam, ſicut ſunt Mercatores quibus exhibetur Juſtitia Pepoudrous &c.* 4 Inſt. 272. cap. 60.

* It is incident, and one cannot grant the Fair, reſerving this Court, Sic dictum fuit, Arg. Br. Incidents, pl. 34. cites 19 H. 8. —— Fin. Law, 8vo. 15. cites S. C. —— Brownl. 175. Trin. 13 Jac. Brown v. Goldſmith, S. P. —— Bulſt 55. S. P. by Croke J.

† Jenk. 132. pl. 70. ſays it is called Curia Pedis Pulverizati, becauſe of the Confluence of People, who, by their Motion, raiſe Pulverem vel Lutum.

8. *And* there may be a Court of Piepowders *by Cuſtom without Fair or Market*, and a Market without an Owner. 4 Inſt. 272.

(I. a) *Piepowders.* *What Action* lies there; And for what.

1. **If one** ſlanders another, who trades in the Market, in any Thing which concerns his Trade, **the Action lies in the Court of Piepowders, but the Words ought to be ſpoke * in the Market, and not before; But if the Words do not concern any Thing** touching the Market, **the Court hath not Juriſdiction. Co. 10. 73. Hall v. Jones.**

* Cro. E. 773, pl. 2. Howell v. Johns, S. C. & S. P. —— Mo. 624, pl. 854. S. C. & S. P. held accordingly. —— S. C cited Mo. 831. in pl. 1116. —— 4 Inſt. 272. cap. 60. cites S. C. & S P. adjudged —— S. C. cited 2 Bulſt. 21. —— An Action upon the Caſe *for ſlanderous Words*, brought in a Court of Piepowders, for Words *ſpoken long before the Court was held*, adjudged there for the Plaintiff, and affirmed here in a Writ of Error, becauſe the Court was *laid to be held by Preſcription.* 2 Bulſt. 23. cites 8 Jac. White v. Snow.

2. **No Action lies upon a** Contract **made** at a Fair before. **D. 3. M. 133. 80. adjudged.**

3. An Action of Treſpaſs *for an Aſſault and Battery*, was brought in a Court of Piepowders *for an Aſſault done long before*, and well maintainable. 2 Bulſt. 23. cites Hill. 33 Eliz. Chambers v. Pert

4. Though it be the *King's Court*, yet *Debt on a Penal Law* ſhall not be brought there. But becauſe they have Power to hold Pleas in Actions of Debt, and ſo had Colour to hold Plea, in ſuch Action a Judgment given therein is not void, but voidable by Error. Cro. E. 530, pl. 59 Mich. 38 & 39 Eliz. C. B. Wilkinſon v. Netherſol.

5. A Piepowder Court *may be as well to a Market as a Fair*, it *has no Juriſdiction of any Matter but what happens in the Market the ſame Day.* Cro. E. 773, 774, pl. 2. Mich. 42 & 43 Eliz. B. R. Howel v. Johns. Mo. 623, 624, pl. 854. Hall v. Jones. S. C. & S. P. and alſo it may be by Cuſtom of a City or Place, where there is no Fair or Market at that Time, and cites 13 E. 4. 8.

A Court of Piepowders, though it be incident to a Fair, yet, by Cuſtom it may be in a Market; and likewiſe may be by the Cuſtom of a City or Place where there is no Fair or Market at the Time, and therefore, though in Pleading the Court was intitled, Curia Pedis pulverizati ratione Mercati &c. an Exception thereto was diſallow'd, becauſe the Record ſaid further, Secundum Conſuetudinem Civitatis. Mo. 623, 624, pl. 854.

6. The Juriſdiction thereof conſiſteth in *four Concluſions*.

1ſt. The Contract or *Cauſe of Action* muſt be *in the ſame* Time of the ſame *Fair or Market*, and not before in a former.

2dly, It muſt be for ſome *Matter concerning the ſame Fair* or Market, done, complained on, heard and determined.

3dly, It muſt be *within the Precinct of that Fair or Market*.

4thly, The Plaintiff *muſt take an Oath* according to the Statute of 17 *E.* 4. 2. but that concludeth not the Defendant. 4 Inſt. 272.

7. *And* all this was reſolved add adjudged in a Writ of Error, brought by **Hall v. Jones**, and the Caſe was this; Jones being Regiſter of the Biſhop of Glouceſter, brought an Action upon the Caſe in the Court of Piepowders, belonging to the Market in Glouceſter, againſt Hall for theſe Words, *Maſter Jones and his Clerks have by Colour of his Office extorted and gotten* 300 *l. per Annum by unlawful Means, for many Years together*, above their ordinary Fees, for proving Teſtaments, and granting Adminiſtrations; And Not Guilty being pleaded &c. it was tried and adjudg'd for the Plaintiff; and divers Errors were aſſigned, but the Judgment was reverſed for theſe Errors following;

1ſt, That this Court of Piepowders being incident to the Market, hath *no Juriſdiction but of ſuch Things as concern the Market*, and theſe ſlanderous Words did in no ſort concern the Market, but if one ſlander the Wares of any in the Market, whereby he cannot make Sale of them, an Action doth lie in that Court.

2dly, It appeared in the Record that the Words were *ſpoken the Day before the Market*, and no Action lieth in that Court but for an Injury within the Juriſdiction of the Court done, complained on, heard and determined on the ſame Market Day, the Proceedings being *de Hora in Horam*, and within the Precinct of the Market. And herewith agreeth 3. Mar. Dier 132. And it was reſolv'd, that this Court was incident as well to a Market as to a Fair. 4 Inſt. 272.

Paſch 42 Eliz. B. R. Hall v. Jones, cites 13 E. 4. 8. ——— Cro. E. 773. pl. 2. Howell v. Johns, S. C. but ſays nothing of the Secundum Conſuetudinem Civitatis, and Judgment was revers'd. Mo. 831. pl. 1116. cites S. C by the Name of Powell v. Jones, as adjudg'd, that the Action does not lie, unleſs the Words were ſpoke in the Market or Fair.——S. C. cited Arg. 2 Bulſt. 21. that the Judgment was reverſed for the Errors mention'd as above in 4 Inſt. 272. ——S. C. cited D. 132. b. Marg. pl. 80. that Judgment was reverſed.

It is only for Matters of Contracts, and for *Matters ariſing within the Market, and by occaſion of the Market*, as Batteries or Diſturbances happening there. But if the *Words* were by Occaſion in the ſame Market, it might perhaps be otherwiſe. Cro. E. 773, pl. 2. Mich. 42 & 43 Eliz. B. R. Howell v. Jones.

8. *Contracts, Batteries, and Aſſaults* are determinable in a Court of Piepowders, but not Actions of the Caſe for *Words*; For that theſe do not diſturb the Market; Per Fleming Ch. J. 2 Bulſt. 24. Mich. 10 Jac. in Caſe of Goodſon v. Duffil.

Fol. 545. (K. a) [A Court of Piepowders.] Of what *Things and Actions* it may hold Plea.

1. VIDE Mirror de Juſtices 16. b. cap. 1. Sect. 15. of what Actions they ſhall hold Plea.

Where the Court is as an Incident only to the Fair, it can-

2. A Court of Piepowders belonging to a Fair cannot hold Plea of Obligations, for this is ordained for Things ariſing in the Fair. Mich. 10 Jac. B. R. between *Goodſon and Duffield* per Curiam.

3. There

3. **There may be a Court of Piepowders** by Preſcription without a Fair or Market, **that may hold Plea of** Obligation by Preſcription. **Mich. 10. Jac. B. R. between** *Goodſon and Duffield*, **reſolved per Curiam.**

not hold Plea of Obligations, or Things happening before the Fair; but where it is by Preſcription it may hold Plea of an Obligation &c., though it appears that the Obligation was made in the May before the Fair. Mo. 830. pl. 1116. S. C. ——— Cro. J. 313. pl. 14. S. C & S. P. reſolved, that they may be by Cuſtom in Vills and Boroughs for any Cauſes, as Debts upon Bonds, or otherwiſe, or any Cauſes done at any Time, being tranſitory and Perſonal, and ſo they are in divers Cities, as Briſtol and Glouceſter, and a Record was cited Mich. 8 Jac. Rot. 146. in Caſe of **White v. Hunt**, where ſuch a Judgment in Glouceſter was affirmed to be good; and Hill. 33 Eliz. in Caſe of **Perd v. Chambers**, where ſuch Cuſtom was alleged to be in Canterbury, and held good. ——— 2 Bulſt. 21. S. C. & S. P. held accordingly; and Ibid 23. Arg. cites the Caſes of **Chambers v. Pert**, and **White v. Pow.** ——— * S. C. cited D. 132. b. Marg. pl. 80. as adjudged accordingly. ——— Ibid. cites Mich. 33 & 34 Eliz. **Parker v. Onely**, where Error was brought on the Recovery had by Onely againſt Parker, in Debt for Performance of Covenants in the Court of Piepowders in Canterbury, and the Stile of the Court was, "Placita tenta in Curia Pedis "Pulveris' in Civitate Cant." without ſaying, "in Pleno Mercato tenta" and Wray, Fenner, and Clench held this to be Error, and Judgment reverſed againſt the Opinion of Gawdy, becauſe the Plea was concluded, "Juxta Conſuetudinem Villæ prædictæ"; But ſays Nota, 13 E. 4. 8. Piepowders without a Market, and this Book was not remembered by any, which is Verbatim contrary to this Reſolution.

* Cro. E. 256. pl. 31. Mich. 33 & 34 Eliz. B. R. Penred v. Chambers, S. C. & S. P. held per Cur. but the Preſcription muſt be in the Stile of the Court. ——— S. P. Cro. C. 45, 46. Mich. 2 Car. C. B. Hodges v. Moyſe.

4. If 2 Men make a *Contract for Land* in a Fair that cannot be within their Juriſdiction, and they are not to hold Plea of ſuch a Contra, but only of buying and ſelling Goods in the Fair, and the Mayor, if *Owner* of the Fair, *cannot be a good Steward* of it; Agreed per Cur. 2 Show. 181. pl. 180. Hill. 33 and 34 Car. 2. B. R. Cholmley v. Morton.

S. P. and it ought to be held before the Steward, and cannot be held before the Mayor, unleſs *by Cuſtom.* Skin. 33. pl. 10. Anon.

(K. a. 2) [Court of Piepowders.] Pleadings and Proceedings.

1. IT was aſſign'd for Error upon Record given in the Court of Piepowders *Secundum Conſuetudinem Civitatis*, becauſe it *did not ſay in pleno Mercato vel Feria*, and it was adjudged no Error by reaſon of theſe Words, Secundum Conſuetudinem Civitatis, ſo that it appears that the Court of Piepowders may be by Cuſtom without Fair or Market. Br. Error, pl. 171. cites 13 E. 4. 8.

S. C. cited D. 132. b. Marg. ——— See (K. a) pl. 2.

2. Error was aſſign'd upon a Judgment in a Court of Piepowders in Glouceſter, becauſe the Adjournment was entred *Idem Dies datus eſt*, whereas it ſhould be *Eadem Hora*, but held good. Mo. 459. pl. 637. Mich. 38 and 39 Eliz. Anon.

3. If Judgment be given upon a *Contract made at a Fair precedent*, and no Plaint was then entred, it is erroneous. Jenk 211. pl. 48.

They cannot meddle with any Matter but what happens in the Market the ſame Day. Cro. E. 773. Howell v. Jones.

4. If *Judgment* be againſt Defendant he muſt be *amerced*, or elſe the Judgment is erroneous. Jenk. 211. pl. 48.

5. Such a Court laid to be held by *Preſcription and Charter* is well laid, the Charter being a Confirmation of the Preſcription. 2 Buls. 21. Mich. 10 Jac. Goodſon v. Duffill.

Such Court may be held, though not *in Pleno Mercatu* &c. but

but then it muſt be by Preſcription, and *the Preſcription muſt be in the Stile of the Court.* Cro. E. 256. pl. 31. Mich. 33 & 34 Eliz. B. R. Penred v. Chambers.

For more of the Court of Piepowders See Crompt. Juriſdiction of Courts, 229 to 230. b. &c. — 4 Inſt. 272. cap. 60. — Prynn's Animadv' &c. on 4 Inſt. 190. to 199 &c.

(L. a) Courts of *Boroughs*, and other *Inferior Courts.* Of what Things they may hold Plea, [and in reſpect of the Declaration,] and try by Jury there.

See tit. Eſcape (F) pl. 3. S. C. and the Notes there. — Mar. 8. pl 20. Paſch. 15 Car. Anon. S. P. and ſeems to be S. C. — S. C. cited by Baron (John) Powell. 2 Lutw. 1567. Mich. 4 W. & M. in a long

1. IF an Obligation be made out of the Juriſdiction of the Court, though the Action brought upon it is tranſitory as the other Courts, as the Courts at Weſtminſter, that have a general Juriſdiction, yet ſuch Inferior Courts have not any Juriſdiction of any Thing that ariſes out of the Juriſdiction, and therefore they have not Power to hold Plea thereof. Paſch. 15 Car. B. R. between *Richardſon and Bernard* adjudged per Curiam, in an Action brought by him that recovered upon ſuch Obligation in an Inferior Court for an Eſcape of him that was taken in Execution upon the Judgment againſt the Officer that ſuffered him to eſcape; and adjudged, That this was coram non Judice, and meerly void; and that the Officer ſhall take Advantage thereof, and Judgment given againſt him that brought the Action for the Eſcape after a Verdict for him. Intratur Trin. 14 Car. B. R. Rot. 1590. for there it appears by the Declaration, that the Obligation was made at a Place in the Body of the County out of their Juriſdiction.

Argument in the Exchequer, in the Caſe of Gwinne v. Poole, and ſaid, that true it is, if it appears by the Declaration of the Plaintiff, that the Cauſe of Action aroſe out of the Juriſdiction of the Court, all the Proceedings after ſhall be void, & coram non Judice, and this was the reaſon of the Judgment in the Caſe of Richardſon v. Barnard, in Roll's Abr. 545. 809. March's Rep. 8. becauſe it appeared in the Body of the Declaration, that the Place, where the Obligation was made, was in the Body of the County out of their Juriſdiction; But where nothing of this appears by the Plaintiff's Declaration, it ought to be notified to the Court by the Defendant's Plea to the Juriſdiction of the Court.

Mar. 3. pl. 5. Anon. ſeems to be S. C. — Error of a Judgment in the Marſhalſea, upon a *Promiſe* made within the Juriſdiction of that Court, which was in Conſideration of

2. In an Action upon the Caſe in an Inferior Court, if the Plaintiff declares, That at a Place within the Juriſdiction of the Court the Defendant aſſumed, That in Conſideration that ſuch a Ship ſhould go from Yarmouth, which was out of the Juriſdiction, to Amſterdam, he would give to the Plaintiff 5l. and avers, That the Ship went from Yarmouth to Amſterdam, and thereupon the Defendant pleads Not Guilty; This is not triable in this Inferior Court, becauſe they cannot enquire of thoſe Things which are out of their Juriſdiction, and without it the Action does not lie, though the Agreement was within the Juriſdiction. Paſch. 15 Car. B. R. between *Brian and Langhorn* adjudged in a Writ of Error upon ſuch a Judgment in Newcaſtle, and the Judgment reverſed for this Error. Intratur 15 Car. Rot. 465.

ſuch a Sum received, *that he would pay him ſuch a Sum when he returned into England from Hamborough*, (being a Place beyond the Seas,) and becauſe the Action is brought of an Act to be done at Hamborough, out of the Juriſdiction of the Court, it was holden Error, and the Judgment was reverſed. Cro. C. 571. pl. 9. Hill. 10 Car. B. R. Anon.

Debt was brought *in Briſtol*, and the Plaintiff *declared for Wages* to be paid *upon the Performance of a Voyage to be made in Locis Tranſmarinis.* In Error brought this was held to be ill; for they cannot inquire

quire at Briſtol, whether the Party has performed the Voyage or not; And Judgment was reverſed. Sty. 260. Paſch. 1651. B. R. Willis v. Bond.

3. **In an Action upon the** Caſe in Windſor Court, **upon a Promiſe that the Plaintiff** declares, That at Windſor aforeſaid, within the Juriſdiction **of the Court,** in Conſideration that the Plaintiff aſſumed to draw with four Horſes 1500 Tiles from an Houſe in Hedley in Comitatu Bucks, to the Top of Hedley Hill ibidem, the Defendant aſſumed to pay 5 l. **Though the Defendant pleads Non Aſſumpſit, yet the Court cannot proceed to try it upon this Declaration, for that it** appears in the Declaration, that Hedley Hill and the Houſe a quo &c. are in Comitatu Bucks, **of which the Jury cannot take Conuſance; and if they proceed to try it, the Jury ought to inquire of it for Damages. Paſch. 15 Car. B. R. between** (*) *Ive and Stone* **adjudged, and the firſt Judgment reverſed. Intratur Hill. 14 Car. Rot.** 444.

S. C. cited by Berkley J. and agreed per Cur. to be Law. Cro. C. 571. in pl. 8. for which ſee the Caſe following.

* Fol. 546.

4. **In an Action upon the** Caſe in the Court of Bath **in Comitatu Somerſet, if the Plaintiff** declares, That he was a Taylor, and **that he** uſed the ſaid Art for ſeveral Perſons inhabiting tam infra Civitatem præd', quam alibi infra Regnum Angliæ, and the Defendant, **to ſcandalize him in his ſaid Art,** ſaid theſe Words **of him;** Thou haſt ſtole as much Cloth out of my Suit and Cloak which thou madeſt for me, as did make thy Wife a Waiſtcoat, **by which he** loſt his ſaid Cuſtomers; **Though the Defendant pleads Not Guilty, yet the Court cannot proceed to try it upon this Declaration, for that the Jury upon the Trial ought [not] to give Damages for the Loſs of Cuſtomers out of the Juriſdiction of the Court. Mich. 15 Car. B. R. between** *Stowel and Ireland*, **per Curiam in a Writ of Error upon a Judgment in Bath, and it was reverſed accordingly, but after a Day was given over to the next Term. Intratur Trin. 15 Car. Rot. 1587, and after, Hill. 15 Car. the Judgment was affirmed, because it was** ſo alleged only for Damages.

Cro. C. 570. 571, pl. 8. Ireland v. Lockwell, S. C. and held that the Allegation was only for the Increaſe of Damages which they may inquire of in any Place whatſoever.—— Jo. 450. pl. 1. Ireland v. Blockwell. S. C. and Judgment affirm'd by three Juſtices, contra Barkley, for he might loſe Cuſtomers who dwelt out of the Juriſdiction, and yet the Cuſtomers may be within the Juriſdiction.——Caſe &c. in the Marſhalſea for theſe Words, You are a Whore; and the Plaintiff declared, that by reaſon of ſpeaking the Words, ſhe loſt her Marriage; After Verdict and Judgment for the Plaintiff, Error was aſſign'd, that the Loſs of Marriage, which was the Cauſe of Action, doth not appear to be within the Juriſdiction of the Court, and the other Words are not actionable, and the Judgment was revers'd. Raym. 63. Mich. 14 Car. 2. B. R. Littleboy v Wright.—Lev. 69. S. C. accordingly.—— Sid. 85. pl. 14. Littlebury v. Wright. S. C. but no Judgment.——Keb. 328, pl. 63. S. C. adjornatur. ——It was agreed clearly, that if that which is the Giſt of the Action, and the compleat Cauſe of it be laid within the Juriſdiction, and the Declaration ſhews further Matter, which is only Aggravation or conſequential Damage, without which the Action would have lain, ſuch Matter need not be averr'd to be within the Juriſdiction; As in Caſe for calling a Woman Whore, whereby ſhe loſt her Marriage, there not only the Words, but the Loſs of Marriage alſo muſt be alleg'd to be within the Juriſdiction, becauſe the one without the other would not maintain the Action, and there one may confeſs the Words, and traverſe the Damage. So in Treſpaſs by a Maſter for the Battery of his Servant, whereby he loſt his Service; the Loſs of Service, as well as the Battery muſt be laid within the Juriſdiction. 6 Mod. 224. Mich. 3 Anon. B. R. and cited and allow'd the principal Caſe in Roll.—— 1 Salk. 404. pl. 1. S. P. and that in Caſe for calling the Plaintiff Whore, Per quod Maritaginm amiſit, the Loſs of Marriage muſt be laid Infra Juriſdictionem; For that is the Giſt of the Action; but otherwiſe for calling her Thief &c. Per Cur. Obiter.

5. **In an Action upon the** Caſe in the Mayor's Court of Oxon. **if the Plaintiff** declares, That in Conſideration the Plaintiff would buy, or procure to be bought, Wines in London, and would convey them to Oxford to the Defendant, to be ſold by him, the Defendant aſſumed at Oxford to pay to the Plaintiff the Money laid out by him for the Wines and Carriage of them, and the Moiety of the clear Profits ariſing by Sale thereof, **and the Defendant pleads Non Aſſumpſit to this; In this Caſe the Court of Oxford cannot try it, becauſe they cannot** III-

In Aſſumpſit in Ipſwich the Plaintiff declared, that in Conſideration he would bring for the Defendant in his

Ship two Hogsheads of Wine from Bourdeaux to Ipswich, he would content and satisfy him for it; and

inquire of the Performance of the Consideration for Damages which is performed out of their Jurisdiction, scilicet, the buying of Wines in London, and the Carriage of them to Oxford from London. Pasch. 1649, between *Turner and Tyler*, adjudged in a Writ of Error upon such Judgment in Oxford, after Verdict for the Plaintiff after Non Assumpsit pleaded, and the Judgment reversed accordingly. Intratur Mich. 24 Car. B. R. Rot. 210.

alleged, that he brought them accordingly; and that 42 l. was Minus satis to satisfy him, and that he required Payment of the 42 l but the Defendant had not paid it. Upon Demurrer it was adjudged for the Plaintiff, and affirmed in Error; for when he shews that he did not require more, that suffices. Cro. J. 552. pl. 14. Mich. 17 Jac. B. R. Griffiin v. Charles.——A Writ of Error was brought to reverse a Judgment given in the Court at Bridgewater in an Action of the Case upon an Assumpsit to pay such a Sum of Money at the Defendant's Return out of Ireland. The Court held that Bridgwater hath no Power to enquire of a Thing done beyond their Jurisdiction, and Ireland is out of their Jurisdiction, whence the Party upon the Assumpsit was to return. Sty. 191. Hill. 1649. Roberts v. Tucker.

6. In an Action upon the Case in the Court of Launceston in Cornubia, if the Plaintiff declares, That whereas he was an Attorney of the Hundred Court of Stratton in Cornubia, the Defendant having Communication with J. of the said Office of the Plaintiff, said these scandalous Words of him, within the Jurisdiction of the said Court of Launceston, Thou art a Cheater &c. After Verdict for the Plaintiff, and Damages given, and Judgment, this is Error, for that the Jury could not inquire whether the Plaintiff was an Attorney of the Hundred Court, this being out of their Jurisdiction, and this being the principal Cause of the Action and Damages. Pasch. 1651. between *Facie and Heddon*, adjudged per Curiam, and the Judgment in Launceston reversed accordingly.

7. If an Inferior Court hath Jurisdiction to hold Plea of any Sum under 40 l. [and] an Action upon the Case [is brought there] upon a Promise, in which the Defendant assumed to perform an Award made by J. S. or otherwise to pay to the Plaintiff 40 l. this Action does not lie in this Inferior Court, though the Plaintiff acknowledges himself satisfied [of part of the Damages] to draw it within the Jurisdiction of the Court, because it consists in Damages to be assessed by the Jury, and the Jury may give more or less Damages than 40 l. and therefore before the Damages are made certain by Assessment of the Jury, the Plaintiff cannot acknowledge Satisfaction of any Part thereof. Pasch. 15 Car. B. R. between *Gilbert and Wilkins* adjudged per Curiam, in a Writ of Error upon a Judgment in Banbury, and (*) Judgment there given reversed for this Cause among others. Intratur Trin. 14 Car. Rot. 755.

* Fol. 547.

8. An Inferior Court cannot hold Plea of an Obligation, Contract, Battery, or other transitory Actions, if it was not made within the Jurisdiction of the Court, inasmuch as the Jurisdiction of the Court is limited to Things arising within the Jurisdiction. Mich. 15 Car. B. R. per Curiam, præter Barkly, who inclined the contra for the common Practice of such Courts.

See tit. Prohibition (I. a) pl. 2. S. C. and the Notes there.

9. In Writ of *Error* by W. against B. *upon a Judgment* given *in the Court of the City of Bristol*, the Case was, that B. was *Plaintiff* in the said Court against W. *in an Action of Covenant, and declared of a Covenant made by Word by the Testator of W. with B and declared also, that within the said City there is a Custom, That Conventio ore tenus facta shall bind the Covenantor as strongly as if it were made by Writing*; And it was holden by the Court, that that Custom does not warrant this Action, for *the Covenant binds by the Custom the Covenantor, but does not extend to his Excecutors*, and a Custom shall be taken strictly, and therefore the Judgment

Judgment was reverſed. Le. 2. pl. 3. Hill. 25 Eliz. B. R. Wade v. Rembo.

10. A Man *recovered Debt and Damages in B. R. and afterwards brought Action of Debt againſt the Bail in the Court in the Tower of London.* Upon this Judgment, and after a Summons and Nihil returned, the *Defendant was taken by a Capias and reſcued*, and thereupon the *Plaintiff brought* an Action on the *Caſe* in the ſame Court *againſt the Reſcuer for the Reſcue*, and upon a Motion a *Prohibition was granted*, for that the Original Foundation of this Action commenced in this Court. Roll Rep. 54. pl. 28. Trin. 12 Jac. B. R. Anon.

11. *In Treſpaſs Vi & Armis at Doncaſter* the Plaintiff *declared that the Defendant took certain Cows of his out of the Juriſdiction of the Court, and brought them within the Juriſdiction, and there diſpoſed of them to his own Uſe.* After Judgment for the Plaintiff it was aſſign'd for Error, that in regard the taking, which is the Ground of the Action, was without the Juriſdiction of the Court, altho' the Diſpoſing of them was within, yet the Court had no Juriſdiction of the Cauſe, which Roll Ch. J. agreed, and ſaid, that *if the Action had been a Trover and Converſion it had been good, but being a Treſpaſs Vi & Armis it is naught*, and reverſed the Judgment Niſi. Sty. 313. Hill. 1651. B. R. Keightley v. Nodes.

12. A *Quantum Meruit for Work done in London will not lie in an Inferior Court, tho' the Promiſe were made good within the Juriſdiction*, for the Jury muſt enquire of the Worth. Freem. Rep. 214. Mich. 1676. in Oldenburgh's Caſe.

13. An *Aſſumpſit for Rent, tho' there were a ſpecial Promiſe, ought not to be brought* for Rent *in an Inferior Court*, becauſe it concerns the Realty; Held. Freem. Rep. 214. pl. 221. Mich. 1676. in Oldenburgh's Caſe.

14. If an *Inferior Court has Juriſdiction over the Cauſe* of Action, no Prohibition ought to go upon a Suggeſtion that the Cauſe of Action aroſe out of the Juriſdiction, but you *ought to Plead to the Juriſdiction*, and if they refuſe ſuch Plea, then move for a Prohibition; per tot. Cur. And Holt ſaid, there have been Caſes to the contrary, but the Law is now ſettled otherwiſe; and if a Perſon *pleads in Chief*, he ſhall never aſſign this for Error, if ſuch Inferior Court has Juriſdiction of the Thing. 11 Mod. 132. Trin. 6 Ann. 1707. B. R. Anon.

(L. a. 2) Inferior Courts. Proceſs and Proceedings therein.

1. IN *Treſpaſs*, the Defendant *juſtifies by Warrant directed to him in the Court of R. by the Steward there, to attach the Plaintiff by his Goods within the Hundred, to anſwer* one A. by Virtue whereof he entred the Houſe, and took the Goods, as Bailiff. Jones for the Plaintiff demurred, becauſe it is *not ſhewed what was the Cauſe, or that the Court had Juriſdiction thereof*, which the Court agreed, and that ſuch Court cannot direct a Warrant to a Bailiff of a Hundred. Keb. 838. pl. 22. Hill. 16 and 17 Car 2. B. R. Watkins v. Cad.

2. A *Summons* muſt be returned *before a Capias ſhall iſſue* out of an Inferior Court, or elſe the Bailiff, who executes the Capias, is guilty of *Falſe Impriſonment*. Vent. 220. Trin. 24 Car 2. B. R. Read v. Wilmot.

See tit. Proceſs, (D) pl. 1. 2. in the Notes there,

3. If where this Caſe is denied

3. If an *Attachment* goes out of the *County Court without a Plaint*, he that executes it cannot juſtify. Vent. 220. Trin. 24 Car. 2. B. R. in Caſe of Read v. Wilmot.

4. In a Cauſe commenced in an Inferior Court, *if iſſue be not joined within ſix Months after Appearance, the Cauſe ought not to be removed by Habeas Corpus, a Special Return being made thereof by Virtue of the Statute*; and this was agreed by the Court on Debate in this Cauſe, a Complaint being made againſt Mr. Staples, the Steward of Windſor. 2 Show. 394. pl. 362. Mich. 36 Car. 2. B. R. Halter v. Whitfield & al'.

5. The regular *Proceſs* in Inferior Courts is a *Pone in Caſe*, and a *Summons in Debt*, but however, the miſawarding of Proceſs is cured by the Defendant's Appearance; per Holt. Comb. 260. Paſch. 6 W. & M. in B. R. Anon.

6. Holt Ch. J. ſaid, that Twiſden was once ſtrongly of Opinion, that a *Capias* does not lie *in an Action on the Caſe* in an Inferior Court; but that upon Conſideration of the Book H. 6. Twiſden ſaid, he was convinced that a Capias well lay. Comb. 260. Paſch. 6 W & M. B. R. Rogers v. Marſchall.

7. In Inferior Courts the Courſe is, to *inforce* an *Appearance by Diſtreſs*, and that ought to be *reaſonable*, and if a *Reſcous* be made to a reaſonable Diſtreſs, the Steward may impoſe a Fine for it; And it would be too much to diſtrain Goods to the Value of the Debt demanded; And the Officer can't juſtify the *breaking an Houſe* to take ſuch Diſtreſs. And tho' Inferior Courts may grant other Proceſs out of Court, yet can't they grant an Attachment *on Contempt* but in Court; per Holt Ch. J. 12 Mod. 610. Hill. 13 W. 3. Anon.

8. *Judgment was given in* the Town Court of *Briſtol*, and *Coſts taxed*, and a *Scire Facias* taken out *againſt the Bail, and a Year afterwards the Court granted a new Trial, and ſet aſide the firſt Judgment*, and an *Attachment was granted againſt the Judge* for this Cauſe. 1 Salk. 201. pl. 4. Trin. 1 Ann. B. R. The Queen v. Hill.

9. An Attachment was pray'd againſt W. the Town Clerk of an Inferior Court, for refuſing an Appearance on an Attachment which was tender'd without putting in Bail, but upon reſtoring of the Goods the Matter ceas'd. Powel J. ſaid, it is the *Courſe of Inferior Courts to take ſpecial Bail even in Caſe of an Executor*, but upon an Habeas Corpus we will diſcharge him. *There is Proceſs of Capias* in an Inferior Court, *and upon this there may be ſpecial Bail*, becauſe their Juriſdiction is limited, *but this is never upon Proceſs by Attachment, becauſe this* Proceſs *is againſt the Goods.* Hill. 10 Ann. B. R. The Queen v. Wakefield, and the Bailiffs of Litchfield.

10. A Motion was made for an Attachment againſt Mr. Street, Steward of the Borough Court in Southwark, alleging, that there had been a Verdict there pro Quer' and Judgment and Execution executed, and that he had granted a new Trial, which he ought not to have done, and ſat aſide all the Proceedings on the Verdict and afterwards; But it appearing, that after Iſſue was joined there was a Reference and an Agreement, that Plaintiff ſhould not go on to Trial, yet Plaintiff brought on his Cauſe, and had a Verdict for all his Damages, viz. 20 l. whereas his real Demand was not above 7 l. and this being made appear to the Steward that the Defendant was ſurpriſed, he ſat aſide all the Proceedings, and having offer'd the Plaintiff, that if he would try the Right in a feign'd Iſſue the Money ſhould remain in Court for Security, but this being refuſed, he granted a new Trial, and the Complainant appearing to be vexatious, the Court order'd the Plaintiff to pay 13 s. 4 d. Coſts; for it was agreed, that *tho' an Inferior Court cannot grant a new Trial after a Cauſe hath been fully heard, yet where a Verdict is obtain'd by Surpriſe, or through any Irregularity, it may there be ſet aſide.*

The

The Judge may and ought to enquire into it, and the Defendant here made no defence, nor knew any Thing of the Matter, 'till Execution executed. Hill. 8 Geo. B. R. Street's Caſe.

(L. a. 3) How they muſt demean to the Superior Courts.

1. IF *Records are*, or Writ of *Falſe Judgment*, or *Certiorari*, *or Writ of Error* comes, the Power of the Court ſurceaſes, and it *is Error if they proceed after it*. Br. Judges pl. 17. cites 6. H. 7. 16.

2. If a *Writ of Error* be directed to an Inferior Court; they ought to execute it in all Things tho' their *Fee be not paid* nor tender'd to them; and the Secondary ſaid, that the Fee which is demanded by them ought to be *indorſed upon the return of the Writ of Error*, ſo that the Judges may Judge if it be reaſonable, and that divers Precedents Warrant that Accordingly. Lane 16. Hill. 4 Jac. in the Excdequer, Mayor of Lincoln's Caſe.

3. In all particular and private Juriſdictions, if they come to be *certified in B. R. in a Writ of Error* you muſt *ſet out their Power*; But if they have their power *by a Statute*, as Wales, then it need not be ſet forth; per Hyde Ch. J. Godb. 381. pl. 466. Paſch. 3 Car. B. R. in Caſe of Gunter v. Gunter. Noy 90. Ganton v. Ganton, S. C. accordingly, and Judgment reverſed.

—— Lat. 180. Gunton v. Gunton, S. C. and Judgment reverſed.

(L. a. 4) Favour'd or reſtrain'd by the Superiour Courts. And what ſhall be an admitting the Juriſdiction.

1. THOUGH Execution of a Judgment had in an Inferior Court of Record having Power to hold Plea above 40s. As in London, Oxford &c. cannot be had of any other Goods than ſuch as are within the Juriſdiction of that Court, yet if the *Record of a Judgment* be *removed into Chancery by Certiorari*, and thence by *Mittimus into B. R. or C. B.* Execution may be had upon any Goods in any County of England. Went. Off. Ex. 138.

2. B. R. *never gives Judgment upon a Conviction in* another Court; But if, after Iſſue joined in another Court, the Indictment be removed, the Party is always admitted to wave the Iſſue below, and plead de novo, and go to Trial upon Iſſue joined in this Court. Carth. 6. Trin. 3 Jac. 2 B. R. The King v. Baker.

3. In Debt on a *Bond ſued in the Court of the Sheriffs of London*, upon Not Guilty, it appeared, that *the Bond was made out of the Juriſdiction of the Court*, and therefore it was objected, that the Proceedings were coram non judice, and void, and that the Serjeant, by executing the Proceſs, was a Treſpaſſor; but adjudged for the Plaintiff, and by Holt Ch. J. to which the reſt agreed, 1ſt, Where an Inferior Juriſdiction is confined to Perſons, as the Marſhalſea was to thoſe of the King's Houſhold, *if it appears by the Declaration, that the Perſon, who ſues, is qualified* 2 Mod. 195 &c. Hill. 28 & 29 Car. 2. C. B. Higginſon v. Martin, S. P. the Court divided. —— Freem Rep.

322. pl 402. S. C and by North, Windham, and Atkins, Judgment was given for the Officer, For it was impoſſible for him to know whether the Fact was done within the Juriſdiction of the Court or not, but as to the Plaintiff in the Inferior Court, they gave Judgment againſt him ; for though the Officer could not take Notice (it being alleged in the Declaration to be within the Juriſdiction of the Court) that it was without, yet the Plaintiff himſelf ſhall be bound to take Notice of it; and though the Defendant did not take Notice of it there, yet he ſhall not be eſtopp'd to do it here, by admitting a Matter in an Inferior Court in a Cauſe that they had no Juriſdiction of ; But Scroggs was e contra, becauſe there was a Judgment in being, and ſo long as that continued in Force, it ſhould patronize thoſe that acted under it till it were reverſed by Writ of Error. But North ſaid, that that would not alter the Caſe ; and cited the Caſe of Richardſon v. Bernard, 1 Roll 810. in which Caſe there was a Judgment. —— 2 Mod. 195. S. C. and the Court were all of Opinion as to the Point of the Officer ; but as to the Eſtoppel by admitting the Juriſdiction before the Court was divided, the Ch. J. and Windham held, that it could not give the Court a Juriſdiction where it had none originally, and that ſo it had been reſolved in one **Squibb's Caſe** in a ſpecial Verdict ; but Atkins and Scroggs held e contra. —— Juriſdiction is admitted by Plea, and by admitting it the Defendant is for ever after eſtopp'd ; Per Holt Ch. J. 11 Mod. 51. Paſch. 4 Ann. B. R. in Caſe of Luttin v. Menin.

qualified to ſue, though in Truth he is not ; Yet, if the Defendant does not plead to the Juriſdiction, but comes in and admits it, *he ſhall never take Advantage of it afterwards* ; but if it is not averred in the Declaration, that the Perſon is qualified to ſue, and within their Juriſdiction, all the Proceedings are void & coram non judice, and Treſpaſs lies againſt the Officer. 1 Salk. 201. Lucking v. Denning.

4. They held 2dly, That *where it is confined to ſome particular Things, and the Suit there is for ſomething elſe*, of which they have no Juriſdiction, all is void, and by no Admiſſion can be made good. 1 Salk. 202. in S. C.

5. *And* they held 3dly, That where they are *confined to Place* (viz.) *to all Contracts ariſing within ſuch a Diſtrict*, though the Contract ariſes out of it, yet the Court may award Proceſs, and the Officer may execute it, unleſs it appears to him, that it aroſe out of the Juriſdiction ; *As if this Bond had been dated at York* ; but he is not bound to enquire either whether there is a Cauſe of Action, or where it did ariſe. 1 Salk. 202. Lucking v. Denning.

6. *But* where a *Defendant pleads to the Merits* of the Cauſe, *and not to the Juriſdiction* of the Court, he can never then take Advantage of the Want of Juriſdiction ; for by the Averment of the Count, and his own Admiſſion, *he is eſtopped to ſay, that it was a Matter that aroſe out of the Juriſdiction* ; and 'tis impoſſible the Court ſhould know where a tranſitory Matter ariſes, unleſs the Defendant acquaints them with it. 1 Salk. 202. S. C.

S. P. per Cur. 7 Mod. 1. Anon, but ſeems to be S. C.

7. Upon a Motion for an Attachment againſt a Steward of an Inferior Court, for *diſcharging a Jury before they gave their Verdict*, it was held, that if a Jury in ſuch Court will not agree on the Verdict, the Way is, as in other Courts, to *keep them without Meat, Drink, Fire, or Candle, till they agree.* 1 Salk. 201. pl. 3. Paſch. 1 Ann. B. R. Anon.

7 Mod. 1. S P. per Cur. and ſeems to be S. C.

8. All *Miſdemeanors in Judicial Officers of Inferior Courts* are *Contempts to the Courts of King's Bench*, and therefore Attachments go daily againſt Stewards of thoſe Courts, for granting an Attachment againſt all the Party's Goods. But for Error in Judgment, a Judge is not puniſhable. 1 Salk. 201. pl. 3. Paſch. 1 Ann. B. R. Anon.

(L. a. 5) Count and Pleadings, and Proceedings in Inferior Courts.

1. IF an *Inferior* Court holds Plea, and in the Stile of the Court it does not appear how it holds it, viz. by Charter, or by Preſcription, the Proceedings in this Plea are erroneous, and all which follows upon it. For all Juriſdiction to hold Plea reſts in the Crown, and therefore it ought to be *aſcertained to the King's Court, how this Power is derived from the Crown.* Yelv. 46. Hill. Jac. Mouſe's Caſe. 8 Rep. 133. a. Paſch. 8 Jac. C. B. S P. in Turner's Caſe. ——Cro. J. 532. pl. 14. Paſch. 17 Jac. B. R. in Caſe of Hodges v. Moyſe, S. P.

Caſe of Pendarvis v. Kingſton, S. P. —— Cro. C. 46. pl. 5. Mich. 2 Car. C. B. in Caſe

2. In Inferior Courts it is *not neceſſary to ſet forth in their Records by what Title and Authority they hold Pleas; But otherwiſe when they certify*; Per the Chief Juſtice and Jones. Lat. 182. Mich. 2 Car. in 7 of Gunton v. Gunton. Cro. C. 46. pl. 5. Mich. 2 Car. C. B. in Caſe of Hodges v. Moyſe, S. P. per Curiam.

3. A. brought Action againſt B in the *Court of the Verge*, and recovered; and upon Error brought the Error aſſign'd was, that the Plaintiff declar'd of a Treſpaſs *in St. Martin's within the Juriſdiction*, and upon Not Guilty a *Ven. fac.* was *from St. Martin's prædict' and ſays not Infra Juriſdictionem.* And this being a *Court which varies* and alters *the Limits of the Juriſdiction according to the Reſiance and Remove of the King*, it may be that St. Martin's was Infra Juriſdictionem at the Time of the Contract and the Declaration, and yet was not at the Time of the Ven. fac. being ſeveral Months after; and therefore he ought to have ſaid Infra Juriſdictionem, as in the Declaration. And Doderidge and Jones, being only preſent, for this Cauſe held it was Error. Lat. 214. Paſch. 3 Car. Thair v. Foſſet. Noy 96. S. C. & S. P. held to be Error.

4. In *Caſe for bringing an Action in* the Court of *Briſtol, at the Suit of H. without his Privity, whereby the Plaintiff was impriſoned, and ſo all his Creditors came upon him, and he loſt his Credit* &c. after Verdict for the Plaintiff, Error was brought and aſſign'd, becauſe it was *not ſhew'd that the Cauſes of Actions which the other Creditors had againſt him did ariſe within the Juriſdiction of the Court of Briſtol.* Berkley held the Damages ill aſſeſſed, becauſe they were given as well for the Actions brought by the other Creditors. But Brampſton J. contra; becauſe *the Actions brought by the other Creditors, were added for Aggravation only*, and the Cauſe of the Action was the Arreſt and Impriſonment, like the Caſe were a Man ſpeaks Words which are in part actionable, and others only put in for Aggravation, and Damages aſſeſs'd for the Whole, it is good. Mar. 47, 48. pl. 76. Trin. 15 Car. Thurſton v. Ummons. Jo. 448. pl. 12. Thurſton v. Vincent, S. C. and the Court held it well.

5. In Error to reverſe a Judgment in the Marſhalſea the Court affirm'd, that *all Matters tranſitory, as well as other Matters, ought to be alledg'd to be within the Juriſdiction*; But if one *lends a Horſe at Hull to ride to Beverley, and to redeliver the Horſe at Hull at a certain Time*, an *Action lies for this in the Court of Hull*; becauſe it is founded upon the Loan and Failure of the Redelivery. Sid. 180. pl. 17. Hill. 15 and 16. Car. 2. B. R. Inman v. Batten.

6. Error

Freem Rep. 321. pl. 400. (bis) S. P. accordingly, though Wylde ſaid, that his Judgment was always to the contrary, but Precedents had been ſo.

6. Error of Judgment given in the Court of York, where the Plaintiff *declared, that the Defendant being indebted to him at York Infra Juriſdictionem for Goods to him ſold and delivered, adtunc & ibidem promiſed to pay*; and the Judgment was reverſed, becauſe it is *not ſhewn at what Place the Goods were ſold*, and it might be out of the Juriſdiction. Lev. 156. Hill. 16 and 17. Car. 2. B. R. Stone v. Waddington.

2 Keb. 129. pl. 87. S. C. & S. P as to a Plea by a Stranger held accordingly by Windham, and cited 1 Cro 46. pl. 52. the Caſe of Hodges v, Moyle, to which Moreton agreed.

7. Where an *Officer of an Inferior Court juſtifies* by Force of the Proceedings, there *he ought to ſhew the Juriſdiction whether by Preſcription, or by Charter*; and if by Charter, he ought to make a *Profert* hic in Cur. of the Letters Patents. *But* if the Plea be pleaded by *a Stranger*, he *need not ſhew ſuch Certainty*; for this would be to lay him under an Impoſſibility. Sid. 311. pl. 23. Mich. 18. Car. 2. B. R. Chute v. Newton.

8. The Plaintiff in the Inferior Court *complains that B. ſuch a Day and Place, being indebted to him infra Jur'* &c. *for Money lent, did die & loco prædicto aſſume to pay*, and doth *not ſay, that the Money was lent infra Juriſdictionem Curiæ*. Per Vaughan, If he had declared upon the *Promiſe in Law*, that did ariſe upon the lending of the Money, he ought to alledge, that the Money was lent infra Jur' &c. But if Money be lent out of the Juriſdiction and *expreſs Promiſe* within to pay it, the Court may hold Plea of this Promiſe. Sed Alii aliter ſenſerunt, becauſe he cannot plead non aſſumpſit infra Juriſdictionem, ſed quære rationem. Freem. Rep. 317. pl. 392. Mich. 1673. C. B. Baker v. Holman.

9. *Treſpaſs* for taking his Goods. The Defendant *pleads, that Proceſs iſſued out of an Hundred Court to ſeize the Goods for not appearing*, the Plaintiff demurred, becauſe it was *not alledged that the Cauſe of Action did ariſe within the Juriſdiction* of the Court; and the Demurrer held good. Freem. Rep. 260. pl. 279. Trin. 1679. Stainton v. Randall.

10. *Debt upon a Bond* againſt an Executor, who *pleaded that in* Curia Domini Regis de Recordo tent' 4 die Novemb. Anno Regni Domini Regis nunc 34. apud Guildhall *Civitat' Norwic'* coram A. & B. Vicecom' ejuſdem Civitatis, *one Lilly brought Debt againſt him on a Bond* for 500 *l. and recovered*, and ſo pleaded Plene adminiſtravit præterquam &c. quæ non ſufficiunt &c. Defendant demurred generally, and adjudged per. tot. Cur. for the Plaintiff, becauſe the Defendant did *not ſhew by what Authority this Court was held*, viz. by Preſcription, Grant, or otherwiſe, according to Turner's Caſe, 8 Rep. [133. a.] 3 Lev. 141. Mich. 35 Cur. 2 C. B. Jones v. Moldrin.

Show. 320. Mich. 3 W. & M. in

11. The *Statutes of Jeofails* extend to Inferior Courts after Verdict; Allowed per Cur. Comb. 260. Paſch. 6 W. and M. in B. R. Anon.

Caſe of Phyler v. Boſon, cites 2 Saund. 257. S. P. allowed by the Judges in the Houſe of Lords, that they are helped by the 21 Jac. cap. 13. and ſays, that of this Opinion was all the Court, and Judgment in the principal Caſe, for which this was an expreſs Authority; for that the Diſcontinuance of Proceſs is helped by the Common Law, and a Diſcontinuance of Court is helped after Verdict by the Statute of Jeofails, and ſays, that ſo they held in another Caſe this Term, in the Caſe of Walwin v. Smith.

Ld. Raym. Rep. 211. Paſch. 9 W. 3. S. P. in Lee's Caſe,

12. Falſe Judgment from a County Court, where Debt was by Juſticies, the *Declaration* was, that the Defendant was *indebted* to the Plaintiff *within the Juriſdiction of the Court, for Goods* ſold and delivered, and becauſe it was *not alledged that the Contract was within the Juriſdiction*

Juriſdiction, Judgment was reverſed, for if one be indebted to the other, he is ſo wherever he goes. 12 Mod. 598. Mich. 13 W. 3. Stedman v. Robiſon.

but the principal Point there was an Action for Money lent, and becauſe it was not ſaid that it was lent Infra Juriſdictionem Curiæ, Judgment was reverſed; For per Cur. though the Debt is tranſitory, and is a Debt in every Part of England, yet it ought to be laid to ariſe within the Juriſdiction of the Inferior Court; But if the Plaintiff had ſhewn, that the Money had been lent Infra Juriſdictionem Curiæ, or if it had been for Goods there ſold, the Plaintiff would have had no need to ſay, that the Defendant aſſumed to pay Infra Juriſdictionem Curiæ, becauſe the Law creates the Promiſe upon the Creation of the Debt, which Debt being within the Juriſdiction, the Promiſe ſhall be intended there alſo.

13. Let a Debt be contracted where it will, if *Bond is given* for it, *within the Juriſdiction* of an Inferior Court, that gives them Juriſdiction. 6 Mod. 303. Mich. 3. Ann. B. R. Villars v. Cary.

14. In Actions in Inferior Courts, *every Part* of that *which is the Giſt of the Action*, *muſt appear to be within the Juriſdiction*, otherwiſe of ſuch Matters as are inſerted only for Aggravation of Damages, and might be omitted, and yet the Action remain; Per Cur. 1 Salk. 404. pl. 1. Mich. 3. Ann. B. R. Stannion v. Davis.

But it was laid down as a Rule, that if the Matters ſo inſerted are eſſentially neceſſary to maintain the Action, they muſt be averred to be within the Juriſdiction, i. e. where the one without the other will not maintain the Action. 6 Mod. 223. S. C. ——— 11 Mod. 7. Stanmer v. Davers, S. C. accordingly.

15. *Nothing ſhall be intended within the Juriſdiction of an Inferior Court, but what is expreſsly alledged ſo*; that where an Action is brought on a Promiſe in a Court below, not only the Promiſe, but the Conſideration of the Promiſe, muſt be alledged to ariſe within an Inferior Juriſdiction; becauſe ſuch Inferior Courts are bounded in their original Creation to Cauſes ariſing within the Limits of ſuch new erected Juriſdiction; and therefore if a Debtor, that has contracted a Debt out of ſuch limited Juriſdiction, comes within it, yet they cannot ſue there for ſuch a Debt; becauſe the Cauſe of Action did not ariſe within ſuch Juriſdiction; and therefore it is not within the Limits of their Commiſſion to try and determine; and therefore *the Conſideration of the Promiſe which is the Cauſe of the Action*, *muſt be alledged to be within the Juriſdiction* of the Court; *and* not only ſo, but it *muſt be proved upon the Trial*; and if the Plaintiff prove a Conſideration out of the Juriſdiction, that cannot be given in Evidence; and if it be, the Defendant's Counſel may propoſe a Bill of Exceptions, and the Bill will appear to be erroneous; and therefore Saund. 74. in Caſe of Deacock v. Beſt, makes a true Diſtinction between Counties Palatine, and other Inferior Courts. Gilb. Hiſt. of C. B. 152, 153.

See Freem. Rep. 124. pl. 122. Paſch. 1673. B. R. Anon. S. P. debated.—Ibid. 314. pl. 387. S. P.——Saund. 74. Paſch. 19 Car. 2. S. P. ——S. P. per Cur. Sid. 331. pl. 13. in S. C.

(L. a. 6) The Offence and Puniſhment of bringing Actions there, in Caſes where they have no Juriſdiction.

See Treſpaſs (C. a.) See Actions (C. a) pl. 26.

1. IF one is arreſted by Proceſs in an Inferior Court, for a Cauſe ariſing out of their Juriſdiction, the Party may maintain an *Action againſt the Plaintiff who levied the Plaint*; for he is ſuppos'd to know where the Cauſe of Action aroſe, *but not againſt the Judge or Officer*, who

Contra if they knew it aroſe out of their Juriſdiction. Lutw. 1566.

—But Gwyn v. Pool, It was held, that Treſpaſs and Falſe Imprisonment will not lie againſt the Judge, Officer or Party. 1ſt. No Action lies againſt a Judge for what he doth ~~Judiciouſly~~. 2dly, Nor againſt the Officer for executing the Proceſs of a Judge, or Court who has Juriſdiction, though the Proceſs be erroneous, or inverſo ordine. 3dly, Nor of the Party, for in this Caſe of a Bond, it doth not appear where it was executed, nor can the Party know the Extent of the Inferior Court, nor is it clear, that Caſe will lye meerly for this if the Plaintiff knew it, unleſs ea Intentione to hold him to Bail. 2. Lutw. 935. Mich. 4 W. & M. in the Exchequer.

who had executed it; for they can't tell, whether it ariſes within their Juriſdiction or not. 2. Jones. 214, 215. Trin. 34 Car. 2. B. R. Olliet v. Beſſey.

2. Some *Juriſdictions are limited*; 1ſt. *As to the ſubject Matter*, as the Commiſſioners of Exciſe touching Impoſitions for ſtrong Waters, and they adjudged low Wines to be ſtrong Waters, which was an Exceſs of their Juriſdiction, and therefore an Action lay againſt them. So Marſhalſea Caſe, Co. 10, they have Juriſdiction in Debt and Covenant, where both Parties are of the Houſhold, and in Treſpaſs where one of them was of the Houſhold, but this did not extend to Treſpaſs upon the Caſe, and their holding Plea in Aſſumpſit, was Coram non Judice. So in Caſe where there is a Founder of an Eleemoſunary Foundation, and a Viſitor is appointed, and his Juriſdiction is limited by Rules and Statutes, if the Viſitor in any ſenſe exceeds theſe Rules, an Action lies againſt him, as was agreed in the Caſe of Exeter College; But contra where he is miſtaken in a Thing within his Power, though there is no Appeal over. 2dly, *In reſpect of the Perſons*, as in the Caſe of the Marſhalſea, where the Parties ought to be of the Houſhold &c. Ut ſupra, or all is Coram non Judice. 3dly, *In reſpect of the Place*, as Juſtices of Peace in relation to the Poor, for their Relief within their ſeveral Pariſhes, but if they tax S. to the Relief of the Poor of D. this is an apparent exceſs of Juriſdiction, and the Juſtices and Officer are lyable to an Action. Of this Sort are Inferior Courts in Corporations. But where the Inferior Court has Cognizance of the Action, and is only reſtrainable in it at the Pleaſure of the Party, by pleading to the Juriſdiction, eſpecially where the Action will lie as well within as without the Juriſdiction, as all tranſitory Matters, where it can't appear whether they ariſe within or without the Juriſdiction, and therefore if the Perſon can be come at by Proceſs, over whoſe Perſon they had Juriſdiction, and he omits to plead to the Juriſdiction, by pleading over to the Merits he is concluded for ever. The reaſon of a Prohibition is the ſame, which is to hinder the Party from being wronged, yet if the Party plead to the Merits no Prohibition lies, for he has eſtopp'd himſelf by Pleading, but if all the Proceedings were void & coram non Judice, if the Party has pleaded, yet a Prohibition ought to go. Where it appears in the Declaration, that the Cauſe aroſe out of the Juriſdiction, all the Proceedings will be Coram non Judice, but where nothing of this appears thereby, it muſt be notified to the Court by the Plea of the Defendant to the Juriſdiction, which Plea, if the Court refuſes or accepts it and proceeds afterwards, if it be offer'd before imparlance and upon Oath as it ought to be, all Proceedings are void, and the Judge and Officer liable to Actions. See W. 1. cap. 35. By pleading to the Action the Defendant cannot have an Action upon this Statute, and therefore the Superior Courts refuſe to grant Prohibitions upon Suggeſtions that the Cauſe aroſe out of the Juriſdiction, until the Defendant has pleaded this Matter to the Juriſdiction of the Inferior Court. 2 Lutw. 1565, 1566, 1567, in the Appendix 4 W. & M. in the Argument of Baron (John) Powell in Scacc. in the Caſe of Gwyn v. Pool.

3. If Suits be in *Inferior Courts* without Cauſe an Action lies, but not for a cauſeleſs Suit in the Courts at Weſtminſter; and *falſe Impriſonment*

ment lies for one taken by Proceſs out of the Inferior Court, if the Cauſe aroſe not within their Juriſdiction. 2 Show. 374, pl. 360. Trin. 36 Car. 2. B. R. Anon.

4. On an *Information againſt an Attorney of the Sheriff*'s *Court* of London, & al' *for arreſting a Man in a ſham Action, holding him to Bail* &c. *to get Money from him* &c. the Court ſaid, that if there had been any Wrong done, the *Remedy is to apply to a Judge of the Inferior Court*, who had Power to puniſh the Attorney and the Bailiffs, and order Satisfaction &c. Mich. 6. Geo. B. R.

(L. a. 7) Of removing Cauſes out of Inferior Courts.

See Habeas Corpus (H) (O) See Superſedeas (I)

1. 43 *Eliz. cap.* 5. *S.* 2. *NO Writ of Habeas Corpus, or other Writ ſued forth to remove an Action, ſhall be allowed, unleſs it be delivered unto the Judgt or Officer of the Court before the Jury appear, and one of them be ſworn,*

See Tit. Habeas Corpus (E) pl. 2, 3, and the Notes there.

2. 21 *Jac.* 1. *cap.* 25. *S.* 2. *No Writ to remove a Suit in an Inferior Court ſhall be obeyed, unleſs deliver'd to the Stewards &c. of the ſame Court, before Iſſue or Demurrer joined, ſo as ſuch Iſſue or Demurrer be not joined within ſix Weeks after the Arreſt or Appearance of the Defendant.*

On a Habeas Corpus it was returned that Iſſue was joined before the Writ came to him, but did not ſay, that Iſſue was not joined within ſix Weeks &c. as it ought to be by the Statute, and therefore ill; There was likewiſe another Fault, becauſe it being in an Inferior Court, it is not returned, that the Cauſe of Action aroſe within the Juriſdiction. Comb. 127. Trin. 1 W. & M. in B. R. Anon.

3. 21 *Jac.* 1. *cap.* 23. *S.* 3. *If any ſuch Cauſe ſhall be removed or ſtaid by any ſuch Writ or Proceſs, and afterwards the ſame Cauſe ſhall be remanded, the ſame Cauſe ſhall never afterwards be removed or ſtaid before Judgment by any Writs whatſoever.*

4. *S.* 4. *If in any Cauſe not concerning Freehold, Leaſe or Rent, it ſhall appear or be laid in the Declaration, that the Debt, Damages or Things demanded do not amount to* 5 *l. ſuch Cauſe ſhall not be ſtayed, nor removed in any other Courts by any Writs other than Writs of Error or Attaint.*

12 *Geo.* 1. *cap.* 29. *S.* 3. *The Judges of ſuch Inferior Courts as are deſcribed in Stat.* 21 *Jac. cap.* 23. *Par.* 3. *may proceed in Cauſes therein ſpecified, which appear or are laid, not to exceed* 5 *l. though there may be other Actions againſt ſuch Defendants, wherein the Plaintiff's demands may exceed* 5 *l.* This was a temporary Act, and continued by 5 Geo. 2. cap. 27. from the End of that Seſſion for ſeven Years &c.

5. *S.* 5. *If any Writ ſhall be ſued forth contrary to the Intent of this Act, it ſhall be lawful for the Judge or Officer, to whom ſuch Writ ſhall be directed, to diſallow the ſame, and to proceed as if no ſuch Writs had been granted.*

6. *S.* 6. *Provided that this Act ſhall extend only to ſuch Courts of Record, and for ſo long Time only, as there ſhall be an utter Barriſter of three Years ſtanding, that ſhall be Steward, Town-Clerk, Judge or Recorder of the ſame Court, or that ſhall be Aſſiſtant to ſuch Judge, and there preſent, and not of Counſel in any Cauſe then depending in the ſame Court.*

It was held by Holt Ch. J. that where an Habeas Corpus is directed to an Inferior Court of which an utter Barriſter is Steward, and in fact the Iſſue of the Plaint was not joined more than ſix Months after the Appearance of the Defendants there; ſo that by the Statute 21 Jac. the Steward had Liberty to proceed notwithſtanding, and without the allowance of the Writ; yet in this Caſe the Steward is bound to return the Writ with the ſpecial Matter, otherwiſe he ſhall be in Contempt; and ſo it was conſtantly ruled in B. R. when Hale was Ch. J. Comb. 69. Mich. 1 W. & M. in B. R. Watſon v. Clerke.——Iſſue was joined in an Inferior Court, and the Steward refuſed to allow the Habeas Corpus, and the Cauſe was tried but not before an utter Barriſter, as is directed

rected by the Statute; The Court held, that the Steward ought to return the Habeas Corpus; and they having proceeded to try the Cauſe, no utter Barriſter being Steward, an Attachment was awarded. 3 Mod. 85. Mich. 1 Jac. 2. B. R. Anon.

7. *S.* 7. *This Act ſhall not extend to any Cauſe wherein any ſuch Plea ſhall be pleaded, as could not be tried within the Juriſdiction of ſuch Inferior Court.*

8. By 21 Jac. *after a Procedendo awarded*, no Superſedeas ought to be granted, unleſs it unduly vel improvide emanavit, in which Caſes it uſual to grant one. Cro. C. 487, pl. 11. Mich. 13 Car. B. R. Bower v. Cooper.

9. *No Court can be exempt from the Superintendancy of* the King in his Court of *B. R.* It is a Conſequence of every Inferior Juriſdiction of Record, that their Proceedings be removable into this Court, to have their Record inſpected, and to ſee whether they keep themſelves within the Limits of their Juriſdiction. 1 Salk. 144, pl. 3. Trin. 12 W. 3. B. R. in Caſe of Groenvelt v. Burwell.

(L. a. 8) Judgments in Inferior Courts. When void.

1. WHERE *Judgment* is given *in a Baſe Court*, or Peculiar, of *Contract, Covenant, or Land which lies out of the Juriſdiction of the Court*, it is void, and the Party of the Execution ſhall have Aſſiſe or Treſpaſs. Br. Judgment, pl. 64. cites 22 Aſſ. 64.

2. *But* where it is given there *of Franktenement upon Plaint, where it ought to be ſued by Writ*, this is not void, but Error, and there it is agreed in Effect, that Franktenement ſhall not be recovered in Court Baron but by Writ, and not by Plaint, and if it be it is Error, and Falſe Judgment lies. Br. Judgment, pl. 64. cites 22 Aſſ. 64.

Yelv. 130. Trin. 6 Jac. B. R. the S. C. and the Ideo videtur was adjudged Error; For it ought to be Ideo conſideratum &c.

3. Error upon a Judgment in Cambridge, becauſe the Cauſe of Action is laid to be *in a Cloſe called Bl. Acre*, and it is *not averred* that it was *infra Juriſdictionem*, cites Kelw. 33. a. 89. a. The *Judgment* was entred, *ideo videtur*; And per Cur. Judgment ſhall not be by a Videtur. And Judgment for thoſe Cauſes was reverſed. Noy 129. Ventres v. Carter.

4. In Aſſumpſit &c. the Defendant pleaded two ſeveral Attachments of Money in London, viz. of one Part of it due to himſelf, and the reſt to a Stranger, and both due on Bond. The Plaintiff replied, that both the Bonds on which the Attachments were made, were executed extra Juriſdictionem &c. The Defendant rejoined, that the Bond made to him was executed infra Juriſdictionem &c. and upon a Demurrer the Plaintiff had Judgment, becauſe Judgment there *of a Thing out of their Juriſdiction is abſolutely void*, and *Advantage may be taken thereof by Pleading, without a Writ of Error*; beſides, the Rejoinder anſwers only Part of the Replication. 3 Lev. 23. Paſch. 33 Car. 2. C. B. Frumpton v. Pettis.

5. *Aſſumpſit in London for depaſturing of an Horſe in Eſſex*; The Defendant pleaded in Bar a former Action brought in the Sheriff's Court in London for the ſame depaſturing, and Judgment there for the Defendant. The Plaintiff replied, that the Cauſe of Action did ariſe in Eſſex, out of the Juriſdiction of the Sheriff's Court. Upon Demurrer it was adjudged that the Plea was ill; for if they *hold Plea of a Matter*

out

out of the Juriſdiction, the Judgment is void, and cannot be executed. 3 Lev. 234. Mico v. Morris.

6. It was held in this Caſe, per Holt Ch. J. that wherever a *new Juriſdiction is erected by Act of Parliament, and the Court or Judge that exerciſes this Juriſdiction, acts as* a Court or Judge *of Record according to the Courſe of the Common Law*, a Writ of Error lies on their Judgments, but where they act in a ſummary Method, or in a new Courſe different from the Common Law, there a Writ of Error lies not, but a Certiorari. 1 Salk. 263. pl. 5. Trin. 12 W. 3 Groenvelt v. Burwell. Carth. 494. S. C. & S. P. by Holt Ch. J. in delivering the Opinion of the Court.

(L. a. 9) Plea or Record remanded into the Inferior Court. In what Caſes.

1. *Mortdanceſtor* in *Cheſter* the *Tenant vouch'd Foreigner to Warranty*, by which the *Record is remov'd into Banco*, and there the *Tenant was eſſoin'd*, and this Eſſoign was *quaſh'd*, by which the Plea was remanded into Cheſter to take the Aſſize. Br. Parol ou Plee remaund pl. 5. cites 8. Aſſ. 22.

2. If *Foreigner* be *vouch'd in Plea of Land in the Huſtings* in London, the Plea ſhall be *ſent into Bank*, and when the Warranty is determin'd, it ſhall be remanded into London, and in this Caſe Bank has no Power to award Seiſin of the Land, but only to try the Warranty, and to remand it. Br. Parol ou Plee remaund pl. 8. cites 43 E. 3. 1.

3. Formedon in London, the *Tenant vouch'd Foreigner to Warranty*, by which the Plea was *ſent into Bank*, and *Proceſs made againſt the Vouchee*, and at the Day the *Tenant ſaid that pending the Proceſs* againſt the Vouchee, *it was found before the Eſcheator, that J. N. held of the King, and dy'd without Heir, by which the King ſeized it, and gave to the Tenant by Patent, and pray'd Aid of the King*; and becauſe the Tenant *wav'd his Voucher*, and this Court has no other Power here but to determine the Warranty, therefore they recorded the Aid Prayer, and remanded the Parol into London. Br. Parol ou Plee remaund pl. 9. cites 44. E. 3. 2, 3.

4. *Fine* came out of Franchiſe *into B. R. by Writ of Error*, and *no Error found*, by which the Party ſu'd Execution there, and the *Bailiffs of the Franchiſe* where &c. ſcilicet of Oxon *demanded Conuſance* of it, and were ouſted; for when the Plea comes into B. R. it ſhall not be remanded. Br. Parol ou Plee remaund pl. 6. cites 50. Aſſ. 9.

5. *But* if Record be *remov'd into C. B. out of Ancient Demeſne by Pretence of Frank Fee*, and it is found no Frank Fee, it ſhall be remanded. Ibid.

6. If *Aid of the King* be *granted in Aſſize for inſufficient Cauſe*, yet when it is in the Chancery, it ſhall not be remanded till the Title of the King be examin'd for the King, *otherwiſe upon a Voucher*, as it was ſaid. Br. Parol ou Plee remaund. pl. 7. cites 8. H. 7. 11.

7. Where Record *comes out of County Palatine or Franchiſe, to try a Foreign Voucher or Foreign Releaſe*, the Record ſhall be remanded after Trial of it. Br. Parol ou Plee remaund pl. 4. cites 21. H. Br Traverſe de Office. pl. 19. cites S. C.

8. *Contrary where both Courts are at Common Law*, as the *Chancery and B. R.* in Caſe of a Traverſe &c. or other Iſſue join'd in Chancery; for this ſhall be try'd in B. R. and there ſhall remain, and there Judgment ſhall be given. Ibid. Br. Traverſe de Office pl. 19. cites S. C.

Br. Traverſe de Office pl. 19. cites S. C.

9. *So* of a Record *remov'd from C. B.* into B. R. by Writ of Error, or otherwiſe, quod nota. Ibid.

10. A Man was *arreſted by Plaint in London*, and after the *Defendant brought Writ of Debt in Bank*, and had Writ of Privilege, and becauſe *it appeared that the Plaint was elder than the Writ*, the Defendant was remanded into London, and the Plaintiff in London had Procedendo, quod nota. Br. Procedendo. pl. 8. cites 8. E. 4. 18.

13. If a Man is *arreſted in London*, and after another brings *Action in Bank againſt the ſame Defendant by Covin*, and has *Capias* againſt him *to have him remov'd out of London*, and the *Plaintiff in London prays Procedendo* for the Covin, he ſhall not have it till the *Day of the Return of the Capias*, that the Parties may be examin'd of the Covin, quod nota; But if the *Defendant does not come at the Day* &c. and is let to Mainprize, the Plaintiff *may have a new Bill againſt him* &c. and the Cauſe why they ſurceaſe in London is, becauſe the *Capias is a Superſedeas* in itſelf; for by the Arreſt upon it, he is Priſoner at the Bank, and not at London, and then they cannot proceed, and cannot have the Priſoner, quod nota. Br. Procedendo. pl. 11. cites 10. E. 4. 16.

14. Where *Plea of Treſpaſs*, which is *in a Court Baron*, *of Damages under 40 s. is removed into Bank by Recordare erronice*, where it ought not to be removed, there the baſe Court cannot proceed, becauſe the Plea is removed, and therefore Procedendo ought to be awarded to them to proceed, per diverſe Serjeants, quod nemo negavit. Br. Procedendo. pl. 6. cites 14. H. 8. 15. 17.

Br. N. C. 31 H. 8. pl. 161. S. C.

15. If a Man *arreſted in a Franchiſe ſues Writ of Privilege, and removes the Body and the Cauſe*, and after *does not come to prove his Cauſe of Privilege*, the Plaintiff in the Franchiſe cannot have Procedendo, and therefore it ſeems that the *firſt Sureties remain*, *contra if he had been diſmiſs'd by Allowance of the Privilege*, for then his Sureties are diſcharged. But it ſeems that when they remove the Body and the Cauſe, they do not remove any Sureties, but then there is not any Record againſt them, and then it ſeems that the Privilege being allow'd, the Sureties are diſcharged, contra where the Privilege is not allow'd; for then the Priſoner and the Cauſe was always remaining in the Cuſtody of thoſe of the Franchiſe. Br. Procedendo. pl. 13. cites 31. H. 8.

16. A Procedendo *is* a Writ to the Judge of an Inferior Court, requiring him to proceed in a Cauſe formerly remov'd hither by Certiorari, or other Writ, or ſtay'd for ſome Time by Superſedeas. P. R. C. 294.

So to Pool which (as Canterbury is) is a *Town and County*,

17. A Procedendo was deny'd to be granted to the Court of Canterbury *in Ejectment*; for per. Cur. it was never known to have been granted in ſuch Action. Sid. 66. pl. 40. Mich. 13 Car. 2 B. R. Anon.

and other ſuch Places, ſuch Motions have always been denied. Sid. 231. pl. 31. Mich. 16 Car. 2. B R. Anon.

Becauſe it appeared to the Court, that the Filing it was *by Practice, and the Offence very great*,

18. An *Indictment of Barretry* being brought in B. R. and *filed*, it was moved to have a Procedendo. Twiſden J. ſaid it could not be; for a Record filed here, cannot be removed without Act of Parliament. But by the Opinion of Foſter and Windham, a Procedendo was granted. Quære de ceo. Lev. 93. Hill. 14 and 15 Car. 2. B. R. Upham's Caſe.

a Procedendo was awarded, againſt the Opinion of Twiſden J. and *contrary to the Courſe of the Court.* Sid. 108. The King v. Upton. S. C. — It was *filed the ſame Day that the Certiorari was returned*, which the Court conceived an irregular Surpriſe, notwithſtanding the Bar, and the Clerks affirm'd that none could iſſue, Keb. 470. The King and Juſtices of Somerſetſhire v. Upham. S. C.

19. Proce-

19. Procedendo lies of Courſe without Motion for *not putting in of Bail.* Comb. 107. Paſch. 1 W. and M. in B. R. Anon.

20. It was mov'd, that if the *Plaintiff in Error* of a Judgment in the County Palatine of Cheſter, *does not return the Record* in a ſhort Time, there might be a Procedendo; But per Holt, we *cannot grant a Procedendo, becauſe there is nothing before us; but* upon a Certificate that the Record is not come in, you *muſt have a Writ De Executione Judicii out of Chancery.* Comb. 422 Hill. 9 W. 3. B. R. Anon.

21. Upon a Return of a Hab. Corp. from London, a By-Law was ſet forth, laying a certain Penalty upon a Freeman, for ſelling Goods not weigh'd at the City Beam, according to the Cuſtom; and it was moved to file the Return, for otherwiſe the Defendant could have no Remedy, if the Return were falſe, and ſo they might return what Cuſtom they pleaſed falſo & impune. Holt Ch. J. held, that the Practice had always been in B. R. to *award* a Procedendo, *without filing the Return*; But the Queſtion (he ſaid) was, Whether the filing would *hinder the granting* a Procedendo? That it was true, that the *Habeas Corpus* * *ſuſpends all Proceedings* below, till the Court has determin'd the Right of the Cauſe of Detainer upon the Return, and if they proceed in the mean Time, it is void, & *Coram non Judice*; ſo that a Procedendo was neceſſary, to unty their Hands below. And ſaid, he could ſee no Reaſon, why they might not grant a he Procedendo *after the Return filed.* 6 Mod. 177. Trin. 3 Ann. B. R. Fazakerly 1 Baldo. 1 Salk. 352. S.C.

22. When a *Cauſe is removed* by Habeas Corpus *into B. R.* a *Procedendo may be granted, though the Return be filed; becauſe the Record is not removed*, but only a Tranſcript of it. Paſch. 6 Geo. B. R.

For more as to Inferior Courts and Proceedings there, See **Certiorari. Cuſtoms.** (I. 2) **Habeas Corpus.** And other proper Titles.

(M. a) Court of *Stannaries.*

See 4 Inſt. 229. cap. 45. and Prynn's Animadv. on 4 Inſt. 174, 175.

1. 33 E. 1. ROT. Chartarum, membrana 8. parte 40, 41. pro Stannatoribus noſtris in Comitatibus Devoniæ & Cornubiæ, **grant to them &c. of their Privileges, &c.** all one except of the Places of the Priſon, viz. l'Oſtwithiel for Cornwal, & Lidford for Devon, and of the Coinage, viz. l'Oſtwithiel, Bodmyn, Liskerret, Truro, & Helſton, in Cornubia.

2. 33 E. 1. Libro Parliamentorum 105. ad petitionem Stannatorum Cornubiæ, conceditur Charta Libertatum, juxta formam Confirmationis Regis Henrici, per ſe, non conjunctim cum Stannatoribus Devoniæ &c.

3. 1 E. 2. Rotulo Patentium, prima parte, membrana 13. Conceſſio Minerariis Regis in Comitatu Devoniæ commorantibus, quod ipſi a die confectionis præſentium per quadriennium proximo ſequens completum, liberi ſint & quieti in Civitatibus, Burgis Villis, Mercatis & aliis locis quibuſcumque in Comitatu Devoniæ prædicto & aliis Comitatibus vicinis de Theoloneo & omnibus aliis Conſuetudinibus præſtandis de quibuſcumque neceſſariis pro victu & veſtitu eorum Minerariorum ibidem emendis. Et quod de tranſgreſſionibus, occaſionibus perſonalibus, ſeu placitis aliquibus, alicubi in Curiis Comitum Baronum, vel aliorum Dominorum quorumcunque, toto Tempore prædicto, non

non placitent, nec placitentur, contra voluntatem ſuam, niſi coram Cuſtodibus noſtris Mineræ prædictæ, & Vicecomite noſtro ejuſdem Comitatus, qui pro Tempore fuerint. Vobis omnibus & ſingulis firmiter inhibentes, ne Minerarios noſtros prædictos contra hanc Conceſſionem noſtram moleſtetis in aliquos, ſeu gravetis quo minus ipſi Quietanciis & Libertatibus prædictis uti poſſunt, juxta formam Conceſſionis ejuſdem.

4. 4 H. 8. cap. 8. Richard Strode **impriſoned in Lidford, till he was delivered by a Writ of Privilege out of the King's** Exchequer **at** Weſtminſter, **for that he was one of the Collectors in the ſaid County for the firſt of the two Fifteenths granted in this Parliament.**

This is imperfect, and ſhould be to this Purpoſe, viz. "Such Suit "ſhall be "void," &c

5. 23. H. 8. cap. 8. **If any Perſon ſhall be ſued, accuſed, indicted, impriſoned, amerced, condemned, or otherwiſe vexed or troubled in his Perſon, Lands, Tyn-Works, Goods or Chattles, by any of the Miniſters or Officers of the King's Courts of Stannary, &c.**

6. **Hill.** 35 E. 1. **B. R. Rot.** Walter Wallings, a Tinner, was indicted at Exeter before the Juſtices Itenerant, for killing Walter Wallings, **the Son of his Brother** in Decenna de Holme, **and after it is there ſaid, Quod Locus in quo interfectus fuit, fuit** infra Libertatem Stannariæ, **and after the Defendant rendred himſelf to the Sheriff of the County of Devon; and after** Thomas de Swineſey, Cuſtos Stannariæ, came to the Sheriff, and required him to deliver the ſaid Defendant to him, **upon which the Sheriff delivered him to the ſaid Thomas, by which the Defendant was ductus ad Gaolam de Lidford in Libertate ejusdem Staunariæ; and after it is ſaid, Quod defendens adhuc eſt in Lidford, infra Libertatem prædictæ Stannariæ, and after it is demanded of the Sheriff, wherefore he delivered the Defendant to the ſaid Cuſtos of the Stannary,** (*) **who ſaid, that he demanded him by force of the ſaid Charter,** 33 E. 1. **upon which they were adjourned to Weſtminſter coram Rege, and Day given to the ſaid Cuſtos, and to the Defendant to anſwer it; but the Cuſtos did not come, but excuſed himſelf by Sickneſs, and for the Damage that might ariſe in the Stannaries by his Abſence; but the Defendant appeared there, and pleaded Not Guilty, and was found Not guilty.**

* Fol. 548.

7. 2 Ed. 3. **Rotulo Patentium parte** 1. **Membrana** 27. **Numero** 130. **upon the Supplication of the Tinners, the** King granted, That no Tin ſhall be weighed at Taviſtock, eo quod multum diſtat a Mari, **and ſo with great Charge tranſported after Coinage and Weighing,** and **for this Grievance it** ſhould hereafter be weighed at Aſhburton, Chagford, and Plympton, **and not at Taviſtock. Apud Weſtmonaſterium in Scaccario among the Eires de Cornubia.** 5 Ed. 2. **Rot.** 6. **apud Launceſton,** William B. and G. T. are ſued by Writ of Conſpiracy by J. T. for appealing him of a Robbery 3 **Ed.** 2. **&c. upon which** comes P. W. and ſhews the Letters Patents of 33 Ed. 1. **which are entered** in hæc verba, **and** thereupon P. W. demands Conuſance **of this Plea,** for that the Defendant ſunt Stannatores, **to which the** Plaintiff J. T. ſaid, **Quod prædicti Stannatores Curiam ſuam habere non debent, quia dicit, quod iſta ſequela jam per** 5 **Dies verſus prædictos Defendentes & alios continuata eſt, abſque hoc quod prædictus P. W. vel aliquis alius eorum Ballivus, Curiam ſuam inde petiſſet, vel Cartam prædictam oſtendiſſet. Dicit etiam, quod cum contineatur in dicta Charta, quod prædicti Stannatores operantes in Dominicis Regis, dum operantur in eisdem Stannariis, liberi eſſe debeant, & quieti de omnibus Placitis & Querelis Curias Regis tangentibus. Et cum prædictus P. W. aſſerit prædictos Stannatores**

Coram

coram nullo Justiciario Regis, vel ministro, nisi coram eorum Custode, non debere respondere, prædicti Defendentes non sunt operantes in Dominicis Regis nec alibi operantes; & hoc offert verificare, prout etc. profert etiam quandam Commissionem & quoddam Breve Regis, per quod quidem Breve idem Rex prædictis Willielmo B. & alus mandavit, quod, Thomam de la Hyde Custodem Stannariæ Regis prædictæ in socium admittant ipso Thoma tunc ibidem præsente, & prædictam Commissionem admittente; and the Defendants being demanded whether they will answer, say, That not till it be determined whether they shall have their Court; and the Plaintiff demands Judgment, as indefensum, upon which Day is given over ad audiendum Judicium, but nothing done in the Roll.

8. The Court of Trematon in Cornubia is not any Stannary Court, for the Stile of the Court is, Manerium de Trematon Curia Domini Regis ibidem tenta coram J. S. etc. and a Writ of Error lies in B. R. upon a Judgment there, and they may hold Plea there of Replevins. Co. Book of Entries, fol. 293. between *Walter Skelton, and John Starkey, and Nicholas Axford*, 15 El. Rot. 78.

9. If a Suit be in the Dutchy Court of Calstock in Cornubia, touching a Copyhold, and after a Verdict, Mr. Coryton, the Vice-warden, grants a Mandate to the Steward of the Court not to give Judgment, for that the Defendant had petitioned him in point of Equity, and a Prohibition is granted, upon a Surmise that the Vice-warden had nothing to do as Vice-warden in the Dutchy Courts; but there hath been a usage there to appeal to the Lord Warden as chief Steward of the Dutchy for Matters of Equity, and Mr. Coryton was only Vice-warden of the Stannaries by his Pateut, and not Deputy Steward of the Dutchy. Tr. 10 Car. B. R. between a Prohibition granted, upon the Motion of Master Attorney General. Mich. 10 Car. B. R. between *Adams and Hunn*, per Curiam, a Prohibition granted.

10. The Charter of the Stannery is, that the *King grants to the Tinners to dig Tin in the Waste Lands and Moors of the King and others whomsoever in the County of Cornwal.* Br. Prerogative, pl. 134.

11. By ancient Charters, *the whole Company and Body of Tynners*, in every of the said Counties of Devon and Cornwall, are cast and *divided in four several Stanneries or Jurisdictions:* In every of which Stanneries, there is a Court to minister Justice in all Causes Personal arising between Tinner and Tinner, and between Tinner and Foreigner; and also for and concerning the Right and Ownership of Tinn Mines, and the Disposition thereof, except in Causes of Land, Life, and Member; and if any false and unjust Judgment be given in any of the said Courts, the Party griev'd may make his *Appeal unto the Lord Warden of the Stanneries, who is their superior Judge, both for Law and Equity; and from him, unto the Body of the Council of the Lord Prince, Duke of Cornwall*, to which Duke the Stanneries were given, as by the former Charters have appear'd, *and from them the Appeal lieth to the King's most Royal Person.* Doderidge's Hist. of the Dutchy of Cornwall, 93, 94.

12. When Matters of Moment concerning the State of those Mines or Stanneries, shall come to be question'd or debated; *there are* in every of the said Counties, by the Direction of the Lord Warden, *several Parliaments or general Assemblies of the Tinners summon'd, whereunto every Stannery within that County sendeth Jurates or Burgesses, by whose Advice and Consent, Constitutions, Orders and Laws are made and ordain'd, touching Tinn-Causes, which being promulged, the same do bind the whole Body* of Tinners of that County, as firmly as if the same had been establish'd in the general Parliaments of the Realm. Doderidg's Hist. of the Dutchy of Cornwal. 94.

13 As well Blowers as all other *Labourers and Workers (without Fraud or Covine) in or about the Stanneries* in Cornwall and Devon, *are to have the Privilege* of the Stanneries, *during the Time* that they do Work there. Reſolv'd by all the Judges. Mich. 4. Jac. 4 Inſt. 231.

14. 2dly, That *all Matters* and Things *concerning the Stanneries, or depending upon the ſame, are to be heard and determin'd in thoſe Courts according to the Cuſtom* of the ſame, Time out of Mind of Man uſed. Reſolv'd by all the Judges. Mich. 4 Jac. 4 Inſt. 231.

15. 3dly, That *all tranſitory Actions between Tinner and Tinner, or Worker and Worker, (tho' the Cauſe be Collaterall, and not pertaining to the Stannery) may be heard and determin'd within the Courts of the Stanneries according to the Cuſtom* of the ſaid Courts, albeit the Cauſe of Action did riſe in any Place out of the Stanneries, *if the Defendant be found within the Stannery*; or may ſued at the Common Law at the Election of the Plaintiff. Reſolv'd by all the Judges. Mich. 4 Jac. 4 Inſt. 231.

16. But if the *one Party only be a Tinner, or Worker, and the Cauſe of Action being tranſitory and collateral to the Stannery, do riſe out of the ſaid Stanneries*, then the *Defendant may by the Cuſtom and Uſage of thoſe Courts plead to the Juriſdiction* of the Court, that the Cauſe of Action did riſe out of the Stanneries, and the Juriſdiction of thoſe Courts, *which by the Cuſtom of the Court he ought to plead in proper Perſon upon Oath.* And if ſuch Plea to the Juriſdiction be not allow'd, then a Prohibition in that Caſe is to be granted. *And* if in that Caſe the Defendant do come to plead to the Juriſdiction of the Court upon his Oath, *he ought not to be arreſted Eundo, Redeundo, vel Morando*, at the Suit of any Subject in any Corporation, or other Place where the ſaid Courts of the Stannery ſhall be then holden. Reſolv'd by all the Judges. Mich. 4 Jac. 4 Inſt. 231.

17. 4thly, *If the Defendant* may plead to the Juriſdiction of the Court in the Caſe before mentioned; and will not, but *pleads and admits the Juriſdiction* of the Court, *and Judgment is given, and the Body of the Defendant taken in Execution, the Party cannot by Law have any Action of falſe Impriſonment*, but the Execution is good by the Cuſtom of the ſaid Court. *But if* in that Caſe *it doth appear by the Plaintiff's own ſhewing, that the Contract or Cauſe of Action was made or did ariſe out of the Stanneries, and the Juriſdiction of thoſe Courts*, or if it appear by the Condition of the Bond whereupon the Action is grounded, that the Condition was to be perform'd in any Place out of the Juriſdiction of thoſe Courts, then *all the Proceedings* in ſuch Caſes upon ſuch Matter apparent, *are coram non Judice.* Reſolved by all the Judges. Mich. 4 Jac. 4 Inſt. 231.

18. 5thly, We are of Opinion, that *no Man ought to Demurr* in that Court, for, *for want of Form* but only for ſubſtance of Matter. Reſolv'd by all the Judges. Mich. 4 Jac. 4. Inſt. 231.

19. 6thly, That the Courts of the Stannery *have not any Juriſdiction for any Cauſe of Action that is local, riſing out of the Stanneries.* Reſolv'd by all the Judges. Mich. 4 Jac. 4 Inſt. 231.

20. 7thly, That the *Privilege of the Workers* in the Stanneries *do not extend to any Cauſe of Action that is local, riſing out of the Stanneries*, (for Matters of Life, Member, and plea of Land, are by expreſs Words excepted in their Charters) and no Man can be exempt from Juſtice. Reſolv'd by all the Juſtices. Mich. 4 Jac. 4 Inſt. 231.

21. *Upon Judgment given* in the Stannery Court, *the Courſe is*, 1ſt. *To appeal to the Vice-Warden.* 2dly, *From him to the Warden*, and after *to the Duke himſelf*, (of Cornwal) when he hath had his Livery; Per Doderidge J. and Coke Ch. J. agreed with him herein, but before this, that he hath his Liberty to appeal to the Warden, and afterwards to the Counſel; But *no Writ of Error lieth upon a Judgment there given for any Matter touching the Stanneries*; but upon a Judgment there given upon collateral Matters

a Writ

a Writ of Error well lieth, and this hath been ſo before reſolv'd, as the ſame is to be ſeen recorded in the Chancery, in the Petty Bag Office, by all the Judges, upon a Conference had. 3 Bulſt. 183. Paſch. 14 Jac. in Caſe of Langworthy v. Scott.

22. S. gave *Bond to deliver ſo much Tinn*, made in the Tin-work in Devonſhire, *at ſuch a Place within the Juriſdiction of the Stannery*. In Debt upon the Bond [brought in B. R.] the Defendant pleaded to the Juriſdiction of the Court, becauſe it was a Tinn Cauſe. Montague Ch. J. ſaid, it is alleg'd in the Plea, that the Defendant is a Tinner, and this is not traverſed, and puts the Caſe, that if the Condition was to deliver the Tin at Briſtol, whether the Stannery Court ſhould have Juriſdiction there? implying, that it ſhould not. But Doderidge ſaid, the Caſe is not ſo here, for it is to be delivered within the Juriſdiction. The Defendant ſhew'd certain Articles under the Great Seal, appointing and limiting the Juriſdiction, wherein the Article goes only to the Cauſe, and not to the Perſon. Doderidge J. ſaid, the Juriſdiction of the Stannaries had been debated before all the Judges of England, and their Charter of E. 1. and the Statute of 50 E. 3. was ſhewn to them, and that both Statute and Charter were general, viz. as to the Cauſe, and not reſtrained to the Perſons; Yet, Montague Ch. J. at length ruled, that becauſe the Cauſe and the Perſon are both Privileg'd, the Juriſdiction be allow'd. 2 Roll Rep. 44, 45. Trin. 16 Jac. B. R. Pinſon v. Smale.

23. C. a Miniſter in London came into the Stannery Court at the Suit of L. and put in Surety and then came again; It was ſhewn, that *neither the Plaintiff nor Defendant were Tinners, nor the Cauſe a Stannery Cauſe*; whereupon C. was diſcharged, and then C. was immediately arreſted again by L. and Proceſs awarded. An Attachment was granted againſt L. and a Prohibition to the Court, for the Defendant ought not to be arreſted in coming to make his Law. And Ley Ch. J. ſaid, that it was uſual there after the Oath made, for 3 d. to enter the Plaintiff a Tinner. 2 Roll Rep. 379. Mich. 21 Jac. B. R. Lovice v. Cloſe.

24. The Juriſdiction of the Stannaries *is only for Tinn Matters, and where the Perſons which ſue, or one of them, be a Tinner*; and all *their Proceedings there ſummarily* and de Plano, without any formal Courſe, *are illegal*, and the King's Courts ſhall take Notice where they proceed irregularly, and ſhall controul them, and preſerve the Juriſdiction of the Court; per Noy; and approv'd by the Court. Cro. C. 333. pl. 19. Mich. 9 Car. B. R. Adams v. Ld. Warden of the Stannaries.

25. The *Cuſtom* in the Stannaries *to try Cauſes there by ſix Jurors* is a void Cuſtom; though in Wales, where it is confirm'd by Act of Parliament it is good. So a *Cuſtom* of the Stannary Court *to take out Execution both againſt Body and Goods* is void. Sid. 233. pl. 36. Mich. 16 Car. 2. B. R. Aike v. Hunkin.

(N. a) Court. Juriſdiction of Court. Pleadings how.

1. IN *Treſpaſs* at the Diſtreſs the Defendant was permitted to ſay, that the Place *is within the Franchiſe of N. E. where the King's Writ runs not*, Judgment of the Writ, and was ſuffer'd to have the Plea *at the Diſtreſs*, and the Writ *abated by Nient dedire of the Plaintiff*. Br. Juriſdiction. pl. 9. cites 45. E. 3. 17.

2. He

2. He who pleads to the Juriſdiction by the *Cinque Ports*, ſhall conclude Judgment *if the Court will take Conuſance*. Br. Juriſdiction. pl. 17. cites 49. E. 3. 24.

3. *Debt in London upon an Obligation*, the *Defendant pleaded*, that it was made *by Dureſs in another County*, by which it was awarded quod defendens eat ſine die, & quod querens nihil capiat per Querelam, and by all, this Judgment *does not go in Bar, but to the Juriſdiction*, and ſuch Plea cannot be ſent into Bank to be tried and remanded as Foreign Voucher in London, for *this is by Statute which does not extend to perſonal Actions*. Br. Juriſdiction. pl. 83. cites 3 H. 4. 18.

4. Formedon of a *Seigniory, Caſtle, and Manor*. Newton ſaid as to the *Seigniory and Manor*, they *are in the County of Carmarthen, and* that the *King and his Progenitors, and all thoſe whoſe Eſtate* &c. *have had Time out of Mind, Juriſdiction Royal*, Exchequer and Juſtice *in the ſame County, and Writs ſealed with the Seal of the Prince, and* that *thoſe Lands and all others in the ſame County have been pleaded within the ſame County*, and not out, Judgment of the Writ, and admitted there that he may plead Matter which *goes to the Juriſdiction* as here, *and conclude to the Writ*. Br. Brief. pl. 165. cites 7 H. 6. 36.

5. Treſpaſs *againſt T. C.* Rolf ſaid he is *Chancellor of Oxford*, and *King Henry* 4. *granted* to J. D. Chancellor of Oxford, and his Succeſſors, *that they ſhould not be impleaded* by Writ of Treſpaſs, nor of Contract of Things which they do by their Office, and *ſhew'd that he diſtrein'd the Plaintiff by his Office, Judgment if the Court will take Conuſance*; per Babb. Ch. J. you *ought to have demanded Judgment of the Writ*. Br. Brief. pl. 169. cites 8 H. 6. 18. 19.

6 *For* thoſe of *London have Privilege* that they *ſhall not be impleaded out of the City of his Lands*, and if Writ be brought here of Land in London, he ſhall plead this Matter, and demand Judgment of the Writ, and not to the Juriſdiction. Br. Ibid.

7. If the *Plaintiff Counts in Debt or Treſpaſs*, and the *Defendant pleads to the Juriſdiction*, the *Count ſhall not be entred before the Juriſdiction be affirmed*, and if *Continuance be taken till the next Term*, it ſhall be upon the Writ as if no Count had been, and at the next Term the Plaintiff ſhall count anew. Br. Count. pl. 36. cites 8 H. 6. 18.

8. In Detinue of a Charter, the *Defendant defended Tort & Force, and no more*, and pleaded to the Juriſdiction, becauſe the *Land in the Charter is within the Cinque Ports*, and it was admitted a good Defence, and therefore it ſeems that he *ſhall not make full Defence*, if he will plead to the Juriſdiction, but it was not adjudged if the Plea be good to the Juriſdiction in this Caſe. Br. Juriſdiction. pl. 36. cites 8 H. 6. 22.

9. *Mortdanceſtor*; the *Tenant pleaded to the Juriſdiction, becauſe the Land lies in another County, and the Action is brought in C. B.* and demanded *Judgment if the Court would take Conuſance*; and per Moyle the Plea is good, and ſhall not conclude to the Writ, but to the Juriſdiction, for another Court ought to hold this Plea, and not this Court, and therefore well; contra where his Plea proves that he ought to have other Action in this Court, but *this Plea proves that this Court ſhall not hold Plea of this Action, but another Court*. Br. Juriſdiction. pl. 59. cites 38 H. 6. 18.

10. Pleadings to the Juriſdiction are, 1ſt. Ancient Demeſne. 2dly, County Palatine. 3dly, Cinque Ports. 4thly, Foreign Plea in perſonal Actions. Brown's Anal. 3.

11. *Rules* of pleading to the Juriſdiction are, 1ſt. Plea to the Juriſdiction *after the Declaration*, ſhall not be enter'd till it be * diſmiſs'd, and the Continuance ſhall be upon the Writ. 2dly, This Plea ſhall not be pleaded † *after* a General, but may after a *Special, Imparlance*, or

* Diſcuſſed. Br. Juriſdiction, pl. 38. cites S. C.

† Br. Ju-

Li. lo. Salvis ſibi omnibus &c. 3dly, Upon the *View Ancient Demeſne* may be pleaded to the Juriſdiction. 4thly, A *Foreign Plea* may be pleaded to the Juriſdiction *in a Perſonal Action*, but not in a Real. 5thly, If one pleads to the Juriſdiction, and *concludes to the Action*, the Juriſdiction is admitted, ‡ except in ſome ſpecial Caſes. 6thly, Every *Caſtle in the Cinque Ports* is intended *Guildable*, and not any Member of the Ports (49. E. 3. 34.) 7thly, The *Tower of London* is accounted in Law to ſtand in the County of Middleſex. 8thly, The || Plea to the Juriſdiction ought to be *pleaded at the firſt*, except in ſome ſpecial Caſes (as before.) 9thly, The *Judgment* in theſe Caſes is, as in other Pleas, That the Writ ſhall abate. Brown's Anal. 3, 4.

riſdiction, pl. 88 cites 22 H. 6. S. P.

It was ſaid by Coke Prothonotary, that one cannot plead to the Juriſdiction at all after any Imparlance, tho' ſpecial;

For the Entry is Salvis Exceptionibus &c. tam ad Breve, quam ad Narrationem &c. (not ſaid ad Juriſdictionem Curiæ.) Comb. 253. Paſch. 6 W. & M. in C. B. Denham v. Plumpton, and cites 3 H. 6. 30. a 11 H. 6. 8. and 20 H. 6. 32.

‡ As where Treſpaſs is brought *Vi & Armis*, or where *Freehold is pleaded in* the *County Court, or Court Baron*, for there the Court ought to take Conſideration therein. Heath's Max. 21. cites 1 R. 3. 1.

|| Pleas to the Juriſdiction muſt always be pleaded Primo Die. Carth. 26. Paſch. 1 W. & M. in B. R. in Caſe of Andrews v. Clerke.

Court. Juriſdiction.
(O. a) Affirm'd. By what.

1. IN Formedon, the *Tenant ſaid after the View that the Land is in Wales, where the King's Writ does not run*, Judgment of the Writ, for he cannot have it to the Juriſdiction, for he *affirmed the Juriſdiction by the View*, by which the Demandant replied. Br. Juriſdiction. pl. 37. cites 7 H. 6. 36.

2. *And* if the *Tenant pleads to the Juriſdiction, and the Demandant Imparles, and the Plea to the Juriſdiction is not entred*, the Juriſdiction is affirmed; *contra if it appears of Record, by Plea entred*, that he has pleaded to the Juriſdiction. Br. Ibid.

3. The Plaintiff declared in the Marſhal's Court, upon an *Inſimul Computaſſet infra Juriſdictionem* &c. and had Judgment. It was objected, that the Account doth not alter the Duty; for that may ariſe in York, and that no other Conſideration being laid to intitle the Court to any Juriſdiction, the Judgment ought not to ſtand; but it was adjudged, that the *Account was ſufficient to give the Court Juriſdiction.* 8 Mod. 77. Paſch. 8. Geo. 1723. Spackman v. Huſſey.

For more of Court in General, See **Ancient Demeſne, Chancery, Eccleſiaſtical, Prohibition, Univerſity,** and other Proper Titles.

Creditor and Debtor.

(A) Creditor. Favoured in Equity againſt the Debtor, and others claiming from him.

Jenk. 295. pl. 45. cites 12 Jac. S. C. — Chan. Rep. 131. 15 Car. 1. Naylor v. Baldwin, S. P.

1. *Conveyance by Covin* does not deveſt the Eſtate out of the Debtor, Feoffor &c. but he ſtands ſtill ſeiſed as to the Creditors, notwithſtanding the Feoffment. Hob. 72. pl. 86. Humberton v. Howgill.

2. A *Judgment* of a Debt, *and Fine to a Purchaſor acknowledged all in one Day*, the Judgment to be preferred. Toth. 180. cites 4 or 5 Car. Owen v. Lady Deancourt.

3. A *Debtor employed a Creditor to purchaſe Lands* for him, and to take up Money to pay for it, which he did, and took the Purchaſe in his own Name. The Debtor ſued in Chancery to have the Lands on Payment of the Money, but the Creditor having on other Occaſions mortgaged his own Lands, and engaged for the Debtor, Bridgman K. decreed, that in order to have a Conveyance, the *Debtor ſhould pay the Debts as well as the Purchaſe Money*. 2 Chan. Caſes 87. cited per Finch Chancellor, as the Caſe of Bradburn v. Amand.

4. A *Settlement after Marriage in Purſuance of a Bond or Agreement before*, is good againſt Creditors, as if made before, and is not a voluntary Conveyance, nor fraudulent; Agreed per Cur. 2 Keb. 700. pl. 52. Mich. 22 Car. 2. B. R. Lloyd v. Fox.

5. *Truſtees by a Settlement for Payment* of Debts pretend, that they have not ſufficient Power to ſell, and the *Heir pretends that he hath ſome Statutes* and Securities which charge the Lands, and ſo obſtruct the Sale, and the Wife pretends that ſhe has a *Jointure, but is willing to accept* 2000 *l. in lieu* of it. Decreed, that all Parties join, that the Creditors may be ſatisfied, (excepting the Jointure, which was prior to all the Incumbrances, or to pay her 2000 l. in lieu of it) and the Debts to be ſatisfied in equal Proportion, the Truſtees to be indemnified, and have their Charges and Allowances, and ſuch Securities, as the Creditors reſpectively have, to be delivered up to the Purchaſors. Fin. R. 262. Trin. 28 Car. 2. Bennet v. Ingoldsby and Hampſon.

6. Creditors, *not Parties to a Suit*, allow'd ſix Months Time to *come in* and prove their Debts before the Maſter, paying their Proportion of the Charge of the Suit to be aſcertain'd by the Maſter, and if they come not in as aforeſaid, to be excluded. Fin. R. 358. Paſch. 30. Car. 2. Foot v. Clerk and Venner.

But the Reporter ſays Quære; for it ſeems *he was but Te-*

7. One *ſeized in Tail* of Lands, whereof a *Term was in Truſtees to attend the Inheritance, levies a Fine*, and *by Deed ſubjects the Land to a Debt of* 1000 *l.* but *declares, that after the Debt is paid, the Land to be to the old Uſes, and* after *deviſes the Land for Payment of all his Debts*;

It

It was decreed, that the Lands are liable to the Payment of the Teſtator's Debts in general. Vern. 99, 100. Mich. 1682. Turner v. Gwynn.

nant in Tail of the Inheritance, and ſo could not charge it by his Will, unleſs it be intended he had ſtill a Power of doing it, lodged in him, by reaſon of the Fine, notwithſtanding he had declared, that after Payment of the 1000 l. it ſhould go to the former Uſes. Ibid.

Tenant in Tail ſuffers a *Recovery to let in a Mortgage of* 500 *Years*, and then limits the Land to the old Uſes, and makes his Will, and *deviſes all his Lands for Payment of his Debts.* The Court thought the Equity of Redemption ſhould be Aſſets to ſatisfy Creditors, or a ſubſequent Grantee of an Annuity. Note, the *Redemption was limited to him, his Heirs or Aſſigns.* Chan. Prec. 39. Hill. 1691. Foſſet v. Auſtin.

8. Creditor ſhall be *relieved againſt a Legatee*, ſaid to be ſettled in the Caſe of * Chamberlain v. Chamberlain. Vern. R. 92. Arg. Mich. 1682. in Caſe of Noel v. Robinſon; and Lord Chancellor ſaid, it is certain that a Creditor ſhall compel a Legatee to refund.

* Chan. Caſes, 257. Hill. 26 & 27 Car. 2. S. C. denied by Lord Keeper Finch. —— 2 Freem. Rep. pl. 37. S C. but S. P. does not appear.

9. A *Deed of Truſt* was made for Payment of *ſuch Creditors as come in within a Year*; yet a Creditor not coming in within the Year, will not be excluded, but it is a continuing Truſt; But a Bill may be exhibited after the Year, to compel the Creditors who ſtand out to come in, or renounce the Benefit of the Truſt. Vern. 260. pl. 253. Mich. 1684. Dunch v. Kent.

10. Creditors on Judgments and Bonds decreed to *redeem Mortgages* towards Satisfaction of their Debts. 2 Chan. Rep. 396. 2 Jac. 2. Anon.

11. Action of *Debt* brought *againſt an Heir upon the Bond of his Anceſtor*, who *pleads a falſe Plea*, and the Plaintiff has Verdict; the *Defendant dies before the Day in Bank, and deviſes his Lands to J. S.* The *Obligee brings a Bill againſt the Deviſee* to be paid his Debt. Lord Chancellor ſaid, there is no Colour of Equity in the Caſe, unleſs you will have it that the Defendant died maliciouſly before the Day in Bank, on purpoſe to defeat the Plaintiff of his Debt, and diſmiſs'd the Bill. Vern. 400, 401. pl. 373. Paſch. 1686. Holley v. Weedon.

2 Chan. Caſes 175. S C. and Bill diſmiſſed.

12. A Tenant for Life was *outlaw'd, and abſconded*; B. *purchaſes his Eſtate.* Jeffries C. ſet aſide the Purchaſe in Favour of Creditors, the Purchaſe being made at an *under Value, and pending the Proſecution at Law againſt him*, and having Notice thereof. Vern. 465. pl. 448. Trin. 1687. Hern. v. Meers.

13. *Executor* makes a Voluntary Aſſignment of Part of the *Aſſets*; it was ſtrongly inſiſted for the Plaintiff, that he being a Creditor to the firſt Teſtator, might * *follow the Eſtate*, in whoſe Hands ſoever it came, and ought not to be put to the Charge and Trouble of controverting the Account directed by the Court to be taken. Sed non allocatur. Per Jeffries C. 2 Vern. 75. Trin. 1688. Stiddolph v. Leigh.

Arg. Vern. 92. in Caſe of Noel v. Robinſon, cites S. C. —— Where the Executor *fraudnlen.ly ſold a Term* to one that contrived and conſented to the Devaſtavit, a Creditor by Bond was allowed to follow the Eſtate in the Hands of the Purchaſor. Decreed at the Rolls, and affirmed by Ld. Cowper. 2 Vern. 616. Crane v. Drake. —— S. C. cited and agreed by Ld. Hardwick, 13 November, 1738. who ſaid, that he had examined the Regiſter Book, and that there the Decree was founded upon *partieular Proof of Fraud*, which Mr. Vernon's Report does not plainly and fully ſet forth in Caſe of Nugent v. Gifford, and decreed accordingly, notwithſtanding it was inſiſted that Notice was not expreſsly given to the Purchaſor.

14. The Son is Surety for the Father to ſeveral Perſons by Bond, and the Father enters into *Statute to indemnify the Surety, and pay the Debts.* Afterwards, at the Inſtance of the Father, one of the Creditors *exchanges his Bond for a Mortgage* from the Father. The Son extended the Lands mortgaged, pretending he was damnified. Several of

of the Debts to be paid were the Debts of the Son. Decreed, that the Mortgage be redeem'd, or foreclosed, and a perpetual Injunction againſt the Statute. 2 Vern. 39. 1 Hill. 1688. Legriel and Moriſcoe v. Barker.

15. *Lands were ſettled by the Parliament for the Payment of C's Debts.* The Truſtees brought a Bill againſt the Adminiſtrators of C. to diſcover the Perſonal Eſtate &c. And the Adminiſtrators (who were *Adminiſtrators as Creditors to C.) with three or four of the Creditors, bring a Bill againſt the Truſtees*; *and it* was *decreed, that they ſhall ſell* &c. *and that all Creditors may come in by a Time*, contributing to the Charges &c. and now the Plaintiffs (as *other Creditors) exhibit their Bill againſt the Adminiſtrators, and* againſt the *Truſtees, to diſcover the Perſonal Eſtate, and to have the Lands ſold* &c. The Defendants objected, That the Plaintiffs ought not to have exhibited a new Bill, but ſhould, by Motion to the Court, come in as Creditors upon the former Bill exhibited by the Adminiſtrators. But the Court over-ruled it, and ſaid this Bill was well brought, becauſe it calls the Adminiſtrators themſelves to an Account, which could not be upon the former Bills. 3 Chan. Rep. 216. Paſch. 1688. Gwevers v. Danby (Earl of) & al'.

2 Vern. 763. Mich. 1718. Wilſon v. Fielding, S P. decreed.

16. Where a *Judgment* Creditor levy'd his Debt out of the Perſonal Eſtate, the Court inclin'd to relieve a *Bond*-Creditor, and to place him in the Stead of the Judgment-Creditor, and *charge the Land* with his Debt. 2 Vern. 182. pl. 164. Mich. 1690. Porey v. Marſh.

17. *Lands* on Marriage were *ſettled on Daughters, and their Heirs, till* 3000 *l. be paid by the next Remainder-Man.* Decreed at the Rolls and affirm'd on Appeal by Cowper K. that *Judgment-Creditors* ſhould redeem the Daughters who had entred on the Eſtate, but that on the Daughters Account of Profits, the Surplus ſhould not annually go to ſink the Principal, but only as an entire Sum of 1000 l. was raiſed, and ſo on, not till another 1000 l. was raiſed. 2 Vern. 523. Mich. 1705, and 578. Hill. 1706. Blagrave & al'. v. Clun. & al'.

17. *Marriage Covenant to purchaſe and ſettle Lands of* 400 *l. per Ann.* to Baron for Life, then to the Feme for Life, Remainder to the *Heirs of their two Bodies*, and if he dy'd *no Settlement made, the Wife may elect* to have either 400 *l. per Ann.* or 3000 *l. in Money*, in Lieu of Dower and Thirds. Baron dies before a Settlement made; the Court, in Favour of Creditors, will not allow the Wife to *elect* the 3000 l. in Money, and the Children to have 400 l. per Ann. ſettled on them after her Deceaſe, and ſo to exhauſt the Aſſets, but decreed a Settlement of 400 l. per Ann. on the Wife for Life, Remainder to the Children. 2 Vern. R. 605. pl. 543. Hill. 1707. Hancock v. Hancock.

18. 4000 *l. was put into Truſtees Hands upon* the *Marriage of* Dr. Fulham with Mrs. Evelin, *to be laid out in Lands to be ſettled upon the Huſband for Life*, Remainder *to the Wife for Life* for her Jointure, Remainder *to the firſt and every other Son* of the Marriage *in Tail Male*, Remainder *to the Heirs of the Body* of Dr. Fulham, Remainder *to his Right Heirs in Fee*; The *Wife dies, leaving Iſſue a Son*, and after the *Husband dies, before the Money was laid out* in Land, *and deviſes all his Eſtate*, both Real and Perſonal *to Truſtees during the Minority of his Son, for the Benefit of his Son, and in Caſe he dies before the Age of* 21, *then he gives ſeveral Legacies, and the Reſidue of his Perſonal Eſtate to Charitable Uſes* &c. The *Son died before the Age of* 21. Creditors bring a Bill againſt Dr. Fulham's Executor and *his Brother*, who *claims the* 4000 *l. as Real Eſtate, and not ſubject to Debts by ſimple Contract*, ſuggeſting, that there are not Perſonal Aſſets enough to pay Dr. Fulham's Debts, without the 4000 l. be taken as Money, there being no Iſſue left of the Marriage, and the Whole would have veſted in Dr. Fulham, if he had out lived his Son &c. and the Conſideration of the Marriage Agree-

ment

ment extends no further than the Iſſue of the Marriage, and not to the General Heir of the Husband &c.

Mr. Vernon for Defendant, who was Uncle and Heir at Law to the Son of Dr. Fulham, and claims the 4000 l. as Real Eſtate deſcended to him cited the Caſe of Whittick v. Jermin, Tempore Hale Ch. B. which was the firſt Caſe where Truſt Money to be laid out in Lands was held to be Real Eſtate. Atkins v. Atkins, Tempore Jeffery's C. ſuch Truſt Money ſhall be taken as Real Eſtate, and ſhall go to the Heir, and not to the Executor, though the Articles be ſilent as to the Remainder in Fee, and the Limitation of the Articles went no further than to the Iſſue of the Marriage. So a Wife ſhall have Dower of ſuch Truſt Money, and a Husband ſhall be Tenant by the Curteſy &c.

Per Harcourt C. I ſhall not give my Opinion now if the 4000 l. agreed to be laid in Land by the Marriage Articles, ſhall be taken in Equity to be Real Eſtate againſt the Creditors by ſimple Contract for the Benefit of a Collateral Heir at Law, but refer the Account of the Perſonal Eſtate of Dr. Fulham to the Maſter, to ſee if that be ſufficient to pay the Debts by ſimple Contract; For if ſo, then this Point cannot come in Queſtion. I don't think the Caſes cited come up to this Caſe; the firſt Caſe was in Favour of the Iſſue of the Marriage, and not for a Collateral Heir; and in the ſecond Caſe, the Diſpute was between the Heir and the Executors, but not of Creditors; So in Dower, and by the Curteſy, it has only been carried againſt Executors, and that does not come up to the Caſe of Creditors. Mſſ. Rep. 13 July, 13 Ann. Fulham v. Jones & al'.

See S. C. cited in 3 P. W. ms 222. in a note as again before Lord Parker in 1720.

20. *Bill by a Judgment Creditor to open a Decree of Foreclоſure, to which Suit he was not a Party, ſuggeſting Fraud* and Contrivance between the Mortgagor and Mortgagee thereby to cheat him of his Debt. The Mortgagee pleaded the Decree of Foreclоſure and Purchaſe of the Equity of Redemption, and by *Anſwer denies the Fraud, but admits he had Notice of the Judgment* when he brought his Bill to foreclоſe, *but did not know the Perſon who had got the Judgment, nor where to find him, and for that Reaſon did not make him a Party* to the Suit. The *Mortgagor, by his Anſwer*, admits the Mortgagee, but *ſays, he was in Priſon at the Time of the Foreclоſure*; but owns he employ'd a Solicitor to appear for him &c. *He ſays, that being very poor and neceſſitous, and in Priſon, he was prevail'd on to aſſign his Equity of Redemption for* 20 *Guineas, though the Eſtate is worth a great deal more.* Per Cowper C. ſince the Mortgagee had Notice of the Judgment before the Foreclоſure and Purchaſe of the Equity of Redemption, the Plaintiff may go before the Maſter, and be at Liberty to ſurcharge or falſify the Mortgagee's Account; but the Mortgagee is not to account for the Profits ſince the Decree of Foreclоſure, and the *Plaintiff being a Judgment-Creditor, and not a Party to the Bill of Foreclоſure, may redeem.* Note, in this Caſe, the Plaintiff being an obſcure Perſon, was ordered to give Security to anſwer Coſts, in Caſe he did not redeem. Mſſ. Rep. Mich. 2 Geo. in Canc. Bird v. Gandy & al'.

21. A *Jointure* was made *after Marriage in Bar of Dower*, by the Husband, of Lands which were then his Father's, and the Father join'd therein; But it was *not to take Effect till after his Father's Death*, as the Statute requires. Afterwards the Husband *deviſed his Lands for Payment of Debts*, and died, *living the Father*, and then the Creditors bring a Bill, and the Wife would *wave the Jointure*, and claim Dower, and after ſuch her Anſwer put in, the Father died. But Parker C. ſeeing that by waving the Settlement, the Lands would go to the Heir at Law not ſubject to the Payment of Debts, ſince it *never was part of the Teſtator's Eſtate, the Father out living him*, and ſo the Aſſets would fall ſhort, and that what the Wife did was in Favour of the Heir at Law, to the

Prejudice of the Creditors, he decreed, that ſhe ſhould take the Eſtate for her Life, but that ſhe ſhould *aſſign it over in Truſt for the Creditors, who ſhould convey to her a third Part of her Husband's Lands for her Dower*, free from Incumbrances. 10 Mod. 487. Paſch. 8 Geo. 1. Mills v. Eden.

22. A. ſeized in Fee *and indebted* to ſeveral *by Bonds, in which his Heirs were bound, deviſed his Lands to A. for Life*, Remainder *to his firſt &c. Sons in Tail*, Remainder *over*. Lord C. Macclesfield decreed a Sale, though there was no Deviſe of the Land for Payment of Debts. 2 Wms's. Rep. 234 Trin. 1724. Manaton v. Manaton.

2 Vern. 306. in pl. 295. Mich. 1693. Arg. cites the Caſe of Knight v. Keyne, where the Perſonal Eſtate was applied in Prejudice of a Bond-Creditor to ſatisfy a *Statute* which bound the Lands, and the *Bond* could not affect them, and adds, that the Court uſually *marſhals the Aſſets*, ſo as all Creditors may have a Satisfaction, but never to prevent any Creditor from obtaining Satisfaction of his Debt, nor a Purchaſor from protecting his Purchaſe.

23. Where *Debts by Specialty*, and which are a *Lien* at Law on the Real Eſtate, are *paid out of the Perſonal Eſtate* by Executors in eaſe of the Lands, the Creditors *by ſimple Contract* ſhall ſtand in the Places of the Creditors by Specialty to have their Debts ſatisfy'd *out of the Lands*, and decreed the Lands to be ſold for that Purpoſe, and the Heir, who was an Infant, to join in a Conveyance within ſix Months after he comes of Age. 9 Mod. 151. Trin. 11 Geo. 1. in Canc. Charles & al' v. Andrews.

Select Chan. Caſes in Ld. King's Time, 24. S. C. but not S. P.

24. A *Legacy of* 1000 *l.* was bequeathed to a Feme ſole Infant, *charged upon Land, and payable at* 25. She took Husband, who *aſſigned the ſame, during her Infancy, to W. in Conſideration of* 750 *l.* and afterwards *ſhe attained her Age of* 25. It was inſiſted againſt this Aſſignment, that it was made for leſs Money than was really due, viz. 750 l. inſtead of 1000 l. But it was anſwered, that the Intereſt of the 750 l. from the Time it was paid to the attaining 25, and the Hazard of her dying before that Age, made it a dear Bargain, and that with regard to any Judgment or other Creditors of the Husband, as they claimed under him, and had *no ſpecifick Lien on the Legacy*, they could not be in a better Condition than he himſelf was; And Ld. Chancellor decreed the Aſſignment good, and that W. was intitled thereto with Intereſt from the Wife's attaining the Age of 25. 2 Wms's Rep. (603.) (609.) Trin. 1731. Duke of Chandos v. Talbot.

25. Where there are proper Perſons to get in the Eſtate of another, Chancery will not ſuffer the Creditors of the Teſtator to bring a Bill in Equity in order to get in that Eſtate; But *if the Executors will collude with a Debtor*, there is no Doubt but a *Creditor may bring his Bill, in order to take Care of the Eſtate, and charge the Executors with ſuch Colluſion*; Per Parker J. who ſate for the Lord Chancellor. Barnard. Rep. in Canc. 32. Paſch 1740. Franklin v. Fern.

(B) Agreements between Debtor and Creditor. How far good and binding.

1. DEBTOR agreed with his *Creditors to aſſign all his Eſtate* on Oath, to Perſons in Truſt, for *Payment of his Debts*, and ſuch Allowance to himſelf; moſt of the Creditors ſigned. Debtor imbezled ſome of the Goods, on which ſome of thoſe that ſigned took out a Statute

Statute of Bankrupts. The Debtor filed his Bill, but no Relief. Chan. Cafes 18. Hill. 14 & 15, Car. 2. Fuller v. Lance.

9. All the Creditors of A. exeept I. S agreed *to accept 5 s. in the Pound*, and to take A's Bond for the ſame, and I. S. *promiſed to do ſo too*, but inſtead thereof, brought an Action for the whole Debt. On a Bill by A. ſuggeſting as aforeſaid I. S. inſiſted that the Plantiff is able to pay the whole, denies the Agreement as ſet forth, and that if he did promiſe to come into any Compoſition, it was to be paid 5 s. in the Pound *ready Money*, and 15 s. more in Seven Years, and the Court diſmiſſed the Bill as not proper for Relief. Fin. R. 332. Mich. 29. Car. 2. Davis v. Legelder.

3. A Creditor *agrees to take leſs* than his Debt, *ſo as the Money is paid at a certain Day*; if Debtor fails at the Day, the Creditor is not bound by the Agreement. Vern. R. 210. pl. 208. Mich. 1683. Sewell v. Muſſon. See Chan. Caſes 110. Delamere v. Smith.

4. Creditors, fearing Want of Aſſets, made a *Compoſition with the Executor of Debtor*; afterwards *Aſſets came in*; though the Executor was was willing to pay the whole, yet on a Bill by the Reſiduary Legatee for an Account, and to have the Benefit of the Surplus Lord Chancellor ſaid he could not ſet aſide the Compoſition the Creditors had made. They have no Bill for the Purpoſe and only come in before the Maſter, and therefore they muſt abide by the Compoſition. Chan. Prec. 99. 100. pl. 68. Mich. 1699. Lord Caſtleton v. Lord Fanſhaw.

5. A. An *Executor and Deviſee, being decreed a Truſtee, was ordered to account*, and, on Account, was reported to be indebted to B. the Ceſty que Truſt, in 4000 l. The Decree was affirmed in the Houſe of Lords. Afterwards A. went beyond Sea, and being there, a *Compoſition was made, by which A. was to pay a ſmall Sum to B. and B. was to indemnify A. from the Creditors of the Teſtator.* A. being threatned with Suits by ſome of Teſtator's Creditors brought a Bill againſt B. to indemnify him. And Ld. C. Macclesfield decreed accordingly, and ſaid, that all that Equity ought to guard againſt, is that *no Fraud* be *uſed in obtaining the Compoſition*, and took Notice, that there had been a fair Repreſentation on the Part of A. and a juſt Compliance by B. the Defendant, and in a great Meaſure executed by A. and therefore ordered B. to execute his Part of the Agreement, and indemnify the Plaintiff againſt the Debts of the Teſtator. Williams Rep. 751. Mich. 1721. Pollen v. Sir John Hubard.

6. The Court of *Chancery* with Conſent of the Wife and her Truſtees, who had about 5 or 6000 l. Portion of hers in their Hands, in Order to compound with the Husband's Creditors, *ordered Part of the Truſt Money to be paid to the Creditors in Diſcharge of the Husband's Debts*, ſome of the Creditors at executing the Deed of Compoſition *took private Securities poſtdated &c.* The Maſter of the Rolls thought this under hand Dealing a Fraud on the Wife, on the Truſtees, and the Court, and therefore directed all ſuch Securities to be ſet aſide and delivered up to the Husband. Wms's Rep. 768. Mich. 1721. Middleton v. Lord Onſlow. & al'.

(C) Where

See Tit. Executor, (Q a) (R. a) &c.

(C) Where a Debtor may prefer one Creditor to another, or what Creditors ſhall have the Preference.

Judgment ſhall be paid before Statutes or *Recognizances.* Brownl. 77. Hill. 11 Jac. Hancock v. Wrenham.

1. A *Statute* firſt acknowledged ſhall be preferred before a *Judgment* obtained afterwards. Brownl 37. and ſo Vice verſa. If nothing be done by the Sheriff on the Extent, and if the Land be firſt executed on the Statute, and afterwards an *Elegit* upon a Judgment obtained, before the acknowledging of the Statute come alſo to the Sheriff, the Moiety of the Land extended ſhall be delivered to the Plaintiff on the Judgment. Brownl. 38.

——— It was admitted, that a prior Statute *extended* ſhall not be avoided by a ſubſequent Judgment, as in the Caſe of **Fuller v. Guilmore**, but that was in the Caſe of a *Freehold*, and not as to Goods and *Chattles.* Vern. R. 294. Hill. 1684. in Caſe of Morgan v. Ld. Sherard.

S. C. N. Ch. R. 183.

2. A Mortgage was made by Feoffment without Livery, yet this *Defective Mortgage* is a Charge on the Lands in Equity, and the Mortgagor and his Heirs are but Truſtees for the Mortgagee and *Judgments confeſſed* by the Heir *on Bonds* of his Anceſtor (the Mortgagor) ſhall not take Place of the Mortgage. Fin. R. 28 Mich. 25. Car 2. Burgh. v. Francis.

3. A. is *indebted by Bond* (in which I. S. is bound as Surety) *and alſo by ſimple Contract to B.* A. *ſtates an Account of both Debts* with B. *and makes a Bill of Sale for the ſecuring the Balance which proves deficient*; On a Bill by the Surety decreed, the Money ariſing by the Bill of Sale ſhould be applied towards of both Debts in Proportion. Vern. 34. Hill 1681. Perris v. Roberts.

4. *Recognizance was enrolled by ſpecial Order of the Court after lapſe of Time* for the doing it, by which the Recognizance is effectual from the Date. A. between the Date and the Inrollment lent Money to the Cognizor and took a *Judgment*, which now was overreached by the Recognizance; *the Eſtate was in Mortgage*, and neither the Judgment or Recognizance could reach it without Aid in Equity, the Cognizor having only an Equity of Redemption in him. The Court inclined to prefer the Judgment Creditor that he might not complain of wrong done him by the order for inrolling the Recognizance. 2 Vern. R. 234. Trin. 1691. Fothergill v. Kendrick.

5. A. Is *Tenant for Life, ſubject to a Mortgage of* 15000 *l. to B. Remainder to J. S. in Fee.* A. acknowledges a *Statute to C.* for 500 l. and afterwards *A. ſells his Eſtate for Life to I. S. for* 3000 *l.* who had *no Notice of the Statute* to C. The 3000 l. was *borrowed* by I. S. *of D.* who likewiſe *paid off the* 15000 *l. and took an Aſſignment* of the Mortgage for the 15000 l. and alſo charged with the 3000 l. and I. S. covenanted to pay the Money, and the Equity of Redemption is limited to him; and D. covenanted on Payment to aſſign to I. S. or as he would direct. *I. S. acknowledged a Statute to E.* who had no Notice of the 500 l. Statute to C. and after *deviſes the Lands to A.* and charged with *Debts and Legacies.* Decreed that B. muſt come in laſt of all, even after Debts and Legacies, and affirmed by Lord Wright aſſiſted by two Judges, and ſaid it was like the Caſe of a Third Mortgagor buying in a firſt. Ch. Prec. 158. Pl. 131. Paſch. 1701. Blake v. Hungerford.

6. A. Seized in Fee, in 1679, morrgaged for 500 Years, and in 1687, the Term being kept on foot and aſſigned to B. C. and D. B. lends 1000 l. to A. on a *Judgment*, and in 1688, A. borrows 1500 l. of E. for

for ſecuring whereof A and C. *one of the Truſtees aſſign the Term of 500 Years to E.* B. having Notice of this Aſſignment, *B. D and A. aſſign to I. S.* in Truſt for B. Per Wright K. tho' there is a *Term attendant* on the Inheritance, yet a Judgment is an equitable *Lien* on the Inheritance and conſequently affects the Term; and therefore B. having got the legal Eſtate as to Two Thirds of the Term in I. S. in Truſt for herſelf, ſhall have the Benefit of it, though ſhe had Notice of the Mortgage and Aſſignment by A. and C. And all meſne Incumbrances from 79 were poſtponed to the Debt to B. and E. 2 Vern. 524. pl. 474. Mich. 1705. Briſtol (Earl) & al'. Creditors of Sir William Baſſet v. Hungerford & al.

7. Decreed at the Rolls that *Mortgages* were to be paid firſt, and then *Judgments*, and then *Recognizances* &c. But upon *Appeal to the Lords*, it was adjudged, that Mortgages were not to be preferred before other *Real Incumbrances*; But Mortgages, Judgments, Statutes, and Recognizances, ſhould take Place according to Priority, and *as they ſtood in Order of Time.* 2 Vern. 525. pl. 474. Mich. 1705. E. of Briſtol. & al' Creditors of Sir William Baſſet v. Hungerford.

8. An Incumbrance by Judgment being a Lien on the Land, if made prior to the Grant of an Annuity, ſhall be preferred before the Grant of the Annuity, becauſe his Charge on the Land is poſterior. Gilb. Equ. Rep. 66. per Lord Chancellor. Paſch. 7. Ann. in Canc. in that of Daviſon v. Goddard.

9. A. a Freeman of London by Will gives his own Third Part of his Perſonal Eſtate to M. his Wife, and the other Two Thirds to his Children, and dies, leaving Two Daughters B. and C. Afterwards *M. poſſeſſed herſelf of the whole Stock and carried on the Trade, and ſome time after married J. S. who employed the whole Stock in Trade* likewiſe, and made *no Diſtribution* to the Children. C. dies; On a Treaty of Marriage between W. R. and B. a Computation was made of what B's Fortune might amount to, but it falling ſhort of what W. R. expected, and the Match thereupon falling off, *J. S. agreed by Parol to make her Fortune* 4000*l. and paid* 2500*l. of it.* J. S. afterwards died indebted to ſeveral other Perſons, but made a Will and entered into a *Bond to W. R. for Payment of the* 1500*l. but kept the Bond himſelf*, though in his Sickneſs he *ſhewed it to W. R.* The Agreement by J. S. to pay the Portion, and the Execution of the Bond was proved. But Lord Harcourt thought the Bond made ſo long after the Marriage as four Years, could not be tacked to the Agreement, ſo as to make it any Evidence in Writing of that Agreement; eſpecially on the Circumſtances that the Bond was then made without any Application of W. R. and B. and was not delivered into his or her Cuſtody, and that it being made at the Time the Will was, and ſhewn to them with his Will, and after his Death found with his Will, he looked on it only in Nature of a Legacy, and *voluntary, as againſt his own Creditors*, and to be poſtponed to them. Ch. Prec. 372. pl. 259. Trin. 1713. Leoffes v. Lewen. Gilb. Equ. Rep. 32. S. C. in totidem Verbis.

10 *Private Act of Parliament for Sale* of Lord Stawell's Eſtate and *directed* that the Money ariſing by Sale ſhould firſt go to pay off Mortgages, and then Statutes, Judgments, and Recognizances, with a *ſaving to all but the Family of Lord Stawell*; decreed in Purſuance of this Act, that ſubſequent Mortgages ſhould be paid before Judgments precedent but ſeem'd to admit that by Virtue of the general ſaving in the Act, they might make Uſe of their Incumbrances as they could at Law; Per Cowper C. 2 Vern. 711. pl. 633. Hill 1715. Ward & al'. v. Cecil & al'.

A Recognizance *is a Judgment*, and wants nothing but Execution to make it a compleat Judgment; Per Powell J. Farr. 8. Paſch. 1 Ann. B. R. in Caſe of Atwood v. Burr. —— Litt. Rep. Arg. 89. Trin. 4 Car. in the Exchequer, in Caſe of Melvin v. Reeve.

11. A *Recognizance not inrolled*, decreed per Cowper C. to be conſider'd *as a Bond*. 2 Vern. 750. Hill 1716. Bothomly & al' v. Lord Fairfax.

Wms's Rep. 334. to 340. S. C.

12. Though the Court may permit the *Inrollment of a Recognizance after the Time is elapſed*; Yet it is always to be done with Caution that it may not prejudice any intervening Purchaſor, and the Statute of Frauds and Perjuries provides that *Judgments* ſhan't, by having Relation to the firſt Day of the Term, bind Purchaſors nor affect the Land, but from the Time of ſigning them in the Margin; But ſays nothing as to Recognizances and Pocket Securities, which are more dangerous to Purchaſors, and it may fairly be *preſumed that the Debt was otherwiſe ſatisfied* or ſecured when the Recognizance was not inrolled. 2 Vern. 750. Hill. 1716. Bothomly v. Fairfax.

(D) In what Caſes, where the Creditor is ſupplanted of his Security, a Court of Equity will ſubſtitute other Security in its Room.

1. A. Indebted to B. in 260 l. *aſſigns over to B. the Benefit of a Decree againſt C.* afterwards A. *agreed with C. to releaſe to him* all Benefit of the Decree, and all Suits and Demands, B. brought his Bill to *ſet aſide the Releaſe*, C. pleads the Releaſe for a Valuable Conſideration, and that he had *no Notice*. The Court allow'd the Plea, and there being ſeveral Securities mentioned in the Releaſe, as made over by C. to A. in Conſideration of ſuch Releaſe, decreed thoſe Securities to be made good to the Plaintiff B. to enable him to receive Satisfaction for the 260 l. and A. and C. to Covenant not to releaſe ſuch Securities till B. is ſatisfied. Fin. R. 218. Trin. 27 Car. 2. Hookes v. Simball.

2. A *Debt owing to the King*, was ordered to be ſatisfied out of the real Eſtate, that the other Creditors might be let in to have a Satisfaction of their Debts out of the *Perſonal Aſſets*. Vern. 455, pl. 427. Paſch. 1687. Sagittary v. Hide.

3. *A. was indebted* 1000 *l. by Mortgage, and* 500 *l. by Bond*; A. before his Death *makes a Leaſe of Lands to Truſtees, for Payment of his Debts, worth about* 1200. *The Heir of A. after his Death ſells as much Land as pays* 1400 *l. whereof the Mortgage was Part*, (which was more than the Value of the Truſt Eſtate). The Creditor for the other 100 l. brought his Bill againſt the Heir, and the Truſtees, to have his Debt ſatisfied out of this Truſt Eſtate. It was inſiſted for the Heir, that having paid as far as the Value of the Truſt Eſtate did extend, he ought not to have his Lands charged any farther. But it was ruled, that ſince the Truſt Lands were not ſufficient to ſatisfy the whole Debt, the Heir, and the Truſtees, and the Morgagee ſhould not juggle together to cheat other Creditors, by paying the Mortgage firſt off; but on the contrary, *the Truſt Lands ſhould be applied in the firſt Place for the other Debts*, becauſe the Mortgagee could be at no Damage, being ſecured by this Mortgage; but on the contrary, if the Mortgage ſhould be firſt ſatisfied, the other Creditors ſhould be ſatisfied, the other Creditors

ditors might loſe their Debts; and ſo the Plaintiff in this Caſe had Relief for his Debt. 2 Freem. Rep. 51, pl. 56. Paſch. 1680. Povye's Caſe.

4. T. S. entred in a *Bond*, wherein he bound *himſelf and his Heirs to pay* 100 *l. within ſix Months after his Death to A. and* became *indebted to B.* in 45 *l. by ſimple Contract*, and died Inteſtate, not leaving Perſonal Aſſets ſufficient to pay his Debts; The Defendant was his Son and *Heir*, and *had real Aſſets* from him *by deſcent of the Value of* 100 *l. and* he *took* out *Adminiſtration to his Father*; *and ſix Days before the* 100 *l. became due*, by the Condition of the Bond, *agrees* with the Obligee *to convey the Freehold Lands* deſcended to him *in ſatisfaction of the Bond*, and the Conveyances were drawn and ingroſſed accordingly; but before the Execution of them, he gives the Obligee 30 s. to have the Conſideration of the Deed razed out, and made to be for ſo much Money paid inſtead of delivery up of the Bond; but no Money was paid, but only the Bond delivered up; B. demanding his Debt, he inſiſted he had paid the Bond out of the perſonal Aſſets, and had none left to pay him; whereupon he brought this Bill, and the Defendant inſiſted, that he being both Heir and Adminiſtrator, had the Liberty to pay the Debt out of what Aſſets he pleaſed; that he had not paid the Bond out of the Real Aſſets, nor ever intended ſo to do, but upon the whole Matter the *Court declared the Bond* to be *well paid out of the Real Aſſets*, and decreed the Debt and Coſts out of the Perſonal Aſſets. Abr. Equ. Caſes, 144. pl. 21. Hill. 1695. Neave v. Alderton.

5. The Plaintiff lent a Sum of Money on the *Mortgage* of ſome Houſes, and had a *Bond for Payment* of the Money, as uſual in ſuch Caſes; afterwards he *lent a further Sum* of 2000 l. *on the Equity of Redemption*, and had a Bond for that likewiſe; afterwards the Mortgagor becomes a Bankrupt, and by ſome Accident the Value of the Houſes ſunk ſo much, that they were not ſufficient to raiſe the Mortgage Money firſt lent; and on a Bill brought to have them ſold, and that as ſo much as they fell ſhort to anſwer the firſt Mortgage Money, the Mortgagee might *come in upon his Bond as a Creditor*; it was ſo decreed; and as to the 2000 l. lent upon the Equity, which was worth nothing, it muſt ſtand ſingly upon the Bond. Abr. Equ. Caſes 312. pl. 9. Paſch. 1695. Wiſeman v. Carbonell.

6. A Man borrows a Sum of Money on the *Mortgage of a Ship*, and Covenants, that whatever Money the Mortgagee ſhould advance for Inſurance of the Ship in a Voyage ſhe was then about to make, that he would repay it, but there was *no Covenant for re-payment of the principal Money* itſelf; the Mortgagee inſures the Ship, and the Mortgagor repaid him that Money; then the Ship proceeds on her Voyage, and returns Home; and being afterwards to go out on another Voyage, the Mortgagee treated with another Perſon concerning the Inſurance, but could not agree for the Rate, and thereupon the Ship went out and *was loſt in the Voyage*, and now between the Mortgagee and the Executors of the Mortgagor, the *Queſtion was*, *whether the Mortgagee ſhould come in for his principal Money as a Creditor*, *by ſimple Contract*; and it was argued that he ought not, becauſe there was no Covenant for Payment of the Mortgage Money, ſo that he muſt be ſuppoſed to reſt himſelf on the Ship only for his Security, and that being loſt, ſo is his Money too; but on the other Side it was argued, that if he had taken no Security at all for his Money, he had then, without Queſtion, been a Creditor by Simple Contract; and ſurely the taking Security ought not to put him in a worſe Condition, eſpecially now, that the Security being loſt and gone, his Debt reſts wholly on the Simple Contract; and of the ſame Opinion was my Lord Chancellor Harcourt, and pronounced

Gilb. Equ Rep. 110. Mich 1 Geo. 1. S. C. in toridem Verbis.

nounced this Decree accordingly. Abr. Equ. Caſes, 139. pl. 5. 1713. Thomas v. Terry.

7. S. having ſeveral young Children, and being much in Debt *conveyed* Part of his *Lands in Truſt for the Payment of his Debts, and by another Deed* conveyed *other Part* to Truſtees *for the Maintenance of his Children.* This laſt Conveyance being voluntary, was declared void as to Creditors, and ſtill liable to their Demands as before, but it was good againſt S. himſelf, and ſhould bind him, and therefore if his Creditors ſhould fall upon thoſe Lands for a Satisfaction of their Debts, and thereby ſtrip the Children of their Maintenance, the Children ſhould have a Recompence out of the Reſidue of the Eſtate, which S. had reſerved to himſelf for his own Maintenance, and compared it to the Caſe where Creditors that have a Lien upon the Land take their Satisfaction out of the perſonal Eſtate, which was liable to other Creditors of an inferior Nature, who have no Lien upon the Land, theſe Creditors in Equity ſhall ſtand in the Place of the other Creditors who had a Lien upon the Land, and have a Satisfaction out of that in their Stead; This Caſe is the ſame, for though the Conveyance was voluntary in the Father, yet he is bound by Nature to provide for his Children, and it a ſort of a Debt. Per Ld. C. Cowper MS. Rep. Mich. 4 Geo. Canc. Sneed & al' v. Ld. and Lady Culpepper. & e Contra.

S. P. per King C 10 Mod. 489. in Caſe of Mills v. Eden.

8. Where a Perſon *indebted by Specialties and Simple Contract* dies, and *leaves both a perſonal and Real Eſtate,* this Court will not ſuffer the Debts by Specialty to be flung upon the Perſonal Eſtate, and that being exhauſted leave the Debts by Simple Contract unſatisfied, the Land not being liable to pay them, but will decree the *Debts by Specialty to be ſatisfied out of the Land, and the Debts by Simple Contract out of the perſonal Eſtate.* Per Parker C. 10. Mod. 462. Mich. 6 Geo. 1. in Canc. in Caſe of Blundell v. Barker.

(E) Creditors. Diſputes inter ſe.

1. CREDITORS having *recover'd at Law and receiv'd the Money,* and given Releaſes, Chancery will not afterwards compel them to take their *proportionable Shares,* but diſmiſs'd a Croſs Bill brought for that Purpoſe. 2 Ch. Rep. 178. 31 Car. 2. Tucker v. Searle.

2. *Bill by a Conuſee of a Statute of the Mortgagor to redeem, after a Decree of Foreclоſure* &c. The Defendant *pleads the Decree* of Foreclоſure, *and that the Statute was acknowledg'd after the Mortgagee's Bill filed, that the Mortgagee had no Notice,* and made proper Parties at the filing of the Bill, and that the preſent Plaintiff took the Security pendente lite. Mr. Vernon ſaid, that if an Incumbrancer lies by, and ſuffers the Mortgagee to obtain a Decree of Foreclоſure, though he is not bound by the Decree, becauſe not made a Party, yet, if he afterwards bring a Bill to redeem, he ſhall not be at Liberty to except to the Accounts ſtated by the Maſter, but ſhall pay the Whole upon his Redemption. Per Harcourt C. *This is a Recent Foreclоſure, let the Plaintiff redeem upon Payment of what is due, with Coſts.* MS. Rep. 9 July, 13 Ann. in Canc. Criſp v. Heath.

3. A. *mortgages to B. for a Term of Years, to ſecure the Sum of already lent to the Mortgagor, as alſo ſuch other Sums as ſhould hereafter be lent or advanc'd to him.* Afterwards *A. makes a ſecond Mortgage to C.* for a certain Sum, *with Notice of the firſt Mortgage,* and then *the firſt Mortgagee*

Mortgagee having Notice of the ſecond Mortgage, lends a further Sum &c. The Queſtion was, upon what Terms the ſecond Mortgagee ſhall redeem the firſt Mortgage. Per Cowper C. the ſecond Mortgagee ſhall not redeem the firſt Mortgage, without paying all that is due, as well the Money lent after, as that lent before the ſecond Mortgage was made; For it was the Folly of the ſecond Mortgagee with Notice to take ſuch a Security. But upon the Importunity of the Counſel, it was order'd, that the Maſter ſhould report what Money was lent by the firſt Mortgagee, after he had Notice of the ſecond Mortgage. MS. Rep. Paſch. 2 Geo. in Canc. Gordon v. Graham.

4. A *Bill* was brought *for a Seal of Defendant Fletcher's Eſtate, for ſatisfaction of Creditors by Mortgages and Judgments.* One Mr. Curwin, *a Papiſt profeſt, had a Mortgage for* 2400 *l. upon the Eſtate Prior to the Plaintiff*'s *Mortgage*, and he had *alſo a Judgment, but that was ſubſequent to the Plaintiff*'s *Mortgage, and to ſeveral other Judgments, and to other Creditors*, and the Queſtion was among the Creditors, who ſhould have the Priority in Payment &c. the Eſtate not being ſufficient to pay off all the Mortgages and Judgments.

Per Parker C. *The Mortgage to Curwin being a Papiſt profeſt is void* by the Statute of W. 3. for that is an Intereſt in Lands, *but as to the Judgment, though a Papiſt can't take out an Elegit*, for that gives an Intereſt in the Moiety of the Debtor's Lands; *Yet, if Lands are decreed to be ſold for Payment of Debts, a Court of Equity ought to aſſiſt a fair Creditor (though a Papiſt profeſt) in obtaining a Satisfaction for his Debt*, and when the Land is ſold and turn'd into Money, Why ſhould he not be paid his Debts out of that Money, as well as another Perſon?

But Quære, if his Judgment ſhall have the Preference of other Judgments ſubſequent to Proteſtants, out of the Money rais'd by Sale, ſince if the Lands were not ſold, they would be liable to the other Judgments, but not to the Judgment given to a Papiſt, who can't ſue out an Elegit.

Another Point was ſtarted, that *one of the Judgment Creditors had ſued out a Ca. Sa. and taken the Defendant* Fletcher's Body *in Execution.*

Quære, if this Creditor ſhall be let in, in a Court of Equity to have a Satisfaction out of the Money rais'd by Sale, unleſs he will diſcharge the Execution at Law, and deliver the Defendant out of Priſon; for by the Ca. Sa. this Creditor has conluded himſelf from taking out any other Execution as long as the Defendant lives, but indeed, if the Defendant dies in Priſon, after his Death the Creditor may ſue out an Elegit or Fi. Fac. but as long as the Body of the Defendant remains in Execution, no other Execution can be ſued out againſt him.

Order'd, that all the Lands be ſold, and an Account ſtated of the Debts, and their Priority, and if there be ſufficient to pay all the Creditors, then the Money to be ſo apply'd, but if there be a Deficiency, then, upon the Maſter's Report, the Court to determine as to the Preference of the Creditors; Per Parker C. MS. Rep. Hill. 6 Geo. in Canc. Lowther v. Fletcher, & al.'

5. *Bill to have a Satisfaction of a Judgment, againſt a Purchaſor of the Equity of Redemption of the Land, or to redeem Incumbrances* &c. The Defendants inſiſt on Stat. 4 & 5 W. & M. cap. 20. that no Judgment ſhall affect a Purchaſer or Mortgagee unleſs Docketted, *this Judgment was not Docketted till* 1721, *and the Purchaſe was made in* 1718.

Counſel for Plaintiff inſiſt, that the Defendant, *the Purchaſor, had Notice of this Judgment, and an Allowance for it* in the Purchaſe, and that raiſes an Equity for the Plaintiff againſt him.

Macclesfield C. It is plain the Defendant had Notice of the Judgment, and did not pay the Value of the Eſtate, and that is a ſtrong Preſumption

ſumption of an Agreement to pay off the Judgment, and ſince the Plaintiff cannot proceed at Law againſt the Defendant upon the Judgment, for want of Docketting in due Time, he ought to be reliev'd in a Court of Equity.

Decree, that the Defendant pay to the Plaintiff the Money Bona Fide due upon the Judgment. MS. Rep. Mich. 9 Geo. Canc. Thomas Pledwell.

6. A *Judgment was ſign'd in June* 1725. A *Mortgage was made to the Plaintiff in* 1728. In *January* 1730, *the Judgment was Docketted*, as appears by Entry in the Margin of the Docket. Maſter of the Rolls held, that the Docket was not good, being made after the Time limited by 4 & 5 W. & M. cap. 20, and that the Officer had no Authority for it, and ſaid, he would complain to the Judges of the Attorney's keeping back the Rolls. That the Mortgage had got the preference of the Judgment by defect of the Docket. And as to the Notice that the Statute being expreſs, that Judgment's not Docketted, ſhould loſe their Preference as to Purchaſors and Mortgagees, *Notice or not Notice was not material*, though urg'd, that the Dogget was purely to give Notice, and to make the finding of Judgments more eaſy. Decree for the Plaintiff; But the Cauſe turn'd upon the Foot of an Agreement between Plaintiff and Defendant, touching the Defendant's delivering upon the Bond and Judgment. MS. Rep. Mich. 1733. Forſhall v. Coles.

7. Where by the Statute of Frauds it is ſaid, that Judgments ſhall not bind Lands, but from the Signing, this relates only to Purchaſes, and therefore, as between Creditors, a Judgment entred in the Vacation relates to the firſt Day of the preceding Term; Per Ld. C. 3 Wms's Rep. 399. Mich. 1735, in Caſe of Robinſon & al' v. Tonge & al'.

For more of Creditor and Debtor, See **Charge, Payment,** and other Proper Titles.

Creditor and Bankrupt.

(A) Bankrupt. Who may be.

1. 21 *Jac.* 1. *cap.* 19. *S.* 15. *ALL Acts againſt Bankrupts ſhall extend to Strangers born, as well Aliens as Denizens, as effectually as to Natural-born Subjects, both to make them ſubject to the Laws as Bankrupts, as alſo to make them capable of the Benefit as Creditors.*

Cro. E. 268. Stanley v. Osbaſton, S. P. accordingly.

2. A *Shoemaker* may be a Bankrupt, for he doth not live by his manual Occupation only, as a Labourer doth, but by buying Leather and ſelling it again in Shoes. Cro. Car. 31. Paſch. 2 Car. 1. C. B. in Caſe of Crumpe v. Barne.

3. A Drover is within the Statutes, for an Action on the Caſe will lie for calling him Bankrupt. Jo. 304. pl. 12. Mich. 8 Car. 1. B. R. Collis v. Malin.

4. One

4. One who had a *Stock in the East India Company*, and who *sat in their Committees as a Merchant in the Management of their Trade*, and did receive the Profits of his Stock upon the Return of the Ships, though he had a great Estate in Lands, and did not get the most Part of his Living by Buying and Selling, yet he may be a Bankrupt, for it is not the Quality of his Person, or the Greatness of his Estate, which protects him from those Laws, but his buying, selling, and trading, makes him liable to be a Bankrupt; and this was the Case of Sir John Wolstenholme. Nelf. Ab. 336. pl. 8. cites Pasch. 1653.

This is taken from Hughes's Abridgment, 315. pl. 7. —— This Case is referred to in the Preamble to the Statute 13 & 14 Car. 2 cap. 24. relating to Bankrupts. —— Dealers in Stocks are not thereby made li[a]ble to Bankruptcy; Per Ld. C. King. 2 Wms's Rep. 308. Mich. 1725 in Case of Colt v. Nettervil, cites Wolstenholm's Case.

Having Stocks, or the *Dealing in them*, will not make a Man liable to Bankruptcy, nor do they seem to be Wares, Goods, or Merchandizes within the Intent of the Clause of the Statute of 13 & 14 Car. 2. cap. 24. Per Ld. Chancellor. 2 Wms's Rep. 308. pl. 86. Mich. 1725.

5. 13 & 14 *Car.* 2. *Cap.* 24. *S.* 3. *No Persons who shall adventure any Money in the* * East India Company, *or* Guinea Company, *or any Joint Stocks of Money by them raised for carrying on the Trade by the said East India Company, or Guinea Company, to be managed, or who shall adventure any Money in any Stocks for managing the* Fishing Trade, *or the Trade called the* Royal Fishing Trade, *and shall receive their Dividend of Fish or Merchandizes in Specie, and shall sell or exchange the same, shall by reason of such Adventure, selling or exchanging, be adjudged a Merchant within any Statute for Bankrupts.*

* And see Stat. 9 & 10 W. 3. cap. 44. S. 74.

S. 4. *Provided that every Person,* who shall trade in any other Way *than in the said Royal Fishing Trade, or the Trade managed by the said East India Company, or the Guinea Company, shall, by Reason of his Trading and Merchandizing, be liable to Commissions against Bankrupts, as fully as if this Act had never been made.*

6. In Trover &c. upon Not Guilty pleaded, the Question of Fact was, whether the Defendant was a Bankrupt, he being the Owner of the Goods; The Plaintiff proved, that he *had Silk and other Goods*, to a great Value in his Warehouses, and that *upon the Credit of them he took up Money*; but *could not prove that the Goods were brought in after the Defendant had contracted Debts, or that he had exported any at any Time after, or for a long Time before*; the Court held, that the selling these Goods, if they were the Effects of his former Trading, which he could not put off immediately, when he ceased to trade, could not make him a Trader; For the Statute extends to those only that live by buying and selling. Vent. 29. Pasch. 21 Car. 2. B. R. Sir Robert Cotton v. Daintry.

Sid. 411. pl. 7. Cotton v. Daintry and Bateman, S. C. says, that it was 15 Years after he surceased his Trade that this Action was brought, and the Court held accordingly, and cited the Cases of **Harrison and Harvey** to be so adjudged, unless the Debts were contracted during the Trade; But if such Person trades again, and then becomes indebted, he may be a Bankrupt for this Debt, but not for the Debts contracted between.—But afterwards it was held otherwise, As where one had *formerly been a Turkey Merchant, and traded in* 1656. (*but had not of late Years* imported or exported any thing) *but had Goods which were the Effects of his former Trading to a very great Value, which he shewed to several Persons, and borrowed Money upon the Credit of them*; The Court held, that this brought him within the Statute, for such Debts as he contracted after 1656. Vent. 166. Mich. 23 Car. 2. B. R. Sir Anthony Bateman's Case, S. C.

7. The Defendant, with others, covenanted with the King to *provide Victuals for the Seamen in the Dutch War, at* 8 *d. per Man*; and afterwards these Victuallers agreed with the Pursers of the Ships to provide for those Men at other Rates; afterwards the Victuallers being discharged from that Employment, and having a great Sum due to them from the King, refused to pay the Pursers, supposing themselves not to be Debtors, until such time as their Accompts with the King were allowed, and so it was said was the Custom of the Navy Board, whereupon a Commission of Bankrupt issued out against them, and Debt was brought

3 Keb. 451. pl. 16. Gibson v. Thomson, S. C. and Verdict for the Defendant, by the particular Direction of all the Court on

this Point, and they would not ſuffer it to be found ſpecially, tho' preſſed by the Plaintiff.

brought by the Plaintiff, who entitled himſelf by Aſſignment under the Commiſſion. The Court were clear of Opinion, that the Employment in buying Stores and Proviſions for the Navy, did not make them Traders; nor was it a buying and ſelling intended by the Statute. And Hale ſaid, every Purveyor might as well be made a Trader, or every *Schoolmaſter* who keeps Boarders. 1 Vent. 270. Paſch. 27. Car. 2. B. R. Sir Thomas Littleton's Caſe.

Raym 175. S. C. adjudged accordingly. —— But whether committing Acts of Bankruptcy beyond Sea, or whether *Trading only beyond Sea* be within the Reach of the Statute, is a Point not yet ſettled. 2 Vern. 162. and diſtinguiſhed this from Anderſon's Caſe, which is the S. C as above. Trin. 1690.

8. Upon an Iſſue directed out of Chancery, whether *Bankrupt or not*, within the Statutes of England at the Time of making a Conveyance of Land by him to the Plaintiff. The Jury found the *Defendant was born England, and after dwelt in Ireland, and there ſought his Living by buying and ſelling*; that he came frequently into England, *and bought Goods here, and ſold them in Ireland, and was indebted to diverſe Perſons in England, to the Value of* 100*l. and more*, yet unpaid. *That once he ſold in England a Parcel of Neats Tongues, and after* ſold *in Ireland a Parcel of Tallow to be delivered in England, and which was delivered accordingly. And afterwards he left his Houſe in Ireland, and his Trade alſo there, and abſented and abſconded* from his Creditors, *and came and ſojourned in England, and ordered himſelf to be denied to Perſons inquiring for him*, and all this before the Conveyance made; But that the ſaid Conveyance was made Bona Fide, and for a Valuable Conſideration. And if &c. It was inſiſted among other Things, that the *Jury make no Concluſion* upon the Evidence *that he is Bankrupt*, and that the Court cannot. But per tot. Cur' Judgment was given for the Plaintiff, for it was ſaid, that though the Jury found the Matter Specially, *the Court may conclude upon the Evidence, that he is Bankrupt*, and this by the Statutes here; for if this Caſe ſhall not be taken to be within the Statutes, all the Intercourſe between the Kingdoms will be much interrupted, if not utterly deſtroy'd. 2 Jo. 141, 142. Paſch. 33 Car. 2. B. R. Dodſworth v. Anderſon.

See Comyns. 390. Holt. MSS. R. case 942.

3 Mod 330. mentions nothing of a Taylor. —— Law of Bankrupts 9. ſays, that a Taylor that makes Garments only as a Servant to his Cuſtomers ſhall not be a Bankrupt; [and this ſeems to be true, but no Book there cited mentions a Taylor.] ——— Dav. of Bankrupts 25. accordingly, but cites no Book.

9. A *Taylor* cannot be a Bankrupt, becauſe he gets not his Living by Buying and Selling, but by working up the Materials of his Cuſtomers in Cloaths, and ſo differs from a Shoemaker. R. S. L. 185. cites 3 Mod. 330.

Dav. of Bankrupts, 23, 24. S. P. and cites Mary Dennis's Caſe, 16 Mar. 1741.

10. A *Feme Sole Merchant* in London, is held to be within the Statutes of Bankrupts. R. S. L. 186. cites Stone's Readings 48.

11. No *Handicraft* Man is within the Statute of Bankrupts, but a *Vintner* is. R. S. L. 186. cites Stone's Read. 121. Quære.

Carth. 151. S. C. & S. P.

12. There is no material Difference between an Inn-Keeper and the *Maſter of a Boarding* School, who buys and dreſſes Proviſions for young Scholars, and obtains Credit by his Way of Living, but it was never yet thought that he was within any of thoſe Statutes. 3 Mod. 330. per Cur'. Mich. 2 W. and M. in B. R. in Caſe of Newton v. Trigg.

3 Lev. 309. S. C. adjudged by three Juſtices, abſente Dolben, (who held

13. An *Inn-Keeper was Part Owner of a Ship*, and having 50 l. Stock therein, abſconded. It was held by Holt Ch. J. and Eyre J. that the Share of the Ship was only Stock to trade in Potentia, that there *muſt be an actual Trading* to make him a Bankrupt; that an Inn-Keeper is not a Trader, for he buys Proviſions, not for Trading, but to accommodate his Gueſts, and not to ſell again at large. And Holt Ch. J. held

held, that where a Man buys and ſells under a particular Reſtraint, he is not Seller within the Statute. 1 Salk. 109. Trin. 3 W. and M. in B R. Newton v. Trigg.

e contra at firſt, but afterwards aſſented to the Judgment,

(as himſelf told the Reporter) that an Inn-keeper cannot be a Bankrupt, and as to his having Part in a Ship freighted, and a Stock in it, no regard was had thereto, the ſame being found imperfectly —— Show. 96. S. C Holt Ch. J. and Eyre J. thought him not liable, but Dolben contra, ſed adjornatur. —Ibid. 268. S. C. and the three Judges delivered their Opinions ſeriatim that he was not liable, and Holt Ch. J. declared Dolben to be of the ſame Opinion. —— 3 Mod. 327. S. C adjudged accordingly. —— Carth. 149. S. C. adjudged accordingly per tot. Cur. and it was reſolved by all, that *Building, and having a Share in a Ship*, is no more than if a Man has a *Share in a Barge or Coach which are let to Hire* &c. and that his having ſome Stock in a Ship does not make him a Merchant, becauſe it is frequent for Perſons to *adventure ſome particular Things in* ſuch *a Ship for ſuch a Voyage*, but that will not make them Traders within the Statutes, for by thoſe Statutes *profeſſed Merchants* are only meant, who are *in conſtant Trading*. —— Skinn. 276. and 291. Luton v. Bigg, S. C. and ſame Points adjudged accordingly.

14 *Steward of an Inn of Court* cannot be Bankrupt; Per Holt Ch J. Skin. 292. Trin. 3 W. & M. obiter.

15. In Trover the Jury find a ſpecial Verdict, that an *Innkeeper* bought Goods for the Uſe of his Gueſts and ſold them to his Gueſts, and the Queſtion was, Whether the Inn-keeper by this was a Bankrupt? And adjudged by the whole Court that he was not; becauſe the Trade was not at large, but confined hoſpitantibus, and is properly the Accommodation of his Gueſts and it was agreed in that Caſe, that *Farmers* are not within the Statutes of Bankrupts; it was alſo found in that Caſe that the *Inkeeper had a Share in a Stage Coach*, but that was not regarded. Cited per Holt Ch. J. Raym. Rep. 287. As the Caſe of Newton v. Trigge adjudged Trin 3. W. & M. in B. R. *ſee y.^e case in Lomberts.* 181.

An *Innkeeper* cannot be a Bankrupt; per Holt Ch. J and not denied by the Court. 12 Mod. 159. Hill. 9 W. 3. in Caſe of Meggot v. Mills.

—— An Inn keeper as ſuch is not within the Statutes of Bankrupts, becauſe he does not live by Buying and Selling, but by uttering his Goods without any Contract, and if he utters them at an unreaſonable Rate he is indictable for Extortion, which a Seller is not. Reſolved by all the Juſtices. Mar. 34. pl. 67. Trin. 15 Car. Criſp v. Pratt. —— Jo. 437. pl. 3. S. C. adjudged. —— Cro C. 548. S. C. reſolved accordingly. —— But where an Inn-keeper *is a Chapman alſo*, and Buys and Sells, he may on that Account be a Bankrupt, though not barely as an Inn-keeper, and this has been frequently ſeen.

16. A *Gunfounder* is not within the Statutes of Bankrupts, becauſe this was for the Service of the King and delivered to his Uſe. Cited per Cur. Skinn. 392. Trin. 3. W. & M. in B. R. to have been lately adjudged.

S. C. cited by Holt Ch. J. Show. 270. as held not within the Statutes, becauſe it was a Particular Undertaking.

17. A *Gentleman* of the Temple *went to Lisbon and turned Factor*, and *traded to England*, and broke. And it was argued, that the Statute of Bankrupts did not extend to Perſons out of the Realm. But the Court held him to be a Bankrupt by Reaſon of his trading hither and back again, which gained him a Credit here; per Cur. on a Trial at Bar. 1 Salk. 110. Pl. 5. Paſch. 5 W. W. & M. Sedgwick v. Bird.

18. If a Man, *whilſt a Trader, owes a Debt of* 100 *l. to A. and leaving off his Trade, borrows another* 100 *l. of the ſame Perſon*, then *pays him one of the* 100 *l.* not mentioning whether it be in Satisfaction of the former Debt, or the latter, yet it ſhall be *applied to the former*, ſo that the Creditors ſhall never charge him with a Commiſſion of Bankruptcy for that which remains; Per Holt Ch. J. Comb. 463. Mich 9. W. 3. B. R. Anon.

19. If A. *leaves off Trade*, he ſhall be a Bankrupt for Debts contracted before, but not for Debts contracted after. Reſolved by Holt. Ch. J. Cumb. 463. Mich 9 W. 3. B. R. Anon.

S. P. Lev. 17. Hill. 12 & 13 Car. 2. B. R. Bateman v. Harvy, the Court inclined accordingly as to both Points, ſed adjornatur —— Vent. 5 Mich. 20 & 21 Carr. 2. B. R. Anon. S P. accordingly, and ſays it was ſo ruled in Sir Jo. Harvey's Caſe.

12 Mod. 159. S. C. & S. P. per Holt Ch. J.

20. A *Victualler* may be a Bankrupt. per Holt Ch. J. Ld. Raym. Rep 287. Hill 9 W. 3. B. R. in Case of Meggot v. Mills.

Ld. Raym. Rep. 443. S. C in totidem Verbis.

21. The Defendant was indicted, for that he being a Bankrupt, and brought before Lords Commissioners, he refused to give them an Account of his Effects, and his Defence at Trial, upon Not guilty pleaded, was, that he was an *Infant at the Time of the Debts contracted*, and therefore could not be a Bankrupt; and of that Opinion was Holt; for tho' the Debts of an Infant are only voidable at his Election; yet no one can be a Bankrupt for a Debt he his not obliged to pay; wherefore the Defendant was acquitted. 12 Mod. 243. at Guild-hall, Mich. 10 W. 3. the King v. Cole.

22. It was ruled by Holt Ch. J. at Lent Assizes at Thetford, 16 Mar. 12 W. 3. upon Evidence at a Trial at nisi prius, that a *Ship Carpenter* is within the Statute of Bankrupts. But a Case was made of it for his farther Consideration. Lord Raym. Rep. 741. Kirne v. Smith & al'.

Dav. of Bankrupts, 16. cites the Case of Burchall a Scrivener, against whom a Commission of Bankruptcy was moved for by Tribe, to which it was objected, that the Statute of 10 Ann. cap. 15. enacts, that after the 12 April, 1712. the said Act of 21 Jac. and all and every other Act and Acts, so far as they related to the said Description of a Bankrupt, should be repealed, and that no Person within the said Descriptions should thenceforth, by reason thereof, be taken to be within the Statutes of Bankrupts whatsoever; and that Burchall set forth, that he never followed any other Trade or Profession than that of a Scrivener, and therefore petitioned that no Commission might be awarded against him; But a Commission was awarded, and he was found a Bankrupt in 1742. —And cites the Case of Hudson a Scrivener in Covent-Garden, against whom a Commission issued, 1st Oct. 1743. and he was found a Bankrupt. Ibid. 18.

23. Upon an Issue directed in Chancery, to be tried before the Lord Ch. J. Holt for his Opinion, the Case upon the Trial before him at Guildhall the sitting after this Term, appeared to be thus. A *Scrivener*, who was not liable to be a Bankrupt before the Statute of 21 Jac. 1. cap. 19. committed an Act, which was made an Act of Bankruptcy by the Statute of 1 Jac. 1. cap. 15. viz. *absconding* &c. *and he had also a Share in the Stationer's Company*. And the Question was, Whether he was not a Bankrupt by that? And Holt Ch. J. held that *since the* 21 *Jac.* 1. *Cap.* 19. *had made a Scrivener liable to be a Bankrupt, it had subjected him to all the Old Acts, which by the former Statutes made a Man a Bankrupt, as well as to the Acts mentioned in the Statute* 21 *Jac.* 1. *Cap.* 19. But as to the Share in the Stationer's Company, he seemed to incline that that could not make him a Bankrupt. But the Ld. Keeper held the Scrivener to be a Bankrupt by both the Points. Upon the Importunity of the Council it was reserved as a Case, as to both Points, for the further Consideration of the Ld. Ch. J. 2 Ld. Raym. Rep. 851, 852. Hill 1 Annæ. Bird v. Major.

24. The Jury found that R. B. *rented a Farm*, for which he paid 300 l. per Ann. and that he *planted Potatoes on Part* of the Lands which he farmed, and that he *bought great Quantities of Potatoes to plant there*, and that for several Years he *dealt with several Persons in Potatoes*, at several Times and Places, *and had employed Ware-houses*, where he put in Potatoes, *and had served several Markets therewith*, and had sold great Quantities thereof for Profit, and for his living &c. The Court being divided, no Judgment was given, but two of the Judges seemed to be of Opinion, that if a *Man bought great Quantities of Wool or Hops, thouh he hath a Farm, and Sheep of his own, and several Hop-Gardens*, he shall be accounted a Trader in those Commodities; and so shall an *Innkeeper*, if he *turn Corn-Chandler*. Tis true, the Jury have not found that B. got the cheifest Part of his Livelihood by buying and selling Potatoes; but tis not the Quantity which is material, if tis in Proportion to other Goods which he buys and sells; for if *a Man hath an Orchard, and buys several Quantities of Fruit of other People, though not so many as he*

he hath in his own Orchard ; yet this ſhall make him a Trader and conſequently ſubject him to the Statute of Bankruptcy. The two other Judges were of a contrary Opinion, viz. that here was not enough found by this Verdict to make B. a Bankrupt; for a Farmer is no Trader within any of the Acts beforementioned, quatenus a Farmer ; and though he uſes another Trade, yet if that is not the principal Means of his Livelihood, he is not a Trader within thoſe Statutes ; 'tis true *if buying and ſelling in any Trade is the chefeſt Means of his Livelihood*, then he is a Trader within the Acts of Banruptcy ; but that is Matter to be given in Evidence, and found by the Jury which was not done in this Caſe. 8 Mod. 46. 48. Trin. 7. Geo. Mayhoe v. Archer.

A Perſon, being *under the Age of Twenty-one, bought Goods, and after the Age* of Twenty-one *committed an Act of Bankruptcy* in Reſpect of thoſe Goods on which a Commiſſion iſſued. Ld. Chan. Macclesfield doubted whether he might not be a Bankrupt ; but the Chan. [Ld. King] was clear of Opinion he could not, and ſaid, if Commiſſioners find a Man a Bankrupt who is not ſo, Action will lie againſt them. Select Caſes in Chan. in Ld. King's Time 46, 47. Trin. 11. Geo. 1. Whitlock's Caſe.

25. 5 *Geo.* 2. *cap.* 30. *S.* 39. Bankers, Brokers, *and* Factors, *are declared liable to the Statutes of Bankrupts.*

26. *S.* 40. *Provided always, and it is hereby further declared and enacted by the Authority aforeſaid, that no* Farmer, Grazier, *or* Drover *of Cattle, or any Perſon, or Perſons, who is, or are, or ſhall be,* Receiver General of the Taxes *granted by Act of Parliament ſhall be entituled as ſuch to any of the Benefits given by this Act, or be deemed a Bankrupt within the ſame, or within any of the Statutes now in force concerning Bankrupts, any Law, Cuſtom, or Uſage, to the contrary notwithſtanding.*

27. A *Pawn-broker*, is not within the Statutes of Bankrupts, barely as ſuch, but if he trades other ways, a Statute may be taken out againſt him by the Addition of Dealer and Chapman. Dav. of Bankrupts 24, 25, cites Highmore's Caſe in 1737, and Read's Caſe in 1742. And that ſeveral Commiſſions have been taken out accordingly.

28. *Members of the Bank of England* are not liable, on Account of their Stocks, to become Bankrupts. See the ſeveral Acts of Parliament relating to the Bank of England.

29. *So of the South Sea Company.* See the ſeveral Statutes as to that Company.

30. *So of the Royal Exchange and London Inſurances*, See 6 Geo. 1. Cap. 18. S. 10.

31. *So of Perſons circulating Exchequer Bills.* See the ſeveral Statutes relating thereto.

(B) Bankrupt. By what Act.

1. 13 *Eliz.* 7. *S.* 1. *IF any Perſon uſing the Trade of Merchandize, or ſeeking his Living by Buying and Selling, in Groſs, or by Retail, ſhall* depart the Realm, *or begin to keep his Houſe, or otherwiſe* abſent himſelf, *or take Sanctuary, or ſuffer himſelf willingly to be arreſted for Debt not grown due, or ſuffer himſelf to be outlaw'd, or yield himſelf to Priſon, or depart from his Houſe with Intent to defraud his Creditors, he ſhall be deemed and taken as a Bankrupt.*

A Merchant in good Circumſtances *departs the Realm to Merchandize*, and afterwards runs in Debts, and to avoid Arreſts, defers his Return, this is tantamount to his departing the Realm to defraud his Creditors, and he ſhall be adjudged a Bankrupt. R. S. L. 186. cites Stone's Read. 123.

One

One againſt whom a *Capias de excommunicato capiendo* is awarded, departs the Realm *to avoid being taken*, this is not an Act of Bankruptcy, any more than the departing the Realm or keeping his Houſe *for fear of an Attachment* out of Chancery. R. S. L. 186. cites ibid.

A *Merchant* indebted *keeps on Shipboard*, this is keeping his Houſe. R. S. L. 186. cites ibid.

An *Apothecary* being *Church Warden*, and in Debt *kept in Church*, this was deemed a keeping his Houſe. So where one has no Houſe of his own, but keeps *in another Man's Houſe*, or *in a Chamber he hires*, this will be adjudged keeping his Houſe. R. S. L. 186. cites ibid. 124.

If the Lieutenant of the Tower of London, be a Merchant indebted, and *keeps in the Tower*, it is an Act of Bankruptcy. R. S. L. 186. cites ibid.

2. A *Proceſs iſſued* againſt J. S. to arreſt him, he *keeps his Houſe to ſave himſelf from Arreſt*, and *afterwards goes out to the Market, and to other Places*; and when he hears again of a *new Proceſs out againſt him, he keeps his Houſe again, and afterwards goes at large*; the Queſtion was, if he were within the Statute of Bankrupts? And all the Court held he was not, becauſe he uſed to go at large; and it might be, that his Policy would not prevent the ſerving of the Proceſs; for he might be met withal unwittingly. Cro. E. 13. pl. 6. Hill. 25 Eliz. C. B. Anon.

3. 1 *Jac. cap.* 15. *S.* 2. *Every Perſon uſing Merchandize &c. who ſhall willingly or fraudulently* procure himſelf to be arreſted, or his Goods, Money, or Chattles, to be attached, *or ſequeſtred*, or depart from his Dwelling Houſe, or make any fraudulent Grant or Conveyance of his Lands or Chattles, *whereby his Creditors may be defeated or delayed for the Recovery of their Debts*; *or being arreſted, ſhall, after his Arreſt, lie in Priſon ſix Months upon that Arreſt, or any other Arreſt or Detention for Debt, ſhall be adjudged a Bankrupt.*

4. A *Merchant* had *made a Fraudulent Deed* to the Defendant *of the Goods* contained in the Count, *but afterwards* he *went abroad* to Church, to the Exchange, *and did trade and commerce*; and yet afterwards it is contained in the Indenture of Sale by the Commiſſioners to the Plaintiff that he had made this fraudulent Deed, and that afterwards he had traded and ſerved the Exchange until a Day after, at which Day he wholly abſented himſelf. And upon this Special Verdict the Defendant had Judgment; For every Deed to defraud other Creditors (but thoſe to whom ſuch Deed is made) is not ſufficient to make one to be a Bankrupt; But if he make any Deed after he begins to be a Bankrupt, it ſhall not bind; But upon the Stat. of 1 Jac. which makes him a Bankrupt which makes fraudulent Deeds, it ought not to be as this Caſe was, viz. ſo long before he became a Bankrupt. Hutt. 42. Paſch. 15 Jac. Cartwright v. Underhill.

5. If one *exerciſes a Trade*, and then becomes indebted, and afterwards *quits his Trade, and lives in the Country* without following any Trade, but lives on his Land only, and conceals himſelf from his Creditors, yet he is a Bankrupt; for he liv'd by his Trade when the Debt grew. Agreed. Paln. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

6. If one for a Time *deals in a Trade*, and afterwards *quits it*, but *leaves his Stock in the Hands of another, and goes ſhares with the other*, both in Profit and Loſs, and after ſuch quitting, becomes indebted and conceals himſelf from his Creditors, he is a Bankrupt within the Statute. Agreed. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

7. If one *confines himſelf within his Houſe for a long Time*, this does not make him a Bankrupt immediately; But if he conceals himſelf *for a Day or an Hour, to delay or defraud his Creditors*, this makes him a Bankrupt within the Statute. Palm. 325. Mich. 20 Jac. B. R. Heylor v. Hall.

8. If one is *Surety* for another, and *conceals himſelf*, he is a Bankrupt within the Statute. Agreed. Ibid.

9. 21 *Jac.* 1. *cap.* 19 *S.* 2. *Every Perſon uſing the Trade of Merchandize, by Way of* Bargaining, Exchange, Bartering, Chevitance, *or otherwiſe in Groſs,*

Groſs, or by Retail, or ſeeking his Living by Buying and Selling, *or that ſhall uſe the Trade or Profeſſion of a* Scrivener, *receiving other Men's Monies or Eſtates into his Truſt or Cuſtody, who ſhall obtain any* Protection *(other than ſuch Perſons as ſhall be lawfully protected by Privilege of Parliament) or ſhall* prefer *unto his Majeſty, or unto any of the King's Courts,* any Petition *or Bill* againſt his Creditors, *or any of them, thereby deſiring or endeavouring* to compel them, to accept leſs than their juſt and principal Debts, or to procure Time, or longer Days of Payment, *than was given at the Time of their Original Contracts*; or being arreſted *for Debt, ſhall after his Arreſt* lie in Priſon two Months *upon that, or any other Arreſt or Detention for Debt*; or being arreſted for 100 l. *or more, of juſt Debt,* ſhall *after ſuch Arreſt* eſcape out of Priſon, *ſhall be adjudged a Bankrupt; and in the Caſe of Arreſt, or lying in Priſon for Debt from the Time of his firſt Arreſt.*

10. A Tradeſman *being outlawed,* becomes a Bankrupt; but if the Outlawry be reverſed for want of Proclamations, all that is done in the mean Time by the Commiſſioners is void; Contra, if it was reverſed on a Writ of Error. R. S. L. 186 cites Stone's Read. 124.

11. If a Trader, hearing that a Writ of Fieri Facias was iſſued againſt him, to the Intent *to preſerve his Goods from being levied in Execution, clandeſtinely conveys them out of his Houſe, and conceals them* privately; that does not amount to an Act of Bankruptcy. Ruled by Holt Ch. J. Ld. Raym. Rep. 725. Hill. 10 W. 3. Cole v. Davis.

12. If a *Banker* or Goldſmith, who has many Peoples Money, will *refuſe Payment, yet keeps his Shop open,* and as often as he is *arreſted gives Bail,* he may by that Means give Preference of Payment to his Friends, and when he has done, he runs away, yet ſuch Payment ſhall ſtand good againſt a Commiſſion of Bankruptcy. And this was practiſed in the *Caſe of Sheppard the Banker,* who was arreſted almoſt every Hour in the Day for ſeveral Days before he went off, and yet gave a Bail as often, and paid his Friends, and then went and rendred himſelf in Diſcharge of his Bail; Per Holt Ch. J. 7 Mod. 139. Hill. 1 Ann. B. R. Hopkins v. Gery.

Stopping Payment by a Goldſmith is no Act of Bankruptcy. MS. Tab. Feb 21. 1726. Pakeman v. Hoskins.

13. A *Banker,* being called upon for Money in his Hands, *does not, or cannot, pay* it; Lord Chancellor King held, that this does not amount to an Act of Bankruptcy. Select Caſes in Chancery in Ld. King's Time, 42, 43. Trin. 11 Geo. 1. in Caſe of Pakenham v. Bland and Hoskins.

14. L. having two *Promiſſory Notes ſigned by A. payable to L. or Order four Months after Date.* L. when *about three Months was to run, endorſed them to M. for Goods then delivered, and A. abſconding about one Month after, L. on M's going to him, procures himſelf to be denied,* and then M. ſues out a Commiſſion of Bankruptcy againſt L. who petitioned to ſuperſede the Commiſſion. 1ſt, Objection was, that L. had committed no Act of Bankruptcy. 2dly, That M. was not a proper Creditor.

Ld. Chancellor, By late Statute a Creditor by Note payable at a future Day, may ſue out a Commiſſion, as well as come in as a Creditor; But the Debtor's *denying himſelf* to ſuch a Creditor, is not an Act of Bankruptcy; it muſt be a *keeping Houſe* &c. in order to defeat or delay Creditors of their Debts, which could not be in the preſent Caſe, becauſe M. had then no Debt due to demand, and ſo a Commiſſion ſuperſeded. It was objected, that L. was Debtor to M. immediately upon the Goods delivered; Sed non allocatur; for by Ld. Chancellor, it was *Part of the Contract that M. would ſtay for the Money, till the Notes became due.* Miſſ. Rep. Mich. Vacation. 1733. Exparte Levi.

15. B. was *arreſted* for 28 l. and though he *had Money ſufficient to pay the Debt, yet choſe rather to go to Priſon, in Order, as he declared, to force his Creditors to come to a Compoſition.* And per Ld. Chancellor, this is an Act of Bankruptcy within 1 Jac. 1. though, without ſuch Intent,

yielding himſelf to Priſon was no Act of Bankruptcy, unleſs he lay there two Months. Otherwiſe, where the Party procures himſelf to be arreſted upon a *Sham Debt*, and that, by the Statute of Elizabeth, is immediately an Act of Bankruptcy. Mſſ. Rep. Trin. Vac. 1734. Ex Parte Barton.

(C) Proving him a Bankrupt. How?

1. IF the *Commiſſioners, without purſuing the Statutes of Bankrupts, affirm a Perſon to be a Bankrupt*, he may traverſe that he was not Bankrupt, cited by Coke Ch. J. 8. Rep. 121. a. as adjudg'd Mich. 6. Jac. B. R. Cut v. Delabarre.

2. In the Caſe of Bankrupts, although the Commiſſioners have ſole Authority to adjudge *a* Man Bankrupt, yet *in an Action the Jury muſt find whether he was a Bankrupt or no*, and not barely by the adjudication of the Commiſſioners. Raym. 337. Hill. 31 & 32. Car. 2. Bambridge v' Bates & al'.

3. It was ruled by Treby Ch. J. of C. B. at Niſi Prius at Guildhall, the Sitting after Michaelmas Term, 10 Will. 3. upon Evidence in Trover brought by the Plaintiff againſt the Defendant, after Argument of the Council on both ſides, 1. That it is *not neceſſary to prove, that the Perſon, upon whoſe Petition the Commiſſion of Bankruptcy was granted, was a Creditor* of the Bankrupt; becauſe upon View of the Statutes they do not require that. 2. That it is not neceſſary to prove, *that the Bankrupt was indebted in* 100 *l.* though the Practice has been to do ſo; becauſe though the Chancellor frequently, before he grants a Commiſſion of Bankruptcy, requires *ſuch Proof*, yet it *is only Matter of Diſcretion* in him. Ld. Raym. Rep. 724. Smith v. Sir Richard Blackam.

And if they commit her, and the Warrant of *Commitment* mentions it to be *as well for refuſing to diſcover the Goods &c.* of a Bankrupt, *as the Time and Manner of his Bankruptcy*; yet, Ld. C. held the Commitment illegal, and ordered, that ſhe be diſcharged.

4 The *Wife of a Bankrupt cannot be examined* againſt her Husband touching his Bankruptcy. By the Common Law, ſhe cannot be a Witneſs for or againſt her Husband; and though the former Statute of 21 *Jac. authorizes the Commiſſioners to examine the Wife touching any Concealment* of his Goods &c. yet neither that, or the late Statute of 5 Geo. 1. 24. extends to examine the Wife touching the Bankruptcy, or whether he had committed any Act of Bankruptcy, and How, and when he became a Bankrupt; Per Ld. C. Parker. Hill. 1719. Wms's. Rep. 610. 611. Ex parte James.

Wms's Rep. 611. S. C.

5. Till the Statute of 5 Geo. 1. cap. 24. the Commiſſioners *could not examine the Bankrupt himſelf touching his Bankruptcy*; per Ld. C. Parker. Wms's Rep. 611. Hill. 1719. ex Parte James.

(D) From

(D) From what Time. To what Time the Bankruptcy ſhall relate.

1. A Grazier *Copy-holder* in Fee, 10 *May* 1643. *became a Bankrupt, and in* 1649 *became a Bankrupt again, and in* 1652 *he ſells his Copy-hold.* On a *Commiſſion* in 1651 (which was *Ten Years after the firſt Cauſe of Bankruptcy)* after Argument at Bar and Bench it was adjudged for the Creditors, that they had a good Title againſt the Purchaſors; Per Curiam, the Proviſo is expreſs, that the Commiſſion muſt be ſued within Five Years after ſome time when he became a Bankrupt; and his being ſo after the Sale, that will not hinder, that if the Commiſſion be not ſued within the Five Years of his becoming a Bankrupt, and then they can only defeat all Sales made within the 5 Years, but not afterwards; and upon this Ground was the Judgment aforeſaid in C. B. for that Point was, whether *if a Man continues Bankrupt Twenty Years, he is always liable or no*, which was adjudged for the Plaintiff by all the Court. Niſi &c. Keb. 12. in pl Mich. 1655. C. B. Jelliff v. Horn.

Goodw. of Bank. 33. cites Hill. 1657. Jellyfer v. Horn, that a Commiſſion of Bankrupt was ſued out againſt a Perſon, and it was confeſſed he was a Bankrupt in 1641, but it was ſaid, he became a

Bankrupt again in the Year 1649. And Hale made this Difference, that if one becomes a Bankrupt by a tranſient Act, as in Caſe of Suit &c. he may again become Bankrupt; but if it be a continued Act, as Impriſonment, withdrawing himſelf &c. he may not become a Brankrupt again; ſo with this Diſtinction you may underſtand how it is ſaid, Once a Bankrupt and always a Bankrupt.

2. A. did an *Act of Bankruptcy in* 1651, *and in* 1657 *did another Act, and in* 1658. *made a Leaſe for Years of Lands*, and *in* 1663 *a Commiſſion iſſued*, whereupon he was found a Bankrupt, and the Lands ſold. It was reſolved that the Commiſſion was well ſued out within Five Years after the laſt Act, though not within the Five Years before the Commiſſion, [of the firſt Act of Bankruptcy] and alſo before the Leaſe, [and] the Vendee of the Commiſſioners ſhall avoid the Leaſe. Lev. 14. the Reporter ſays, that he heard and obſerved this Caſe. Paſch. 16. Car. 2.

Keb. 722. Paſch. 16 Car. 2. B. R. Spencer v. Venacre. S. C. and after Verdict for the Vendee of the Commiſſioners, it was mov'd, that

the Commiſſion ſhall relate to the firſt Act 1651, which was the moſt Notorious, being by Impriſonment, though had the firſt Act been by Concealment or Outlawry, he agreed, the Party-Creditor need not take Notice of it by the 21 Jac. which he ſaid, ſhould not be taken favourably againſt the Purchaſor, but only againſt the Bankrupt himſelf, and cited the Caſe of **Bradford v. Bludworth**; but Curia contra; For the Words of the Act are not, " After he ſhall firſt be a Bankrupt." For then the earlier being a Bankrupt, would, after five Years, be a perpetual Superſedeas to all Tradeſmen; but if one hath ſold, and then five Years paſs without any Act of Bankruptcy, the Purchaſor is ſafe, and then no Act can hurt him; But where the Bankrupt continues in Poſſeſſion, any after Act is ſufficient to bind the Term; and Judgment clearly for the Plaintiff.

3. One Staly was *arreſted by an Executor* of his Creditor, *before Probate of the Will, and put in Bail, and with two or three Days after he paid* 1000 *l. to the Defendant* to whom he ſtood indebted in ſuch Sum, *and then yielded himſelf to Priſon in Diſcharge of his Bail.* The Queſtion was, whether Staly ſhould be ſaid to be a Bankrupt from the Time of his firſt Arreſt (and ſo the Defendant be liable to refund the Money paid to him) or from the Time he yeilded himſelf to Priſon. Judgment was given in C. B. for the Defendant; and upon Error brought in B. R. the Judgment was affirmed una voce, for that *the Relation to make a Man a Bankrupt ought to be upon an actual lying in Priſon, and not upon putting in Bail only.* 1 Vent. 370. Paſch. 36 Car. 2. B. R. Duncomb v. Walter.

3 Lev. 57. S. C.—— Raym 479. S. C. in B. R. adjornatur.—— Skinn. 22. Mich. 33 Car. 2. C. B. the S C. and adjudg'd for the Defendant.—— Ibid. 87. S. C. and Judgment

affirm'd in B. R. —— 2 Show. 253, pl. 261. S. C. and Judgment affirm'd.

4. If

Freem. Rep. 270, 271, pl. 298. Paſch. 1680. S. C. and if the becoming a Bankrupt by not paying his Debt within ſix Months, ſhould relate to the Time of the Arreſt, ſo as to avoid all Contracts made by him in the mean Time, the Court ſaid, it would be very Miſchievous if the Law ſhould be ſo, and it ſeem'd to be within the Words of the Statute, but they would not deliver any Opinion.——2 Show. 512. pl. 476. Paſch. 3 Jac. 2. B. R. Hill. v. Shiſh. S. P. and ſeems to be S. C. argued by the Reporter for the Plaintiff, 512, to near the End of page 525, and ſays, that Ld. Ch J. Wright, and the Reſt, delivered their Opinions for the Defendant, without having that due Conſideration of the Caſe as it deſerv'd, as he thought; and adds, Ideo mihi reſtat dubitandum.

4. If one is *arreſted and puts in Bail*, and after does *not pay the Money within Six Months*, he ſhall be adjudged a Bankrupt after the Six Months only, and it ſhall *not relate to the Time of the Arreſt*. And ſo is the Stat. of 21 *Jac.* 19. to be underſtood, for it may be that he had Cauſe to conteſt the Debt, and the Suit might depend above Six Months; and alſo it would be miſcheivous to all Perſons who deal with them, to make them refund their Money, when the Bankrupt appeared to be a Man creditable and ſolvent, and Judgment accordingly; Per tot. Cur. Skin. 270. Trin. 3. Jac. 2. Hinton's Caſe.

5. Indebitatus; in a ſpecial Verdict, the Caſe was, that H. being a Tradeſman *owed* 100 *l. to B. and* 50 *l. to C. B. arreſted him for this* 100 *l. and he put in Bail, and about a Month afterwards* H. *paid off C. and then rendered himſelf in Diſcharge of the Bail* in B's Action. Note, the Statute of 21 Jac. cap. 19. ſays, he ſhall be a Bankrupt from the firſt Arreſt; but per Cur. that muſt be taken from the firſt Arreſt upon which he lies in Priſon, and not where he puts in ſufficient Bail, otherwiſe no one could ſafely pay or receive from a Tradeſman; adjudged in B. R. and affirmed in Error in Cam. Scacc. 1 Salk. 109. Trin. 2 W. & M. Came v. Coleman.

Dav. of Bankrupts 381. in the Caſe of Tribe v. Webbet. Paſch. 17 Geo. 2. C. B. Willes Ch. J. cited the Caſe of Smith v. Tracy, reported in Salk. and ſaid, that it was only an obiter Opinion at the Niſi Prius, and that there

6. In *Trover* the Caſe was, J. S. *was arreſted* at the Suit of H. *and put in Bail. Afterwards* upon a *Scire Facias at another's Suit, his Goods were ſold to the Plaintiff*; after this J. S *renders himſelf* in Diſcharge of his Bail and goes to Priſon. And *Holt* C. J. inclined (contrary to the Caſe of Duncomb and Walter in 3 Lev. 57. wherein he was of Counſel, but not ſatisfied with the Judgment) That J. S. *was a Bankrupt from the Time of the Arreſt, not from the Render only*; for if H. is arreſted at the Suit of A. and puts in Bail, and, that pending, is after arreſted at the Suit of B. and goes to Priſon and lies two Months, he is, by the Act of Parliament, Bankrupt from the Time of the firſt Arreſt by A. But it appearing in this Caſe, that the *Commiſſion was taken out before the Two Months were expired from the Render*, it was held to be ill taken out; J. S. not being then a Bankrupt. And thereupon the Plaintiff had a Verdict. 1 Salk. 110. pl. 7. Trin. 2 Ann Coram Holt Ch. J. at Niſi prius at Guildhall. Smith v. Stracy.

the Commiſſion was taken out before the Bankrupcy, ſo that there was no Determination on that Point. And the Words in the Act viz. "*Or ſhall procure his Enlargement by putting in common or hired Bail*." are by 10 Ann. cap 15, repealed; ſo that the putting in hired Bail is no Act of Bankrupcy; by which it is plain, that bare Arreſt, and putting in Bail, are not conſider'd as Acts that hurt a Man's Credit; The Act of Parliament muſt mean, that where there is a lying in Priſon for two Months, the Bankruptcy ſhall not be from the End, but the Beginning of the two Months, viz. from the Arreſt; But in the principal Caſe, where the Debtor on the 23 June, 1740, was arreſted upon a Writ returnable in three Weeks after Trinity, at the Suit of the Plaintiff Tribe, and at the Return thereof put in ſpecial Bail, and being indebted to the Defendant Webber in 365 l. 18 s. on the 7th of January following paid him 347 l. and on the 13th of Auguſt, 1741, paid him the further Sum of 18 l. 18 s. the Court were of Opinion, that as to ſuch Payments as were made between the Arreſt, and the Debtor's ſurrendring himſelf to Priſon, which was after the Payment of the 347 l. were good Payments to the Defendant Webber, but that the Plaintiff ſhall take a Verdict for the 18 l. 18 s. which was paid after the Bankrupt's ſurrendering himſelf to Priſon.

7. Upon an Iſſue directed out of Chancery, whether Bankrupt or not at ſuch a Time, it was held per Holt C. J. that if H. *commits a plain Act of Baptruptcy*, As keeping Houſe &c. though he after *goes abroad* and

and is a great Dealer, yet that will not *purge the firſt Act* of Bankruptcy, but he will ſtill remain a Bankrupt; But if the Act was *not plain but doubtful*, then going abroad and dealing &c. will be an Evidence to explain the Intent of the firſt Act; for if it was not done to defraud Creditors and keep out of the Way, it will not be an Act of Bankruptcy within the Statute. 1 Salk. 110. pl. 6. Trin. 3 Ann. coram Holt Ch. J. at Guildhall, Hopkins v. Ellis.

(E) Commiſſions. How and when to be granted &c.

1. 13 *Eliz. cap.* 7. *S.* 2. *CHancellor is to appoint Commiſſioners to ſeize his Perſon, Eſtate, and Effects, and to diſtribute the proceed rateably among the Creditors.*

2. There ought to be a *Petition in writing* to my Ld. Chancellor, or elſe he has no Warrant to grant a Commiſſion, and then whatever the Commiſſioners do will be void. Reſolv'd. Freem. Rep. 270. pl. 298. Paſch. 1680. C. B. Hinton's Caſe.

3. If the *Examinations* are *loſt by Fire*, &c. if there ought in ſuch *Caſe of Fire* to be a *New Commiſſion*, Quære. 2 Show. 102. Paſch. 32 Car. 2. B. R. The King v. Ballat.

4 Commiſſion of Bankruptcy *ſuperſeded* by the Conſent of the Petitioning Creditors, North K. refuſed to *revive* it, or to grant a Procedendo on the Application of the other Creditors that had not come in, but deſired ſo to do. Vern. R. 208. Mich. 1683. Backwell's Creditors Caſe.

The Superſedeas being granted within the Time allowed for the Non-Petitioning Creditors to contribute, Ld. Jeffries Ch. ſeem'd to think it might be renewed. See 2 Chan. Caſes 192. S. C.

5. The *granting* a Commiſſion is *not* a Matter *diſcretionary* in the Ld. Chancellor &c. but he is bound to do it; Per North K. Vern. 153. Paſch. 1683. Backwell's Caſe.

6. Commiſſion of Bankrupt cannot be granted but *by Petition* of a Creditor; Per North K. 2 Ch. Caſes 191. Mich. 3 Jac. 2. Backwell's Caſe.

But ſuch *Petitioning Creditor* muſt not be one who is *become a Creditor ſince leaving off Trade* by the Bankrupt, though if others ſue out a Commiſſion, ſuch may come in and join; per Holt Ch. J. 12 Mod. 159. Hill. 9 W. 3. Meggot v. Mills.

(F) Commiſſion. What Creditors may obtain it, and how, and when.

1. IF a Man *quits his Trade*, and *after becomes indebted to J. S.* In this Caſe J. S. cannot ſue a Commiſſion of Bankruptcy for ſuch Debt contracted after, though if the old Creditors ſue a Commiſſion, this new Creditor ſhall be admitted to have his Share of the Bankrupt's Eſtate. Per Holt Ch. J. Ld. Raym. Rep. 287. Hill. 9 W. 3. in Caſe of Meggot v. Mills

2. If A. being a Trader, *becomes indebted to B. in* 100 *l. and* then he *quits his Trade, and afterwards becomes indebted to B. in* 100 *l. more*; A

afterwards *pays to B. 100 l. without ſaying upon what Account.* Holt Ch. J. ſaid, that ſince ſo much in Quantity is paid to B. as was due to him from A. when A. was capable of being a Bankrupt, it would be too rigorous to admit B. to ſue a Commiſſion of Bankruptcy for the old Debt of 100 l. But to this Point he ſaid, he would not give an abſolute Opinion; and none of the other Judges contradicted it. Ld. Raym. Rep. 287. Hill. 9 W. 3. B. R. in the Caſe of Meggot v. Mills.

Ld. Raym. Rep. 287. S. C. & S. P.

3. It was ſaid by Holt, and not denied by the Court, that if a Man *contracts Debts while he is a Dealer, and after leaves off his Trade, and then commits an Act of Bankruptcy*; there none of his Creditors becoming ſo, ſince the leaving off of his Trade, can ſue out a Commiſſion of Bankruptcy; but if thoſe, who were his Creditors before his leaving off his Trade, ſue out ſuch a Commiſſion, the other Creditors may come in and join. 12 Mod. 159. Hill. 9 W. 3. Meggott v. Mills, & al'.

4. B. *gave A. two Notes*, the one *for 50 l. and* the other *for 53 l. payable at different Times.* Afterwards B. *before the Day of Payment of the ſecond Note, ſued out a Commiſſion of Bankruptcy*; But Ld. C. Harcourt ſuperſeded the Commiſſion; But the Court denied to aſſign the Bond, the Commiſſion not appearing to be taken out malitiouſly or fraudulently, which are the Words of the Act. Wm's Rep. 260. Trin. 1714. Ex Parte Mackerneſs.

And his Lordſhip held, that *though* they had been *given without any Conſideration*, yet they are now his Debts, and the legal Right veſted in the Indorſee; but *otherwiſe in Caſe of a Bond aſſigned*, for as much as ſuch Aſſignee, *not being the legal Creditor*, could not have taken out ſuch a Commiſſion; *And* had the *Indorſement* been *made after the Bankruptcy*, it might be a Queſtion, whether he would be intitled to a Commiſſion, as not being a Creditor for 100 l. or capable of taking out a Commiſſion at the Time of the Party's becoming Bankrupt. Ibid.

5. *Indorſee of Notes* of one, who afterwards becomes Bankrupt, *purchaſed in at an under Value*, as at 10 s. in the Pound, petitioned for a Commiſſion againſt the Drawer. And Ld. C. Macclesfield held, that he was plainly a Creditor, juſt as if the Drawees had paid the Bankrupt an under Rate for them. Wms's Rep. 782. Hill. 1721. Ex Parte Lee.

6. 5 *Geo.* 2. *cap.* 30. *S.* 22. Enacts, That *it ſhall be lawful for Perſons taking Bills, Notes, or other Security for* Money payable at a future Day, *to petition for a Commiſſion, or join in petitioning.*

7. *S.* 23. *No Commiſſion of Bankruptcy ſhall be awarded, unleſs the* ſingle Debt *of the Creditor, or of more Perſons being Partners petitioning for the ſame* amounts to 100 l. *or unleſs the* Debt of two Creditors *petitioning* amounts to 150 l. *or unleſs the* Debt of more Creditors *petitioning* amount to 200 l. *And the Creditors petitioning ſhall, before the ſame be granted, make* Affidavit, or ſolemn Affirmation, *before one of the Maſters of Chancery*, of the Truth of their Debts, and give Bond *to the Lord Chancellor, in the Penalty of 200 l. to be conditioned* for proving their Debts, *as well before the Commiſſioners, as upon a Trial at Law, in caſe the due iſſuing forth of the ſame ſhall be conteſted*, and alſo for proving the Party a Bankrupt, *and to proceed on ſuch Commiſſion as herein is mention'd.*

8. *S.* 25. *The Creditors who ſhall petition for a Commiſſion of Bankrupt, ſhall be obliged at their own* Coſts *to proſecute the ſame, until Aſſignees ſhall be choſen; and the Commiſſioners ſhall, at the Meeting appointed for the Choice of Aſſignees, aſcertain ſuch Coſts, and by Writing ſhall order the Aſſignees to reimburſe ſuch Petitioning Creditors out of the firſt Effects of the Bankrupt that ſhall be gotten; and every Creditor ſhall be at Liberty to prove his Debt without paying Contribution.*

9. The Defendant *W. being indebted* to the Plaintiff *in* 1730, *afterwards committed an Act of Bankruptcy*; upon which the Plaintiff being the petitioning *Creditor, took out a Commiſſion* of Bankruptcy againſt the Defendant, *in order to over-reach and make void as many of his Conveyances and*

and Settlements &c. as poſſible, the Creditors on a Bill filed endeavoured to prove him a Bankrupt, as far backward as they could; and *did actually prove*, to the Satisfaction of the Court, *that he committed an Act of Bankrupcy in the Year* 1726. Then it became a Queſtion, whether the Commiſſion of Bankruptcy, and all that was done under it, was not Wrong, in regard that the Debt of the petitioning Creditor on which it was grounded, was contracted ſubſequent in Time to the firſt Act of Bankruptcy? After this Matter had been argued, and Time taken to conſider of it. The Lord Chancellor diſmiſſed the Plaintiff's *Bill* without Prejudice. Note, this Decree was *reverſed in the Houſe of Lords*, by the Opinion of all the Judges, February the 17th, 1737. Caſes in Canc. in Lord Talbot's Time 243, 244. Mich. 1734. De Gols v. Ward.

10. Per Ld. Chancellor, where *Debt* is due *to Wife as Adminiſtratrix*, the Husband alone cannot take Oath of this as a Debt due to himſelf, in order for a Commiſſion of Bankruptcy. Commiſſion ſuperſeded, and Reſtitution awarded. Mſſ. Rep. Mich. 1734. Ex Parte Staples.

(G) Commiſſion ſuperſeded or abated.

1 *Jac.* 1. *cap.* 15. *S.* 17. IF after *any* Commiſſion *of Bankrupts* ſued forth, and dealt in *by the Commiſſioners, the* Offender happens to die, *before the Commiſſioners ſhall diſtribute the Goods, or any of them; the Commiſſioners ſhall in that Caſe proceed in Execution, upon the Commiſſion for the Offenders Goods, Lands, as they might have done done if the Party were living.*

2 If there be once a Petition in writing, my Lord Chancellor may *grant and repeal* Commiſſions toties quoties, *and need not a new Petition* for a new Commiſſion, but may ſuperſede the old Commiſſion, either for the Miſcarriage of the Commiſſioners, or in Caſe of Death, or for any other Reaſon, and may grant a new Commiſſion; and the granting a new Commiſſion is a Superſedeas to the old one; Reſolved. Freem Rep. 270, 271. Paſch. 1680. C. B. Hinton's Caſe.

3. If a Commiſſion of Bankruptcy be ſued out againſt one A. and the *Commiſſioners* do, purſuant thereto, *declare him to be a Bankrupt, and then he dies, and then the King dies*, and then a Commiſſion is renewed againſt him, whereupon the Commiſſioners met and aſſigned his Eſtate to one David Robinſon and Charles Challis (being two of the Creditors;) Held per Juſtice Powell, Judge of Aſſize, at Somerſet Aſſizes in the Summer, 5 Ann. that the Commiſſioners might proceed after the Death of the Bankrupt. Arthur's Caſe.

4. If a *Creditor by Bond, before the Day of Payment ſues out a Commiſſion* of Bankruptcy againſt the Obligor, it is irregular, and is ſuch Irregularity, for which the Commiſſion ought to be ſuperſeded; For though it be debitum in præſenti, yet as it cannot be ſo much as put in Suit, or an Action commenced upon it, much leſs can there be a Commiſſion of Bankruptcy taken out upon it, by which all the Real and Perſonal Eſtate of the Bankrupt is (as it were) ſeiſed in Execution. Wms's. Rep. 610. Hill 1719. by Ld. C. Parker. Ex parte James.

5. A Commiſſion was *taken out* and *not ſat on till Three Months after.* Ld. Chancellor ſaid it plainly ſhews it was done to protect the Eſtate; the Commiſſion ſhall be *ſuperſeded for Example-Sake*, that ſuch Things ſhould not be practiced. Select Caſes in Canc. in Ld. King's Time. 46. Trin. 11 Geo. Comb's Caſe.

6. A.

6. A. ſued out a Commiſſion of Bankruptcy againſt B. and *kept it for 6 Months, without doing any thing upon it, and afterwards executed it.* Ld. C. King on a Petition ſuperſeded it for this very Reaſon; And it being urged, that the Expence of another Commiſſion would be a freſh Charge upon the Bankrupt's Eſtate, his Lordſhip replied, he would take Care that the former Commiſſion ſhould not be at the Charge of the Bankrupt's Eſtate. 2 Wms's. Rep. 545. Trin. 1729. Ex parte Puleſton

7. A. being *Aſſignee under a Commiſſion* of Bankruptcy, *dying indebted by Bond, &c.* the *Creditors* of the Bankrupt *petitioned that the Adminiſtrator of the Aſſignee might account before the Commiſſioners*, ſuggeſting that the Adminiſtrator had confeſſed, that ſhe believed her inteſtate, the Aſſignee, kept the Bankrupt's Money in a ſeparate Bag, with a Note in it, ſhewing it to be ſuch. But the Adminiſtrator denying this upon Oath, and that he did not believe the Fact to be ſo, and likewiſe ſwearing that Teſtator died indebted by Specialty ſeveral 1000 Pounds beyond all his Aſſets; whereupon Ld. C. King ordered the Petition of the new Aſſignees to be diſmiſſed, and directed them to bring their Bill. 2 Wms's Rep. 546. Trin. 1729. Ex parte Markland.

8. 5 *Geo.* 2. *cap.* 30. *S.* 23. If Debts ſworn to (*and by reaſon whereof a Commiſſion is awarded*) ſhall not be really due, or, *if after ſuch Commiſſion taken out*, it cannot be proved that the Party was a Bankrupt, *then the Lord Chancellor ſhall, upon Petition of the Party grieved, order* Satisfaction to be made *for the Damages ſuſtained; and, in Caſe there be Occaſion, aſſign ſuch Bond to the Party, who may ſue for the ſame in his own Name.*

9. *S.* 24. *Commiſſions fraudulently obtained to be ſuperſeded, and another granted.*

10. *S.* 45. *No Commiſſion of Bankrupt ſhall abate by the* Death of his Majeſty, *his Heirs or Succeſſors, but ſhall continue in force; and if it ſhall be neceſſary to renew any Commiſſion by reaſon of the* Death of the Commiſſioner, or any other Cauſe, *ſuch* Commiſſion ſhall be renewed, *and but half the Fees uſually paid, ſhall be paid for ſuch renewed Commiſſion.*

11. A *Commiſſion* of Bankruptcy *iſſues* againſt H. *at* 11 *of the Clock in the Morning; At* 3 *in the Afternoon the Commiſſioners declare him a Bankrupt, and execute an Aſſignment at* 6, *and then have Notice that he died at* 10 *a Clock that Day*, this is a Dealing within the Act of Parliament, and the Proceedings ſhall ſtand. Ld. Chancellor ſaid, he knew no particular Act as diſtinct from another which can be called a Dealing. It has been ſaid, that the declaring him a Bankrupt was the Act meant, but that Declaration of the Commiſſioners being only Diſcretionary and for Caution, and not at all binding to any Body, it is not probable that the Act ſhould intend that only a Dealing, which it has not any where given the Commiſſioners Power to do; whatever is done in Purſuance of the Commiſſion is a dealing in it, if never ſo minute; and the rather for theſe being remedial Laws, are to be beneficially conſtrued in Favour of the Creditors, I cannot therefore put a narrow conſtrained Conſtruction upon the Words dealt in, in Order to overthrow this Commiſſion, and all the juſt Right of the Creditors claiming under it. Caſes in Equ. in Ld. Talbot's Time, 184. Hill. 1735. Warrington v. Morton.

(H) Who are Creditors; and How, and When, to prove their Debts.

1. O. And B. were *Sureties* for one C. for the Payment of Money, and *had Counter-Bonds* to ſave them harmleſs; the Money was not paid at the Day, and the Sureties paid it; and afterwards C. *became Bankrupt*, and whether they were Creditors within the Statute, was the Queſtion. And it was reſolved, that they were. Cro. J. 127. Trin. 4 Jac. B. R. Osborn & al' v. Churchman.

2. A *Creditor offered Proof* of his Debt, which the *Commiſſioners diſallowed*; whereupon Application was made to the *Court*, who at firſt declined to meddle with it, but *at length conſented to hear the Proof*. Chan. Caſes. 275. Paſch. 28. Car. 2. Anon.

3. A. *lent Money* to a Bankrupt, *after a Commiſſion of Bankruptcy ſued out* againſt him. Trevor and Hutchins, Lords Commiſſioners, held, that he could not come in as Creditor, but was excluded. But Lord Rawlinſon doubted, and took it to be a new Point, not yet ſettled, and that there were no Words in the Act to exclude him. But Ld. Trevor and Hutchins held, that when the Commiſſion was ſued out, he was *bound to take Notice*. 2 Vern. 157. 161. Trin. 1690. Hitchcox v. Sedgewick.

4. If there be an *Act of Bankruptcy committed*, and a Creditor obtains a *Judgment ſubſequent* to it, then a Commiſſion is taken out; now the Judgment is thereby avoided. At Niſi Prius coram Holt. 12 Mod. 446. Paſch. 13 W. 3. B. R. Anon.

5. *A lends Money to B. and C. on their Bond; B. becomes Bankrupt.* The Commiſſioners aſſign the Eſtate in Truſt for the Creditors. *A ſues the Bond againſt C.* and *gets Judgment*, and *takes him in Execution* by a Ca. Sa. and thereupon *C. paid A. 24 l. but being old and poor, A. conſented to diſcharge him out of Cuſtody.* Ld. C. Harcourt decreed A. to come in as a Creditor for a Moiety of what remained due on the Bond; for the Execution being ſubſequent to the Aſſignment of the Bankrupt's Eſtate, ſhall not (at leaſt in Equity) diſcharge A's. Demand out of the Bankrupt's Eſtate. But becauſe each, in Equity, was liable but to Half the Debt, and C. was not the original Debtor for the Whole, A. ſhall have Relief only for a Moiety of his remaining Debt againſt the Aſſignees; But had the Bankrupt been the original Debtor, and had *borrowed all the Money*, then A. ſhould come in before the Aſſignees, as a Creditor, for all his Debt. Wm's Rep. 237. Trin. 1713. Ex Parte Smith.

6. If a Man *trade with a Bankrupt between the Act of Bankruptcy and the Commiſſion ſued out*, whether by Delivery of Goods, or Payment of Money, *without Notice of the Act of Bankruptcy, the Bankrupt keeping open Trade*, ſuch Perſon ſhall come in as a Creditor for ſuch Goods or Money. Trin. 1716. Croſly's Caſe.

7. On a Petition to Ld. Chancellor Parker, praying to be admitted a Creditor on a *Note, payable at a future Day, given for Goods ſold and delivered*, the *Commiſſioners* having *refuſed to admit him* as ſuch, *in Regard the Bankruptcy was between the Date of the Note, and Time of Payment* Objection, That there was a Difference between a Bond and a Note, for a Note did not import any Debt till the Day of Payment came *.

But per Ld. Chancellor, this comes improperly before me for my Determination, on a Petition, I having nothing to do in ſuch Caſes, but to direct

* By 7 Geo. cap. 31. a Creditor in ſuch Caſe is to be admitted, upon a Diſcount or Rebate; but no ſuch Creditor is

to join in a Petition for a Commiſſion —— Mich. Vac. 1726. the Eaſt India Company prayed by Petition to be admitted as a Creditor on a Sale of their Goods at a future Day but refuſed, being a Caſe not within this Act, and Petition diſmiſſed without Prejudice to their ſeeking to recover at Law.

direct and ſee that the Commiſſioners do their Duty, and can't order them to admit any one Creditor; But I may *ſtay ſo much Money in their Hands as will anſwer the Proportion of the Debt, in Caſe it ſhould be allowed of*, and a Bill may be brought for that Purpoſe, in order to determine if the Caſe be of great Conſequence. For by this Means a Trader may diſappoint which of his Creditors he pleaſeth, and poſtpone them, by giving of ſome Notes payable at a future Day, and then becoming a Bankrupt. I do incline to relieve ſuch Creditors, eſpecially *where the Note is given for Goods ſold*, and theſe Notes are a Sort of Specialty. Objection, That he might plead Certificate and Diſcharge at Law, if an Action were brought upon ſuch a Note. But per Cur. That is not ſo becauſe the Cauſe ſays, Cauſa Actionis accrued before the Bankruptcy, which can't be in this Caſe till the Money is payable; and why may not ſuch a *Note for a Precedent Debt be ſaid Debitum in præſenti & Solvendum in futuro?* As to the Honeſty of the Note, that may be enquired into, and will be no Objection, becauſe the Honeſty of a Judgment Bond &c. are liable to the ſame Enquiry. And though this Note were given to one S. who is now abroad, yet it being now aſſigned to another, there is no Occaſion or Neceſſity for an Inquiry on what Terms it was given him, and to call him to be examined to it, becauſe prima facie it carries the Face of Truth. It is uſual not to grant a a Commiſſion on the Petition of Creditors on ſuch Notes, till the Day of Payment comes. Trin. 6. Geo. Canc. Burdock's Caſe.

N.B. The Eaſt India Company in this Caſe inſiſted on ſeveral Allowances, as Intereſt, Warehouſe-room &c. but not allowed; for even in a Caſe of a Bond no Conſideration ſhall be had, or Allowance made for Intereſt after the Time of the Bankruptcy.

8. A Creditor on a Bond with *Condition to pay Money at a future Day, ſubſequent to an Act of Bankruptcy*, could not before 7 Geo. 1. cap. 31. be admitted to prove ſuch Debt, or to have any Dividend before ſuch Security became payable; and that Act recites it to have been a Queſtion, for Remedy whereof that Act was made; and ſo was the Opinion of all the Judges. 2 Ld. Raym. Rep. 1549. Mich. 2 Geo. 2 B. R. in Caſe of Tully v. Sparkes.

9. *5 Geo. 2. cap. 30. S. 26. At ſuch Meeting as ſhall be appointed, the Commiſſioners ſhall admit the Proof of any Creditor's Debt, that ſhall live remote from the Place of ſuch Meeting*, by Affidavit, *or ſolemn Affirmation, and permit any Perſon duly authorized* by Letter of Attorney *(Oath or Affirmation being made of the Execution thereof, either by an Affidavit ſworn, or Affirmation made, before a Maſter in Chancery, Ordinary or Extraordinary, or before the Commiſſioners viva voce; and in Caſe of Creditors reſiding in Foreign Parts, ſuch Affidavits or Affirmations to be made before a Magiſtrate, where the Party ſhall be reſiding, and ſhall, together with ſuch Creditor's Letters of Attorney, be atteſted by a Notary Publick) to vote in the Choice of Aſſignees in the Place of ſuch Creditor.*

(I) Contingent and future Debts.

1. IN an Action of Debt upon a *Bond dated before the Act of Bankruptcy* committed by the Defendant, it appeared the *Money* in the Condition was *not payable till after the Act* of Bankruptcy; the Defendant inſiſted he ought to be diſcharged upon Common Bail, by Virtue of the Statutes about Bankrupts, but it was ruled he ſhould *be held to Special Bail.*

Bail. 2 Ld. Raym. Rep. 1548, cites Paſch. 12 Ann. as the Caſe of Godling v. Godling.

2 7 *Geo.* 1. *cap.* 31. *S.* 1. Enacts, that *every Perſon who ſhall give Credit or* Securities payable at future Days, *to Perſons who are, or ſhall become Bankrupts, upon good Conſideration bona fide, for Money or other Thing not due before the Time of ſuch Perſons becoming Bankrupts, ſhall be admitted to prove their Securities or Agreements, as if they were payable preſently, and ſhall have a Dividend in proportion to the other Creditors, diſcounting 5 per Cent. per Ann. from the actual Payment to the Time ſuch Money would have become due.*

A Trader contracted with the East India Company, at one of their Sales, for the *Purchaſe of a Parcel of East India Goods, to be paid for at a future Day, and before the Day of Payment he became Bankrupt.* Ld. Ch. King held this Caſe not within the Statute, becauſe *the Goods were not delivered, nor the Contract ſigned by the Party.* 2 Wms's Rep. 396. Mich. 1726. Ex Parte of the East India Company.

3. And by *S.* 2. *the Bankrupt ſhall be diſcharged from ſuch Securities, as if ſuch Money had been due before the Time of his becoming Bankrupt.*

And at this Day, if a *Bond* or Note be given by a Trader *upon a Contingency*, and before it happens the Trader becomes a Bankrupt, and then the Contingency happens, this is not within the Act, neither ſhall the Debt ariſing after the Bankruptcy be ſatisfied under the Commiſſion; Per Ld. C. King. Mich. 1726. 2 Wms's Rep. 397. in Caſe of the East India Company.

Obligor in a *Bottomry-Bond* became Bankrupt before the Return of the Ship, and the *Ship did not return before the Diſtribution made*; Ld. C. King held, that the Obligee ſhould not have Benefit of the Diſtribution upon the Commiſſion. 2 Wms's Rep. 499. Mich. 1728. Ex Parte Caſwell, Ex Parte Cazalet, Ex Parte Bateman. —— See pl. 8 & 9.

4. Upon a Treaty of *Marriage between the Plaintiff*'s *Nephew and the Defendant*'s *Daughter*, a *Settlement was agreed upon, and Articles entered into* between Plaintiff and Defendant, *and alſo before the Marriage, the Plaintiff by a ſeparate Writing, reciting, that a Marriage was intended, and in Conſideration thereof*, the Plaintiff *promis'd* and agreed *to pay the Defendant 40 l. a Year by Quarterly Payments, during the Plaintiff*'s *Life; but if the intended Husband and Wife, or either of them ſhould die during the Defendant*'s *Life, then the Annuity to ceaſe.* This Agreement was Signed and Sealed by the Plaintiff; The *Marriage was had*, and Settlement made according to the Articles. The *Plaintiff ſoon after became a Bankrupt, and in all Things conformed* to the Acts relating to Bankrupts, *and had a Certificate confirmed*; the Defendant did not come in under the Commiſſion, but afterwards *for two Years and half's Annuity, accrued ſince his Bankruptcy, brought Action of Covenant*; it was tried per Ch. J. King. The now Plaintiff pleaded the Bankruptcy and Certificate, and it was ſtrongly inſiſted, that it was within the Statute of 7th of the preſent King, whereby Perſons intituled to Notes payable at future Days, ſhould come in under the Statute, and a Value ſet on the Debt, with rebate of Intereſt, but Ch. J. was of Opinion this Agreement was not within that Statute. The rather, becauſe of the Impoſſibility of ſetting a Value on this Annuity, being on three Contigencies, and Verdict for the now Defendant, but upon the now Plaintiff's importunity, the the Point was referred to be argued in the Court of C. B. which was done accordingly, and all the Judges were of the ſame Opinion. Plaintiff brought a *Bill for Injunction.*

1ſt. On Suggeſtion that this Agreement was a Fraud being *private and not in the Articles.*

2dly, For that the Verdict was againſt Conſcience, for that the now Defendant *ought to have come in under the Statute*, being within the late Act; But on Motion for continuing the Injunction the Maſter of the Rolls ſaid, had it been Res Integra he knew not what he might have done, but now the Point was determined at Law, ſo diſallowed the Cauſe, for that there was no Fraud. MS. Rep. Trin. 9 Geo. 1723. Fletcher v. Bathurſt.

5. A *Contingent Creditor*, as where Obligor in a Bottomree-Bond becomes a Bankrupt, ſhall not be barr'd by the Allowance of the Bankrupt's Certificate, the Right of Action not being then accrued. 2 Wms's Rep. 499, pl. 159. Mich. 1728, per Ld. C. King. Ex Parte Caſwell.

Barnard. Rep. in B. R. 39. S. C the Court ſaid, that the Stat. 7 Geo. 1. cap. 31. extends only to Creditors at a future Day certain, and not to mere Contingent Creditors as this Caſe is, and that it ſeemed clear he could not be prejudiced for not coming in; for if he had come in it would have done him no Service; and Judgment for the Plaintiff Niſi, and ſays, that this Matter came on again the next Term, and the Court was of the ſame Opinion.

6. If J. S. gives a *Bond* to certain Perſons condition'd *for Payment of ſo much in Caſe he ſhall marry ſuch a Woman, and that ſhe ſhall ſurvive him*, but *in Truſt for the ſaid Woman her Executors* &c. and afterwards J. S. marries her, and becomes Bankrupt, and has his Certificate of Diſcharge and dies living his ſaid Wife. The Court held, that this was not barred; For that it was not within the 7 Geo. 1. cap. 31. it being uncertain whether this Bond ſhould ever become payable or not, by reaſon of its *depending on two Contingencies*, which had not both happen'd at the Time of the Act of Bankruptcy committed, and ſo was impoſſible to make Abatement of 5 l. per Cent. as the Act directs. 2 Ld. Raym. Rep. 1546. Mich. 2 Geo. 2. B. R. Tully v. Sparks.

7. Edward Cork *on Marriage*, by Articles in 1716, *Covenanted to pay Truſtees* 4000 *l. in Caſe he ſhould die leaving a Son and other Children who ſhould arrive to* 21 equally &c. E. becomes a Bankrupt and has a Son, and four other Children all Infants who preſer Petition, praying that ſufficient Part of the Eſtate might be ſet apart in order to be divided, when &c. Lord Chancellor, it is uncertain whether ever any Thing will become due, and before 7 Geo. 1. cap. 31. it was a Queſtion whether Bonds or Promiſſory Notes payable at a future Day, though certain in all Events could be let in, and the Difference now in ſuch Caſes is to be adjuſted by rebate of Intereſt, but here how is it poſſible to adjuſt the Difference upon a *Contigency which may never happen?* He allows the Caſe upon Bottomree-Bonds, where Contingency had happen'd before a Diſtribution actually made. Obj. that this Demand will be diſcharg'd by Certificate by Statute 5 Geo. 2. cap. But per Lord Chancellor that Clauſe only relates to inrolling Proceedings, and this is not a Debt due or ariſing at the Time of the Bankruptcy. Petition diſmiſt. MS. Rep. Trin. 1734. Ex Parte Jefferies.

8. *Statute* 19 *Geo.* 2. Enacts, *That from and after the* 29*th Day of October, the* Obligee in any Bottomree-Bond, *or Reſpondentia Bond, and* the aſſured in any Policy of Inſurance *made and entered into upon a good and valuable Conſideration Bona Fide*, ſhall be admitted to claim; *and after the Loſs or Contingency had happened, to prove his, her, or their Debt and Demands, in reſpect of ſuch Bond or Policy of Inſurance, in like Manner as if the Loſs or Contingency had happened before the Time of iſſuing of the Commiſſion of Bankruptcy againſt ſuch Obligor or Inſurer; and ſhall be intitled unto*, and ſhall have *and receive* a proportionable Part, *Share, and Dividend of ſuch Bankrupt's Eſtate, in Proportion to the other Creditors of ſuch Bankrupt, in like Manner* as if ſuch Loſs or Contingency had happened before ſuch Commiſſion iſſued.

9. *And that all and every Perſon or Perſons againſt whom, from and after the ſaid* 29*th Day of October, any Commiſſion of Bankruptcy ſhall be awarded, ſhall be diſcharged of, and from the* Debt *or* Debts owing *by him, her, or them*, on *every* Bottomree or Reſpondentia Bond, *and ſhall have the* Benefit of the ſeveral Statutes now in Force *againſt Bankrupts, in like Manner to all Intents and Purpoſes*, as if ſuch Loſs or Contigency had happened, *and the Money due in reſpect thereof, had become payable before the Time of the iſſuing ſuch Commiſſion.*

(K) Who

(K) Who muſt come in as Creditor.

1. A. *Sells Land to B. who afterwards becomes a Bankrupt*, Part of the Purchaſe Money not being paid; A. ſhall not be bound to come in as Creditor under the Statute, but *the Land ſhall ſtand charged with the Money unpaid*, though no Agreement for that Purpoſe. Vern. 268 Pl. 262. Mich. 1684. Chapman v. Tanner.

2. A. makes a Mortgage and afterwards a Commiſſion of Bankruptcy is taken out againſt him, and Commiſſioners make an Aſſignment of his Eſtate, and then B. lends 2000 *l.* to the Bankrupt on a Second Mortgage, having no Notice of the Bankruptcy, and afterwards he gets in the firſt Mortgage. This Prior Mortgage ſhall not protect the Mortgage ſubſequent to the Bankruptcy. 2 Vern. 157. Trin. 1690. Hitchcox & al' v. Sedgwick & al'.

3. *Clothier become Bankrupt*, the Queſtion was, Whether his *Factor, having Cloaths in his Hands* of the Bankrupts, might thereout *retain* his Debt, or muſt come in as a Creditor under the Statute, and accept of a Satisfaction in Proportion with other Creditors, and account for the Cloaths he had in his Hands. 2 Vern. 254. Hill 1691. Woodford v. Swaine

A Merchant *remits Goods* to his Factor, and about a Month after *draws a Bill*, then the *Principal breaks*, againſt whom a Commiſſion of Bankruptcy is awarded, and the Goods in the Factor's Hands are ſeized, it has been conceived the Factor muſt anſwer the Bill notwithſtanding, and come in as a Creditor for ſo much, as he was inforced by reaſon of his Acceptance, to pay. Molloy 465. S. 8.

4. A. by *Articles* was *to build certain Houſes. B. furniſhes him with Materials, and takes an Aſſignment of the Articles* for his Security, but *before the Aſſignment A. was a Bankrupt.*

Ld. Chancellor, B. has a *Special Equity*, inaſmuch as, by what he advanced, A. was enabled to perform his Agreement to the Common Benefit of the Creditors, and therefore *B. ſhall have all his Money he advanced after he had a Specifick Intereſt in the Articles*, but as to what he gave credit for before, he truſted as another Creditor.

And Ld. Chancellor put the Caſe of *A. in building a Ship*, he becomes Bankrupt, and after *B. furniſhes Materials to finiſh it.* B. ſhall have all his Money, and not come in Average with the other Creditors. MS. Rep. Paſch. 1715. on a Rehearing. Langton v. Hall.

5. A. ſeiſed in Fee, *borrowed Money of J. S. on a Judgment*, and then *articled for Sale of the Lands to B.* and afterwards *became Bankrupt.* The Queſtion was upon Stat. 21 Jac. 1 Cap. 19. S. 9. the *Judgment not being executed before the Bankruptcy*, 650 l. Part of the Purchaſe Money remained unpaid. It was decreed at the Rolls that the Aſſignees convey the Premiſſes to B. as A. had articled to do, aud thereupon B. to pay the Aſſignees the 650l. for the Benefit of the Creditory; and J. S. to come in for a Proportion only with the Reſt of them. Wms's Rep. 737. Mich. 1721. Orlebar v. Fletcher and D. of Kent.

But though J. S. could not come in upon the Bankrupt's Eſtate for more than his Proportion with the other Creditors, yet it was inſiſted, that he *would be at Liberty to extend his Judgment againſt the Purchaſor* who bought the Land prior to the Bankruptcy, which ſeemed to be admitted; but that B. could not be deemed a Purchaſor till he had paid the Remainder of the Money, which, when paid, muſt go to the Creditors, and that he was not compellible to pay it, unleſs upon his having a good Title made him by the Aſſignees, who had the legal Eſtate of the Premiſſes aſſigned to them by the Commiſſioners, and ſo decreed as above. Ibid. 739.

6. P. had a *current Account with B. a Banker, and had* 3000*l. in B's Hands; B. paid P.* 1000*l.* and *P. inſtead of a Receipt gave B. a Promiſſary Note B aſſigned the Note to H. and afterwards B. became a Bankrupt.* H. ſued the Note, and P. not being able to prove on the Trial, that B. was Bankrupt at the Time of the Aſſignment, H. recovered. P. brought a Bill for an Injunction, and for a Diſcovery, whether the Aſſignment was not made after the Time it bore Date. It was inſiſted that though this was a Promiſſory Note it ſhould be conſidered only as a Receipt, he having at that Time Money in his Hands, and could not be imagined he intended to be liable on the Note at the ſame Time that ſo much Money was due to him; and if ſo, the 1000l. ſhould be taken as ſo much Money paid and deducted out of the 3000*l.* ſo ſhould come in for his diſtributive Share of 2000 l. of the Bankrupt's Eſtate, and not be a Creditor for 3000l. and pay the 1000l. Note; No Proof was made of Bankruptcy at the Time of the Aſſignment, only that he could not pay it, but never kept out of the Way; Ld. Chancellor, That does not amount to an Act of Bankruptcy; and if People are ſo careleſs to give Notes inſtead of Receipts, it is more fit they ſhould ſuffer than innocent People who know nothing of their Tranſactions; Bill diſmiſſed. Select Caſes in Chan. in Ld. King's Time. 42, 43. Trin. 11 Geo. 1. Pakenham v. Bland and Hoskins.

7. On a *Diſtreſs for Rent*, Goods were ſold and 77*l.* 3*s. remain'd in the Conſtable's Hands, who became a Bankrupt.* The *Tenant dies*, and his *Executor prays to be paid this Money by Aſſignees in Preference to other Creditors.*

Obj. This comes to the Hands of the Conſtable by due Courſe of Law, and cited Mar. 9. 1721. Ld. Macclesfield ex Parte Peirſon, where was cited Wright v. Dixon, Mich. 6 Geo. 1. C. B. *Goods taken in Execution by* Wilcox *Bailiff* of of Weſtminſter and *he died; Judgment and Execution ſet aſide*, and ruled by B. R. that the Widow and *Executrix* of W ſhould *refund the Money though ſhe alledged ſhe had not Aſſets* to pay Specialties.

But per Ld. Chancellor both the Caſes cited are againſt Executors, and though the Law makes a Difference between one Creditor and another; yet in Caſe of Bankruptcy all Creditors are upon an equal Foot, if any *Thing remain'd in Specie*, it might be otherwiſe, but here the Money is embezelled by the Conſtable; ſo ordered the Petitioner to come in as a Creditor with the reſt. MS. Rep. Mich. Vac. 1733. Ex Parte Dobſon.

8. An *Attorney* had been *employed* by one who became *Bankrupt*; Aſſignees petition to have up Papers, and that the Attorney might come in for his Demands Pari paſſu with other Creditors.

Ld Chancellor, the Attorney *hath a Lien upon the Papers* in the ſame Manner *againſt Aſſignees as againſt the Bankrupt*, and though it doth not ariſe by any expreſs Contract or Agreement, yet it is as effectual, being an implied Contract by Law; *But as to Papers received after the Bankruptcy they cannot be retained*, and therefore if the Aſſignees deſire it let the Bill be taxed, and upon Payment, Papers delivered up; and although the Attorney had come in and proved his Debt, yet a Creditor, who hath a Security, may properly come in and prove his Debt, becauſe poſſibly his Security may prove deficient. MS. Rep. Mich. 1734. Ex Parte Buſh.

9. A. being *Collector of Land-Tax*, and in Arrear *becomes Bankrupt.* His Goods are ſeized by Warrant from Commiſſioners of the Land-Tax; Then an Aſſignment is made, but it was before Sale by the Commiſſioners of the Land-Tax.

Per Cur. this is to be conſidered as a *Prerogative Caſe*, and the Collector is an Officer and Debtor to the Crown, and as in Caſe of an Extent

tent, a Seiſure before Aſſignment is good and binds, ſo here. But in Caſe of a Common Perſon it ſeems contra, andthe Aſſignment of Commiſſioners of Bankrupt would have been good.

Objected, that the Collector was not to be looked upon as an Officer, or Debtor of the Crown, becauſe in Caſe of Failure the County is to make it good, ſed non allocatur; For the Duty is given to the King, and his Salary &c. ariſes from the Duty &c. MS. Rep. Mich. 1734. B. R. Bracey v. Dawſon. S.C. Fol 2. a. pl. 12. 13. 1. Forteſcu. Rep. 1. Vol. 207.

(L) Creditors. At what Time to come in.

1. 1 *Jac.* 1. *cap.* 15. *S.* 4. ANY *Creditor may come in* within four Months *after the Commiſſion ſued forth*, and until Diſtribution be made, *ſo that he contributes to the Charges of the Commiſſion, and if the Creditors come not within four Months, the Commiſſioners may proceed to Diſtribution.*

2. A *Commiſſion* of Bankruptcy *was taken out* againſt T. F. the 17th of November 1676, *but proſecuted only by R. the other Creditors conſenting, that Execution* of the Commiſſion *be forborn a Month, but R. did not conſent thereto, nor knew thereof*, but R. proſecuted and ſued M. who had poſſeſſed the Eſtate by Aſſignment of the Bankrupt. It was inſiſted at the Trial, that F. (the ſuppos'd Bankrupt) was not ſo. R. had a Verdict, and the four Months were out; three Weeks after, ſhe petitions to be admitted into the Diſtribution, and now would contribute to the Charges, the Suſpenſion of executing the Commiſſion having been ſo ordered by the Chancellor; and now his Lordſhip directed her to be admitted into Contribution. Chan. Caſes 307. Paſch. 30 Car. 2. in Canc. Ruſhworth v. Forth.

After Diſtribution, ond four Months, it was admitted, Arg. that other Creditors could *not come in to diſturb the firſt Diſtribution, but* might come in *for the Reſidue*, of which no Diſtribution was made. 2 Chan. Caſes 153, 154. Mich. 35 Car. 2. Harding v. Marſh.

(M) Of Joint or Separate Commiſſions in reſpect of Partners in Trade Bankrupts. And how to proceed therein.

1. A Joint Commiſſion was taken out againſt two Joint Traders Bankrupts. The *Commiſſioners aſſign the Real and Perſonal Eſtate of them, or either of them.* Afterwards the *ſeparate Creditors take out ſeparate Commiſſions* againſt them, and the *ſeparate Commiſſioners aſſign the ſeparate Effects and Eſtate to other Aſſignees.* Upon Petition by the ſeparate Aſſignees for Liberty to ſue at Law for the ſeparate Eſtate, Ld. C. King thought the firſt Aſſignment paſſed as well the ſeparate as joint Eſtate, and that the ſecond Aſſignees could do nothing at Law, and ſo denied the Petition, but would not hinder their joining in a Bill for an Account in Equity. 2 Wms's Rep. 500. Mich. 1728. Ex Parte Cook.

2. A Petition came on before the Ld. Chancellor on the Behalf of D. There was a ſeparate Commiſſion taken out againſt one P. only; and a Petition

Petition by a Creditor on the Partnerſhip Eſtate. The Order pronounced was, that the *Partnerſhip Eſtate ſhould be divided amongſt the Partnerſhip Creditors in the firſt Place*; *and if* there ſhould be *any Surplus* of this Eſtate due to the Bankrupt, that *the Surplus, together with his ſeparate Eſtate, ſhould be divided amongſt his ſeparate Creditors*; that on the other Hand, the *ſeparate Eſtate ſhould in the firſt Place be divided amongſt the ſeparate Creditors*; *and if* there ſhould be *any Surplus* from that, that *that Surplus, together with the Partnerſhip Eſtate, ſhould be divided among the Partnerſhip Creditors.* Barnard. Rep. in B. R. 470. Arg. cites 23 December 1728, the Caſe of Mackenſon v. Parker.

3. If *A. and B. Joint Traders*, become Bankrupts, and there are *joint and ſeparate Commiſſions* taken out againſt them, and A. and B. before the Bankruptcy, become *jointly and ſeverally bound to J. S.* — *J. S. may chuſe under which Commiſſion he will come, but ſhall not come under both.* 3 Wms's Rep. 405. Hill. 1735. Ex Parte Rowlandſon.

4. *But* if two Joint Traders *owe a Partnerſhip Debt*, and *one* of the Partners *gives a Bond as a Collateral Security* for Payment of this Debt; here the Joint Debt may be ſued for by the Partnerſhip Creditor, who may likewiſe ſue the Bond given by one of the Traders. 3 Wms's Rep. 408. Hill. 1735. Ex Parte Rowlandſon.

(N) Commiſſioners. Who may be. And how to qualify themſelves.

1. JOHNSON was *both Clerk and Commiſſioner* to a Commiſſion of Bankruptcy, by which Means he had Fees for both, and thereby four Commiſſioners were always preſent, including the Clerk, whereas three are ſufficient. On Petition he *was removed.* Select Caſes in Canc. in Ld. King's Time 46. Trin. 11 Geo. Wood's Caſe.

2. 5 *Geo.* 2. *cap.* 30. *S.* 43. *The Commiſſioners ſhall not be capable of acting until they reſpectively ſhall have* taken an Oath to the Effect following, viz. I A. B. do ſwear, that I will faithfully, impartially, and honeſtly, according to the beſt of my Skill and Knowledge, execute the ſeveral Powers and Truſts repoſed in me as a Commiſſioner in a Commiſſion of Bankrupt againſt and that without Favour or Affection, Prejudice or Malice. *So help me God.*

3. *S.* 44. *Which Oath any two of the Commiſſioners are impowered to adminiſter to each other, and they are required to* keep a Memorial thereof, ſigned *by them among the Proceedings on each Commiſſion.*

(O) Commiſſioners. Their Fees and Allowances.

1. 5 *Geo.* 2. *cap.* 30 *S.* 42. THERE *ſhall not be paid out of the Eſtate of the Bankrupt any Monies for* Expences in Eating and Drinking, *of the Commiſſioners or of any other Perſon, at the Times of their meeting of the Commiſſioners or Creditors; and if any Commiſſioner ſhall order ſuch Expence to be made, or eat or drink at the Charge of the Creditors, or out of the Eſtate of ſuch Bankrupt, or receive above* 20 *s. each Commiſſioner for each*

each Meeting, every ſuch Commiſſioner ſhall be diſabled to act in any Commiſſion of Bankrupts.

2. S. 46. *All Bills of* Fees or Diſburſements *demanded by any Solicitor employ'd under any Commiſſion of Bankrupts* ſhall be ſettled by one of the Maſters in Chancery, *and the Maſter who ſhall ſettle ſuch Bill, ſhall have for his Care in ſettling the ſame, as alſo for his Certificate thereof,* 20 *s.*

3. On a Petition to the Ld. Chancellor in Feb. 1739, in the Caſe of *Edward Haliday a Bankrupt*, againſt ſeveral of the Commiſſioners for taking more than 20 s. apiece at each Meeting, and likewiſe ordering great Sums of Money to be charged for their Eating and Drinking, his Lordſhip declared them uncapable by Virtue of this Act to be any longer as Commiſſioners in the Execution of the ſaid Commiſſion, and that no further Proceedings ought to be had thereupon, and alſo that all further Proceedings on the preſent Commiſſion be abſolutely Stayed, and that the Petitioners be at Liberty to apply to his Lordſhip by Petition, to have the ſaid Commiſſion renewed, and directed to ſuch new Commiſſioners to be named therein as he ſhall think fit, and for that Purpoſe did order, that the Solicitor for the Petitioners, and the Solicitor for the Aſſignees, do reſpectively leave with his Secretary to the Commiſſioners of Bankruptcy, the Names of five Perſons whom they ſhall propoſe for his Lordſhip's Conſideration, in order that proper Perſons may be appointed Commiſſioners in ſuch renewed Commiſſion; and did alſo further order, that the preſent Aſſignees, under the ſaid Commiſſion, be removed from being Aſſignees of the ſaid Bankrupt's Eſtate and Effects, and that the ſaid Bankrupt's Creditors do proceed to a Choice of new Aſſignees in their room, and for that Purpoſe, after the ſaid Commiſſion ſhall be renewed, an Advertiſement is to be publiſhed in the London Gazette, appointing a meeting of the Creditors of the ſaid Bankrupt for choice of ſuch new Aſſignees, and after ſuch Choice ſhall be made, his Lordſhip did order, that the ſurviving Commiſſioners in the preſent Commiſſion, or any three of them, and the ſaid Aſſignees ſo hereby removed, do join with the major Part of the Commiſſioners to be named in the renewed Commiſſion, in making an aſſignment of the ſaid Bankrupt's Eſtate and Effects, to the new Aſſignees ſo to be choſen; and did further order, that forthwith after the Execution of ſuch Aſſignment, the ſaid old Aſſignees do reſpective deliver over to the new Aſſignees, all the Effects of the ſaid Bankrupt, remaining in Specie in the Hands, Cuſtody, or Power of them, or any of them upon Oath, and alſo all Books, Papers, and Writings in their reſpective Hands, Cuſtody, or Power, relating to the ſaid Bankrupt's Eſtate or Effects upon Oath, and that the ſaid old Aſſignees do deliver Poſſeſſion of the ſaid Bankrupt's Real Eſtate to the new Aſſignees, and did further order, that the ſaid old Aſſignees petitioned againſt (naming them) do, out of their own Pockets, pay to Mr. Skurry, Sollicitor for the Petitioners in this Matter, the Coſts of the Petitioners preſent Application, and the Coſts of renewing the ſaid Commiſſion, to be Taxed by Mr. Burroughs, one of the Maſters of this Court, in Caſe the Parties ſhall differ about the ſame.

(P) Commiſſioners and Aſſignees Power as to diſcovering.

1. 13 *Eliz cap.* 7. *S.* 2. GIVES *Power to the Commiſſioners, or the moſt Part of them, to take by their Diſcretions Order with the Body of the Bankrupt by Impriſonment.*

2. *S.* 5. *If any after ſuch Act committed, and Complaint thereof made to the Comiſſioners, or the Major Part of them, by any Party grieved, ſuſpecting any of the Goods or Debts of ſuch Offender to be in the Poſſeſſion of any Perſon, or any Perſons to be indebted to ſuch Offender, do make Relation thereof to the Commiſſioners, they ſhall have Power to call before them by ſuch Proceſs, or Means, as they ſhall think convenient, all ſuch Perſons ſo ſuppoſed to have any ſuch Goods or Debts in their Cuſtody, or ſuppoſed to be indebted to ſuch Offender, and upon their Appearance to examine them, as well by their Oaths, as by ſuch Means as the Commiſſioners ſhall think meet, for the Knowledge of all ſuch Goods and Debts.*

3. *S.* 6. *If ſuch Perſons upon Examination do not diſcloſe the whole Truth of ſuch Things as they ſhall be examined of, or deny to ſwear, then ſuch Perſons upon Proof made before the Commiſſioners by Examination, or otherwiſe, ſhall forfeit double the Value of all ſuch Goods and Debts by them concealed; which Forfeiture ſhall be levied by the Commiſſioners of the Lands, Goods, and Chattles, of ſuch Perſon ſo denying to ſwear, or not diſcloſing the whole Truth, in ſuch Manner as is before appointed for the principal Offenders, the ſame Forfeitures to be diſtributed for Satisfaction of the Debts of the Creditors in ſuch Rate as before declared.*

4. *S* 7. *And every Perſon fraudulently claiming or detaining any Debt, Goods, or Chattels of the Bankrupts, which are not really due, or belonging to him, ſhall forfeit double the Value he ſhall ſo claim, or detain, to be levied and employed as aforeſaid.*

5. 1 *Jac. cap.* 15. *S.* 6. *The Commiſſioners may call before them the Bankrupt; and if upon* Warning left in Writing Three Times at the Dwelling-Place, *where the Bankrupt, his Wife, or Family, for the moſt Part of his Abode, did remain,* within One Year next before he became Bankrupt, *the ſaid Bankrupt ſhall not appear before the Commiſſioners, it ſhall be lawful for the Commiſſioners to appoint to proclaim the ſaid Party a Bankrupt, at ſuch Publick Places where the Commiſſioners ſhall think meet, warning him to appear before them upon the Commiſſion, at ſome Time appointed*; and if upon Five Proclamations, the Party *offending* appears not *before the Commiſſioners, and yield his Body; the Commiſſioners may award a Warrant, to ſuch Perſons as they think meet, to apprehend the Body of the Offender, and to bring him before the Commiſſioners, whereſoever the Party may be found, in Place privileged or not, to be examined.*

6. *S.* 7. *It ſhall be lawful for the Commiſſioners to* examine the ſaid Offender upon Interrogatories *touching the Lands, Goods, Debts, Books of Account and ſuch other Things as may tend to diſcloſe his Eſtate, or Secret Grants, and eloigning of his Lands, Goods Money and Debts, as they ſhall think meet.*

7. *S.* 10. *If any* Perſons *known or* ſuſpected to detain any *of the* Lands, Hereditaments, Goods, or Debts of the Bankrupt, *or to be* indebted to, *or for the Benefit of the Bankrupt,* ſhall, after lawful Warning *to the ſaid Perſons given to come before the Commiſſioners to be examined,* refuſe to come, *or ſhall not come at the Time appointed, having no lawful Impediment,*

(*ſuch*

(ſuch as ſhall be allowed off by the Commiſſioners, and which ſhall be then made known to the Commiſſioners) or having Knowledge of any other Meeting of the Commiſſioners ſhall not appear before them at ſuch Time as they may, or being come ſhall refuſe to *be ſworn, and make* Anſwer to ſuch Interrogatories as ſhall be miniſtred; it ſhall be lawful for the Commiſſioners to commit to ſuch Priſon *as to them ſhall be thought meet*, all ſuch Perſons *as ſhall refuſe to be ſworn and make Anſwer, and alſo to direct their Warrants to ſuch Perſons as to them ſhall be thought meet, to apprehend ſuch Perſon as ſhall refuſe to appear, and to bring them before the Commiſſioners to be examined, and upon their Refuſal to come, or to be examined, to commit the Party, ſo refuſing, to ſuch Priſon as the Commiſſioners ſhall think meet, until the ſaid Perſon ſhall ſubmit himſelf to the Commiſſioners, and be by them examined according to the Statute* 13 *Eliz. and this preſent Act.*

8. *S.* 11. *Provided that ſuch* Witneſſes *as ſhall be ſent for*, ſhall have ſuch Coſts as the Commiſſioners ſhall think fit, *to be rateably born by the Creditors. And if any Perſon, other than the Bankrupt, either by Subornation of others, or by his own Act, ſhall wilfully and corruptly* commit wilful Perjury *by his Depoſition to be taken before the Commiſſioners; the Party ſo offending, and all Perſons that ſhall unlawfully and corruptly* procure any ſuch *unlawful, wilful and corrupt Perjury, may therefore* be indicted *in any of the King's Courts of Record and ſhall ſuffer ſuch Pains as are limited by the Statute concerning Perjury* 5 *Eliz. cap.* 9.

9. E. was found to be a Bankrupt by 13 Eliz. cap. 7. and was *committed to the Fleet, the Warrant* to the Warden of the Fleet *was, to retain and keep in Priſon, to anſwer and to ſatisfy all ſuch Matters as ſhall be objected againſt him.* The Queſtion now was, if the Commiſſioners may *licenſe him to go at large to treat about his Debts.* By the Court, if the Warrant had been, that the Party ſhould have been in Execution, then he could not be enlarged; but the Court adviſed them to take Security, leſt he ſhould withdraw himſelf; But if one had Judgment againſt a Bankrupt, and, upon a Habeas Corpus brought, he is committed in Execution without a Capias Utlagat' then the Commiſſioners cannot deal with him any more for to enlarge him. Noy 140. Mich. 4 Jac. C. B. Edwards's Caſe.

10. 21 *Jac.* 19. *S.* 6. *The Commiſſioners ſhall have Power to* examine the Wife *of the Bankrupt upon Oath for the Diſcovery of his Eſtate, Goods, and Chattels, and ſuch Wife refuſing to appear, or to anſwer Interrogatories, ſhall incur the ſame Penalties as are provided againſt other Perſons in the like Caſes.*

11. I. brings his *Habeas Corpus*; the *Return* was, *That he was committed by J. S. J. N. J. T. (to whom, and others, a Commiſſion of Bankrupt was awarded) for refuſing to anſwer a Queſtion* put to him, concerning the Bankrupt's Eſtate &c. and ſo commiſſus fuit in Cuſtodia by Warrant to the Officer, Virtute Commiſſionis præd' & hæc eſt Cauſa captionis ſeu detentionis &c. Three Exceptions were taken to the Return. 1ſt. For that there did not appear a ſufficient Authority; for the Commiſſion is ſaid to be granted to them and others, and then they could not act without the reſt; for the Return does *not expreſs any Quorum* &c. in the Commiſſion. 2dly, Inſtead of *Commiſſus in Cuſtodia*, it ought to be Captus, for that is the uſual Form; For this is, as if the Commitment were by the Officer that makes the Return. 3dly. *Hæc eſt Cauſa captionis ſeu detentionis* is uncertain; for it ought to be & detentionis. And upon the firſt and laſt Exception, the Priſoner was diſcharged by the Court, but told him, that he muſt anſwer directly to ſuch Queſtions as were put to him, in Order to the Diſcovery of the Bankrupt's Eſtate, or elſe he was liable to be committed. Vent. 323. 324. Mich. 29 Car. 2. B. R. J's Caſe.

3 Keb. 837. pl. 74. The King v. Jeakill, S. C. and becauſe it did not appear that thoſe that committed him were a Majority, or a Quorum, Rainsford and Jones held it ill, and diſcharged him. (the other Juſtices being abſent) in regard he did not refuſe to ſwear, but had ſworn, that he had none of the Bankrupt's Eſtate in his Hands, but would

would not anſwer whether any of the Bankrupt's Eſtate came to his Hands before the Commiſſion ſued out &c. having received his own Debt before, nor per Cur. is he compellable to ſwear ſo upon 1 Jac. cap. 15. S. 10.

12. A *Perſon once examined* by Commiſſioners of Bankrupts, cannot be examined *again* without a new Commiſſion. 2 Show. 102. Paſch. 32 Car. 2. B. R. The King v. Ballet.

13. The Defendant *bought of P. Jewels, Plate* &c. for valuable Conſideration paid; *P. became a Bankrupt*, and a Commiſſion was taken out againſt him, and the *Commiſſioners examined B. the Defendant touching the Goods* what they were, and the Value on them, but on Pretence that he did not anſwer, the Commiſſioners committed him; but on an Habeas Corpus in B. R. he was delivered. The *Anſwer* before the Commiſſioners being as to the Time &c. *to his Remembrance, and that he could not Poſitively anſwer farther*, and by Conſent he was again to attend and be re-examined, which he did. And now the Plaintiff's Bill is to have the Defendant's Anſwer in Chancery, where he *pleaded, that he had no Goods of P's, but ſuch as he really paid for before the Commiſſion iſſued* againſt P. *and that he had no Notice of any Act or Thing by P. whereby he was a Bankrupt*, but truly paid for what he bought &c. It was objected, he ought to anſwer the Time of Bankruptiſm, elſe the Statute againſt Bankrupts will be of little Effect. E contra, It is no Equity in ſuch Caſe to make a Man pay twice. Lord Chancellor ruled the Plea good, ſaying it is an Infallible Rule, that a Purchaſer for a valuable Conſideration ſhall never, without Notice, diſcover any Thing to hurt himſelf. But as to the Point of Bankruptiſm, whether that the Defendant being formerly examined by the Commiſſioners on Oath, ſhould be examined, or put to anſwer to the ſame Matter here, the Chancellor ſeemed to be of Opinion that he ſhould; But the other Point being clear, there was no Debate on this Point. 2 Chan. Caſe 72, 73. Mich. 33 Car. 2. Perrat v. Ballard.

14. Equity will not compel a Man to *diſcover what Goods he* really *bought of a Bankrupt after the Bankruptcy, and* before the Commiſſion ſued out, where the Party has no Notice of the Bankruptcy. Vern. 27. pl. 23. Hill. 33 and 34. Car. 2. Abery & al' v. Williams.

15. B. was committed by Commiſſioners of Bankruptcy, and the Concluſion of the *Commitment* was, *until he conform himſelf to our Authority, and be thence delivered by due Courſe of Law.* By Cowper it was objected, that the Concluſion of the Commitment ought to have been, *until he ſhall ſubmit himſelf to be examined upon Interrogatories, according to the Intent and Meaning of the Act*; for being a Special Authority to commit, the Words muſt be purſued. Here the *Commiſſioners required B. to tell all that he knew touching the Eſtate of the Bankrupt and* (that being too general) *when and in what Manner did you aid and aſſiſt in embezzelling the Eſtate of the Bankrupt* (not whether he did aid or aſſiſt) and for not anſwering, they committed him. Holt C. J. ſaid, The General Queſtions may be well, if he cannot recollect any Thing, it is a fair Anſwer; Now, if any of the Queſtions were fair, there was juſt Cauſe to commit for not anſwering them. He is not to anſwer any thing criminal; it is criminal to embezzle any Goods after the Bankruptcy, but not before. But held, if a Man has intermeddled honeſtly and fairly without Craft, he may and ought to diſcover it to avoid the Penalty; it may be the Word Embezzlement may be too hard, but there is Latitude enough for other Queſtions tantamount? But here the Priſoner muſt be diſcharged; for the Concluſion of the Commitment is ill. Here the *Concluſion ſhould have been, till he ſhall ſubmit, and be* (or to be) *examined touching the Premiſſes, or* (as Mr. Cowper ſaid) *upon Interrogatories.* Nota, Something was ſaid at the Bar of an Action of

falſe

falſe Impriſonment. Per Holt Ch. J. There is no Colour for an Action of falſe Impriſonment, where an Officer commits ſuch a Miſtake or Slip. Comb 390, 391. Mich. 8 W. 3. B. R. Bracy's Caſe.

16. The Defendant was *committed* by the Commiſſioners of Bankrupts *for not* anſwering and *making a Diſcovery of his Eſtate*; and being in Court upon an Habeas Corpus, he *produced Affidavits that he had made a Diſcovery*, and moved to be diſcharged, but it was denied; for if the Commitment was illegal, he might have an Action of falſe Impriſonment, and per Curiam, the Statute impowers the Commiſſioners to *examine the Party upon Interrogatories*, which they *muſt prepare and tender to him ready drawn*; and this not being returned on the Habeas Corpus, the Warrant for Commitment was held void. 5 Mod. 368. Mich. 9 W. 3. B. R. Gregory's Caſe.

17. H. was brought into B. R. upon a *Habeas Corpus*; and the *Return* was, that ſhe was *committed* by Commiſſioners of Bankrupts, *for refuſing to be examined* by them; and the Concluſion of the Warrant of Commitment was, *that ſhe ſhould remain in Cuſtody, until ſhe ſhould be otherwiſe diſcharged by due Courſe of Law*; and by Reaſon of this Concluſion, the Court held the Commitment to be ill, and diſcharged the Defendant; becauſe the Power given by the Statute 1 Jac. 1. cap. 15. is to commit the Party, until he ſubmit himſelf to the Commiſſioners, and ſhall be by them examined. And there is no Mention made of being diſcharged by due Courſe of Law. And for this Exception Bracy committed for ſuch Account was diſcharged. 2 Ld. Raym. Rep. 851. Hill. 1 Annæ, Hollingſhead's Caſe.

18. Though the Aſſignees under the Statute of Bankruptcy were diſabled from recovering the Effects belonging to the Bankrupt's Eſtate by a Fraud in the Defendant's, viz. their having *altered the Bills of Lading and Invoices, and* even the *Ship's Name*, that the Aſſignees might not know or diſcover the Goods, that were aſſign'd to B. the Bankrupt; yet there the Ld. Keeper *refuſed to direct an Iſſue*, ſaying, it was a Matter triable at Law, *and refuſed to direct that the Statute of Limitations ſhould not be given in Evidence.* 2 Vern. 504. pl. 452. Trin. 1705. cites the Caſe of Peeres v. Bellamy.

19. 5 *Geo.* 2. *cap.* 30. *S.* 4. *Every* Bankrupt, after Aſſignees *ſhall be* appointed, *is* to deliver upon Oath, *or Affirmation, before one of the Maſters of Chancery, or Juſtice of Peace, unto ſuch Aſſignees*, all his Books of Accounts and Writings *not ſeized by the Meſſenger of the Commiſſion, or not before delivered up to the Commiſſioners, and then in his Power, and diſcover ſuch as are in the Power of any other Perſon that any ways concern his Eſtate; and every ſuch Bankrupt, not in Priſon, ſhall after ſuch Surrender, be at Liberty, and is required to attend ſuch Aſſignees upon Notice in Writing, in order to aſſiſt in making out the Accounts of the Eſtate.*

20. *S.* 5. *Every* Bankrupt having ſurrendered *ſhall at all ſeaſonable Times, before the Expiration of Forty-Two Days or ſuch further Time as ſhall be allowed to finiſh his Examination, be at* Liberty to inſpect his Books and Writings, *in the Preſence of ſome Perſon to be appointed by the Aſſignees, and to bring with him for his Aſſiſtance, ſuch Perſons as he ſhall think fit, not exceeding Two at One Time*, and to make Extracts and Copies *to enable him to make a full Diſcovery of his Effects, and the ſaid Bankrupt* ſhall be free from Arreſts *in coming to ſurrender, and from Actual Surrender for the ſaid Forty-two Days, or ſuch further Time as ſhall be allowed for finiſhing his Examination, provided ſuch Bankrupt was not in Cuſtody was not in Cuſtody at the Time of Surrender; and* in Caſe ſuch Bankrupt ſhall be arreſted *for Debt, or on any Eſcape Warrant*, coming to ſurrender, *or after his Surrender, within the Time before mentioned; then on producing ſuch Summons or Notice under the Hands of the Commiſſioners, or Aſſignees, and giving the Officer a Copy thereof, he* ſhall be *diſ-*

charged; and in Caſe any Officer ſhall detain any ſuch Bankrupt, ſuch Officer ſhall forfeit to ſuch Bankrupt, for his own Uſe, 5 l. for every Day he ſhall detain him.

21. *S.* 6. *In Caſe any* Bankrupt *be* in Cuſtody *at the Time of iſſuing of the Commiſſion, and is willing to ſubmit to be examined, and can be* brought before the Commiſſioners *and Creditors, the* Expence thereof ſhall be paid out of the Bankrupt's Eſtate; but in Caſe ſuch Bankrupt is in Execution, *or cannot be brought before the Commiſſioners, then the* Commiſſioners ſhall attend the Bankrupt in Cuſtody, and take his Diſcovery; *and the Aſſignees are required to appoint Perſons to attend ſuch Bankrupt in Priſon, and to produce his Books and Writings, in order to prepare his Diſcovery; a Copy whereof the Aſſignees ſhall apply for, and the Bankrupt ſhall deliver to their Order ten Days before ſuch laſt Examination.*

22. *S.* 14. *Upon Certificate under the Hands and Seals of the Commiſſioners that ſuch Commiſſion is iſſued, and ſuch Perſon proved before them to become Bankrupt, it ſhall be lawful for any of the Juſtices of his Majeſty's Courts of B. R. or C. B. or Barons of the Exchequer, and the Juſtices of the Peace within England, and Wales, and Town of Berwick upon Tweed, and they are required upon Application made, to grant their Warrants for apprehending ſuch Perſon, and him to commit to the Common Gaol of the County where he ſhall be apprehended, there to remain, until he be removed by the Order of the Commiſſioners; and the Goaler, to whoſe Cuſtody ſuch Perſon is committed, is required to give Notice to one of the Commiſſioners.*

23. *S.* 16. *It ſhall be lawful for the* Commiſſioners to examine *every Perſon, againſt whom any Commiſſion ſhall be awarded, touching all Matters relating to the Trade and Effects of* ſuch Bankrupt, and alſo *to examine* every other Perſon duly ſummoned, or preſent, *at any Meeting of the Commiſſioners,* touching all Matters relating to the Perſon and Effects of ſuch Bankrupt, and any Act of Bankruptcy committed by him; and *alſo* to reduce into Writing the Anſwers *of ſuch Bankrupt, or other Perſon, which Examination the Party examined is required to ſubſcribe; and in caſe ſuch Bankrupt, or other Perſon, ſhall* refuſe to anſwer, *and ſhall not fully anſwer to the Satisfaction of the Commiſſioners, all lawful Queſtions put by the Commiſſioners,* or *ſhall refuſe to* ſubſcribe his Examination *(not having a reaſonable Objection to the wording thereof, or otherwiſe to be allowed by the Commiſſioners) it ſhall be lawful for the Commiſſioners by Warrant to* commit him to ſuch Priſon *as the Commiſſioners ſhall think fit,* there to remain *without Bail,* until ſuch Perſon ſhall ſubmit *himſelf to the Commiſſioners,* and full Anſwer make *to the Satisfaction of the Commiſſioners to all ſuch Queſtions as ſhall be put to him,* and ſubſcribe ſuch Examination as aforeſaid.

24. *S.* 17. *In caſe any Perſon ſhall be* committed *by the Commiſſioners* for refuſing to anſwer, *or not fully anſwering any Queſtion, the Commiſſioners ſhall in their* Warrant of Commitment ſpecify ſuch Queſtion.

25. *S.* 18. *In caſe any* Perſon committed *by the Commiſſioners Warrant ſhall* bring a Habeas Corpus, *in order to be diſcharged, and there ſhall appear any* Inſufficiency in the Form of the Warrant, *it ſhall be lawful for the Court, or Judge, before whom ſuch Party ſhall be brought by Habeas Corpus, by Rule, or Warrant, to commit ſuch Perſon to the ſame Priſon, there to remain, until he ſhall conform as aforeſaid, unleſs it ſhall be made appear, that he has fully anſwered all lawful Queſtions put to him by the Commiſſioners; or (in caſe ſuch Perſon was committed for not ſigning his Examination) unleſs it ſhall appear that the Party had good Reaſon for refuſing to ſign the ſame. And in caſe any* Gaoler, *to whom ſuch Perſon ſhall be committed, ſhall wilfully* ſuffer ſuch Perſon to eſcape, *or to go without the Walls or Doors of the Priſon, ſuch Gaoler ſhall for ſuch Offence, being convicted by Indictment, or Information,* forfeit 500 l. for the Uſe of the Creditors.

(Q) Power of Commiſſioners in ſeiſing the Effects of the Bankrupt.

1. 21 *Jac.* 1. cap. 19. S. 8. *IT ſhall be lawful for the Commiſſioners or any other Perſons, or Officers, by them to be appointed by their Warrant, under their Hands and Seals,* to break open the Houſes, Chambers, Shops, Warehouſes, Doors, Trunks or Cheſts of the Bankrupt, *where the ſaid Bankrupt, or any of his Goods or Eſtate ſhall be reputed to be,* and to ſeiſe upon, and order the Body, Goods, Money, and other Eſtate of ſuch Bankrupt, *as by the ſaid former Laws are appointed, by Impriſonment or otherwiſe, as to the Commiſſioners ſhall be thought meet.*

Reſolved by Ld. Pemberton at Guildhall, that Commiſſioners of Bankrupts cannot break open a Houſe to ſearch for the Bankrupt's Goods, unleſs it be the Bankrupt's Goods in the Houſe of the Bankrupt. 2 Show. 247. pl. 248. Mich. 34 Car. 2. B. R. Anon.

2. A Merchant ſeiſed of Lands, being indebted to ſeveral Perſons, *committed an act of Bankrupcy, and was outlawed in* 1645, and *in* 1648 *ſold his Lands* to the Leſſor of the Plaintiff, and *in* 1649 *was outlawed again; in* 1653 *a Commiſſion* of Bankruptcy *was taken out* againſt him, and *in* 1657 *he was declared a Bankrupt*, and the Commiſſioners ſold the Lands to the Defendant, who enter'd and got Poſſeſſion; The principal Queſtion was, Whether the Commiſſion taken out in 1653, whereupon he was found a Bankrupt, ſhould relate to the firſt acts of Bankruptcy in the Year 1643, ſo as to avoid the Sale made by the Bankrupt in the Year 1648? It was reſolved per tot. Cur. that the Sale ſhould not be defeated by an act of Bankruptcy done before, if it was not done within five Years before the ſuing out of the Commiſſion. Lev. 13, Hill. 12 & 13 Car. 2. B. R. Radford v. Bludworth.

2 Sid. 69. Paſch. 1658. B. R. S. C. but no Judgment or Opinion of the Court. ——Ibid. 114. S C. argued again, and Glyn Ch. J. ſaid, that Once a Bankrupt and Always a Bankrupt, and he thought that a new Act of Bankruptcy did not make him a new Bankrupt, and ordered it to be argued again. ——Ibid. 176. S. C. argued again, and Newdigate Ch. J. ſaid, that they were divided in Ch. J. Glyn's Time, and that perhaps they would now adjourn it into the Exchequer Chamber, and therefore perſwaded the Creditors to agree, and ſo they referred it to certain Perſons to end it that Vacation; and if not then ended, they ordered that it ſhould be argued again the firſt Saturday of the next Term. —— Keb. 11. pl. 25. Paſch. 13 Car. 2. S. C. argued by Newdigate as Counſel for the Defendant. But per Cur the Proviſo is expreſs, that the Commiſſion muſt be ſued within 5 Years after ſome time when he became a Bankrupt, and his being ſo after the Sale will not hinder, that if the Commiſſion be not ſued out within 5 Years of his becoming a Bankrupt, and then they can only defeat all Sales made within the 5 Years, but not afterwards.

3. *By* 5 *Geo.* 2. *cap.* 30. *S.* 14. *Judges and Juſtices of Peace may grant Warrants to commit the Bankrupt to Goal, and the Goaler is to give Notice of ſuch Perſon being in Cuſtody, and the Commiſſioners are impowered to ſeiſe the Effects of ſuch Bankrupt (the neceſſary wearing Apparel of ſuch Bankrupt, or of his Wife or Children excepted,) and his Books or Writings, which ſhall be then in the Cuſtody of ſuch Bankrupt, or of any other Perſon in Priſon.*

(R) Aſſignees

(R) Aſſignees bound. By what Acts or Agreements of Bankrupt.

Such Contract, after an Act of Bankruptcy, is not merely void, but is good between the Parties.

1. ADjudged, that a *Sale made of his Goods by a Bankrupt*, after a Commiſſion of Bankruptcy is awarded, is utterly void. Mo. 594, pl. 805. Hill. 33 Eliz. Smith v. Mills.

3 Salk. 59. pl. 2. Hill. 11 W. 3. B. R. Huſſey v. Fidel.

2. *A. was indebted to B. a Bankrupt*, and *A. and B. became bound for this Money to M. L. in Truſt for the Bankrupt*, a Commiſſion iſſued, and *this Debt was aſſigned to a Creditor*; *M. L. died, and his Executors releaſed his Debt.* The Creditor brought Debt, and adjudged that it lies; becauſe the Intereſt of this Debt was transferred to the Creditor, by the Statute 21 Jac. cap. 19, the Bond being made to the Uſe of the Bankrupt, and therefore *the Releaſe* afterwards *was no Bar*; and ſo the Bankrupt's being bound was not Material, the Bond being in Truſt for him. Palm. 505. Hill. 3 Car. B. R. Gerrard v. Aylmer.

3. *C. poſſeſſed of a Leaſe* for Years, *contracted* with the Committee of the Company *for a new Leaſe, and paid part of the Fine*, and *by C's Conſent a new Leaſe was made to M.* by the Company, and to him executed, *C. was at the Time of the Treaty, a Bankrupt.* The Queſtion was, Whether the Commiſſioners could aſſign the Leaſe to the prejudice of M. and Drake's Caſe was cited. The Lord Keeper ordered, that the Plea and Demurrer be ouſted, and the Benefit thereof ſaved till the Hearing; he doubted of the Leaſe; there were other Matters for the Benefit of M. alſo in the Plea. 2 Chan. Caſes 196. Paſch. 26 Car. 2. Street v. Mercer's Company, and Moſſe.

4. A. *mortgaged Lands*, and *afterward became a Bankrupt.* The Title of the Mortgages ſhall not be impeached by the Commiſſioners or Aſſignees of the Statute of Bankruptcy; Decreed. Fin. Rep. 466, 467. Mich. 32 Car. 2. Tanner v. Chapman.

5. Two Joint Traders, *one* of them *became a Bankrupt*; Per Holt Ch. J. the *Commiſſioners cannot meddle with the Intereſt of the other*, for it is not affected by the Bankruptcy of his Companion. 3 Salk. 61. Paſch. 7 W. 3. Anon.

6. A. becomes *Bankrupt*, and then *ſells Goods to B. B. ſells them to C.* which is a Converſion; then *a Commiſſion* of Bankrupts *is ſued, and an Aſſignment made by the Commiſſioners to E.* who brings Trover againſt C. Per Holt; the Action well lies; but that Point was alſo reſerved for his Conſideration. Ld. Raym. Rep. 741, at Lent Aſſiſes at Deptford, 16 Mar. 12 W. 3. Kirne v. Smith, & al.'

7. *D.* the Receiver of the New River Rent *aſſigned* to the Plaintiff by *a Bond, wherein* the Defendant *S. and G. were bound to him in* 700*l. for Payment of* 350*l.* and *this Aſſignment was to indemnify him againſt two Debts, for which P. ſtood bound as Surety* for D. and in Satisfaction of 30*l.* he owed the Plaintiff; *D. became a Bankrupt*, ſo *P. could not ſue in the Name of D. at Law, and brought his Bill to have the Money decreed to him in Equity.* Defendant *S. inſiſted, that D. is indebted to him* for four New River Shares, *and inſiſted to retain it out of the Bond*; and the Aſſignees inſiſted to have the Bond, they being juſt Creditors as well as the Plaintiff, and had the Law as well as Equity, on their Side.

Side. Per Ld. Keeper, the *Aſſignees can have no better Right than the Bankrupt himſelf*; and as the Bankrupt is bound by the Aſſignment, the Aſſignees under the Statute muſt be bound likewiſe, and ſtand in his Place; but they inſiſting D. was a Bankrupt before he aſſigned the Bond, he directed that to be tried at Law; but ſaid, he was in doubt whether *S. might not retain for his Debt*, and that Stoppage ſeemed to be a good Equity in ſuch Caſe. 2 Vern. 428, 429. pl. 390. Hill. 1761. Peters & al' v. Soame, & al'.

8. C. about two Months before Bankruptcy, *having truſt Money*, Tallies &c. *in her Hands belonging to her Children, makes a Deed, declaring the Truſt* of what belonged to her Children reſpectively &c. The Creditors would have ſet this aſide. Ld. Chancellor ſaid, it is a fair and honeſt Proceeding, there can be no Bankrupt in Equity, but at Law only. 10 Mod. 489. 498. Paſch. 8 Geo. Canc. Cock's Caſe.

2 Wms's Rep. 430. Mich. 1727. in Caſe of Small v. Oudley, the Maſter of the Rolls cited S. C. and ſaid, that Ld. Macclesfield declared, that this was ſo far from being an Act of Fraud, that it ſeemed to be juſt and commendable.

9. Appeal was from a Decree of Diſmiſſion at the Rolls upon this Caſe. The Defendant Warner made a *Leaſe* of an Inn to A. for Years, with a *Proviſo* in the Leaſe, *that the Leſſee, his Executors or Adminiſtrators, ſhould not aſſign the Term to any Perſon* or Perſons, *without the Conſent of the Leſſor, under his Hand in Writing*, firſt had and obtained with a *Power of re-entry in ſuch Caſe to the* Leſſor, *and that the Leaſe ſhould be void. Leſſee dies*, and *his Executor enters* and enjoys the Premiſſes, *and afterwards becomes a Bankrupt.* The Commiſſioners aſſign this Leaſe inter alia to the Aſſignees choſen by the Creditors, and afterwards in Conſideration of 50 l. they aſſign to the Plaintiff Goring, who brought this Bill to be reliev'd againſt this Proviſo, and to ſtay Proceedings in an Ejectment brought by the Leſſor againſt him upon this Proviſo &c. The Defendant Warner by his Anſwer inſiſts upon the Forfeiture at Law, and that the Proviſo was reaſonable and ought not to be ſet aſide in Equity. Per Macclesfield C. I don't think this is a breach of the Proviſo or Condition at Law, but whether it be ſo or not, I think this is a proper Caſe for Relief in a Court of Equity. I think *the Aſſignment by the Commiſſioners is clearly no breach of the Proviſo*, for that is done by Authority of a Statute, which will ſuperſede any private Agreement between the Parties, inconſiſtent with it, and I am inclin'd to think the Aſſignment over by the Aſſignees is not a breach of Condition; For the firſt Aſſignment by the Commiſſioners, is not a perfect and compleat Aſſignment within the Meaning of the Statute, and paſſes only the legal Intereſt ſubject to a Truſt to be ſold and diſpoſs'd of for the Benefit of the reſt of the Creditors, and the Diſpoſition is not compleat, till ſold by them for the Benefit of the Creditors. The firſt Aſſignment is only formal, and in eaſe of the Commiſſioners, and in order only to make a Sale thereof for the Benefit of the Creditors, and their Aſſignees ſtand in the Place of the Bankrupt, and is in effect his Aſſignee, and it is unjuſt and unreaſonable that ſuch a Proviſo ſhould fruſtrate and overthrow the Intent of a Statute, made in favour of honeſt Creditors, and deprive them of the Advantage they may make of a beneficial Leaſe. And though it was inſiſted, that the Commiſſioners nor their Aſſignees can be in no better a Condition than the Bankrupt himſelf, and conſequently cannot aſſign over without Licence, I think tho' that Rule holds true generally, yet there may be ſome Exceptions to it, and that the preſent Caſe is an Exception out of that Rule, and decreed the Plaintiff to hold and enjoy, and an Injunction, to ſtay Proceedings at Law. MS. Rep. Mich. 11 Geo. in Canc. Goring v. Warner.

See Doug. C. Rep. 174. 2. Term Rep. 134.

10. The Law is very clear, that the Aſſignees are exactly in the ſame Place as the Bankrupt, and ſtand in his Place to every Particular,

and any *Agreement entered into ſhall bind* them; and though there may not be the ſame Remedy againſt them, that is not from the Nature, but the Neceſſity, of the Thing; for he ſhall have an adequate and compleat Satisfaction, *as far as his Fortune in the Hands of the Aſſignees will admit of.* Select Caſes in Chan. in Ld. King's Time, 77. Trin. 2 Geo. 2. in Caſe of —— v. Du Rhone.

11. A Bankrupt, whoſe Eſtate is in Mortgage, *conveys the Equity of Redemption* to a third Perſon *after an Act of Bankruptcy, but before the Commiſſion* and Aſſignment, this ſhall not defeat the Aſſignees. But where *a Bona Fide Purchaſor* for a valuable Conſideration, *and without Notice*, has a Conteſt with the Aſſignees, *this Court will not* take any Advantage from him, therefore not *compel a Diſcovery.* A Commiſſion iſſued is Notice of the Bankruptcy. Caſes in Equ. in Ld. Talbot's Time. 65. Hill. 1734. Collet v. De Gols and Ward.

(S) Commiſſioners Power in ſelling, diſpoſing, aſſuring, and aſſigning Eſtates &c.

1. 13 *Eliz. cap.* 7. *S.* 7. THE *Lord Chancellor, upon Complaint in Writing, againſt Perſons being Bankrupt, ſhall have Power, by Commiſſion under the Great Seal, to appoint ſuch Perſons as to him ſhall ſeem good; who, or the moſt Part of them, ſhall have Power to take by their Diſcretions ſuch Order, with* all his Lands, as well Copyhold as Freehold, *which he ſhall have* in his own Right *before he became Bankrupt*, and alſo with all ſuch *Lands* as ſuch Perſon ſhall have purchaſed for Money, or other Recompence, jointly with his Wife, or Child, *to the only Uſe of ſuch Offender, or for ſuch Uſe, or Title, as ſuch Offender then ſhall have in the ſame, which he may depart withal*, or with any Perſon of Truſt, to any ſecret Uſe of ſuch Offender, and alſo with his Money, Goods, Merchandizes and Debts; *and cauſe the ſaid Lands &c. to be appraiſed to the beſt Value*, and by Deed indented, inrolled to make Sale *of the ſaid Lands &c. and of all Deeds touching only the ſame, belonging to ſuch Offender*, and alſo of all Fees, Offices, *Goods, and Chattles; or otherwiſe to order the ſame for Satisfaction of the Creditors; to every of the Creditors a Portion, rate like, according to their Debts; and every Direction, and other Thing done by the Perſons ſo authorized, ſhall be good in Law againſt the ſaid Offender, his Wife, Heirs, Children, and ſuch Perſons, as by joint Purchaſe with the Offenders ſhall have any Eſtate or Intereſt in the Premiſſes, and againſt all other Perſons claiming by, from, or under ſuch Offender, by any Acts done after ſuch Perſon ſhall become Bankrupt, and alſo againſt the Lords of the Manors, whereof the ſaid Copyhold Lands be holden.*

2. *S.* 3. Provided *that every Perſon, to whom any ſuch Sale of Copyhold Lands ſhall be made, ſhall before they take any Profit of the ſame*, agree with the Lords of the Manors for ſuch Fines as have been accuſtomed to be paid; *and upon ſuch Agreement, the Lords at the next Court, ſhall not only grant unto the Vendees, upon Requeſt, the ſame Cuſtomary Lands, by Copy of Court-Roll for ſuch Eſtate as to them ſhall be ſold, reſerving the ancient Rents, Cuſtoms, and Services, but alſo admit them Tenants, and re-their Fealty.*

3. *S.* 11. *If any Perſon declared a* Bankrupt *by Virtue of this Act, ſhall* at any Time after purchaſe Lands or Chattles, or any *Lands or Chattles* ſhall deſcend or come to ſuch Bankrupts *before their Debts ſhall be fully ſatisfied*

tisfied or agreed for; the ſaid Lands and Chattles ſhall by the Commiſſioners be bargained, ſold, extended, delivered and uſed for Payment of the ſaid Creditors, in like Manner as other the Lands and Chattles of the ſaid Bankrupts.

4. *S.* 12. *This act ſhall* not extend to *any* Lands *which ſhall be* aſſured *by any Bankrupt* before he became Bankrupt, *ſo that ſuch Aſſurance be made* bona fide, *and not the Uſe of the Bankrupt himſelf only, or of his Heirs, and that the Parties to whoſe Uſe ſuch Aſſurance ſhall be made, be not privy to the fraudulent Purpoſe of ſuch Bankrupt to deceive his Creditors.*

5. A Debtor became a *Bankrupt*, and *after a Commiſſion* awarded he *ſold Part of* his *Goods to one of his Creditors in Satisfaction of Part of his Debt*, and afterwards the *Commiſſioners* by Indenture *ſold thoſe Goods jointly to the* Plaintiffs, who were the other Creditors. It was reſolved that the Sale by the ſaid Commiſſioners was good, for the Intent of the Statutes is to relieve the Creditors equally in Diſtribution of the Bankrupt's Eſtate, and that he himſelf cannot diſpoſe of his Goods after the Commiſſion awarded; and if a Creditor refuſes to come into the Commiſſion, and the Goods are ſold to others, it is likewiſe good. 2 Rep. 23. Trin. 31 Eliz. B. R. Caſe of Bankrupts.

Mo. 594. pl 805. Smith v. Mills, S. P. and ſeems to be S. C. adjudged accordingly.

6. 21 *Jac.* 1. *cap.* 19. *S.* 10. *If any Lands, Goods, or other* Eſtate, *of any Bankrupt, ſhall be* extended, *after ſuch Time as he is become Bankrupt*, under Colour of being an Accountant, or indebted unto the King; *it ſhall be lawful for the Commiſſioners to examine upon Oath, whether the ſaid Debt were due to ſuch Debtor or Accountant, upon any Bargain or Contract originally made, betwixt ſuch Accountant and the ſaid Bankrupt; and if ſuch Bargain or Contract was originally made with any other Perſons than the ſaid Debtor or Accountant, or for the Uſe and Truſt of any other Perſon, it ſhall be lawful for the Commiſſioners to diſpoſe of all ſuch Lands, Goods and Debts ſo extended, for the Uſe of the Creditori.*

7. A. Indebted to B. prevailed on C. to be bound with him, and for his Indemnification; A. *aſſigned ſeveral Debts and covenanted not to releaſe* the ſame or any Part thereof; A. became Bankrupt; decreed the Letter of Attorney, by which the Debts were ſo aſſigned, ſhould be confirmed to C. againſt A. and all claiming under him. N. Ch. R. 22. 9 Car. 1. Meechet v. Bradſhaw.

2 Vern. R. 428. Peters v. Soame, S. P.

8. It has been ruled in Canc. that they may aſſign *an Equity or Redemption* of a Mortgage, but Quære; for it ſeems to be againſt the Statute, which enables them to the Benefit of a Condition that is performed and not forfeited. Chan. Caſes 71. Hill 17 & 18 Car. 2. cited by Newdigate Serj. in Caſe of Drake v. Mayor of Exon.

N. Ch. R. 102. S. C. & S. P. —— 2 Vern 97. in pl. 89. S. P. cited per Cur.

and ſays, that it was for ſome time doubted. —— Held per Hutchins Commiſſioner, that the Commiſſioners ſhould have the *Equity of Redemption.* 2 Vern. 101. Trin. 1690. in Caſe of Hitchcock v. Sedgwick. —— 2 Vern. 286. pl. 274. Hill. 1692. S. P. ſeems admitted.

9. A Leſſor and Leſſee for Years, the *Leſſor covenants with the Leſſee and his Aſſigns to renew*, then the Leſſee becomes Bankrupt, and Commiſſioners of Bankrupt aſſign this Covenant. The Aſſignee brought this Bill to have the Defendant, the Leſſor, renew to him. The Caſe was referred to Wyndham J. and Baron Turner, and they certified the Plaintiff ought not to be relieved; and ſo he was diſmiſſed. Chan. Caſes 71. Hill 17 & 18 Car. 2. in Canc. Drake v. the Mayor of Exon.

Nels. Chan. Rep. 102. S. C. in totidem Verbis —— S. C. cited per Cur. as adjudged accordingly. 2 Vern. 97.

in pl. 89. —— S. C. cited per Cur. 2 Vern. 194. in pl. 176. as adjudged.

10 The Commiſſioners of Bankrupts have only a Power to ſell, and no Eſtate, and to paſs the Eſtate there muſt not only be a *Deed indented*, but the ſame *muſt be inrolled alſo*, and in this Caſe there is no Relation; for no Time is mentioned within which it is to be done, ſo that it might extend

1 Vent 360. S. C. & S. P.

extend to Seven or Twenty Years, which would be dingerous. 2 Jo. 197. Paſch 34 Car. 2. B. R. in Caſe of Perry v. Bowers.

12 Mod. 324. S. C. accordingly, by Holt Ch. J. but if they bring the one Action they ſhall not afterwards bring the other.

11. Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not merely void; the Contract is good between the Parties, but it may be *avoided, or not* avoided, by the Commiſſioners or Aſſignees at Pleaſure; therefore they may either bring *Trover* for the Goods as ſuppoſing the Contract to be void, or may bring Debt or Aſſumpſit for the Value, which *affirms the Contract*. 3 Salk. 59. pl. 2. Hill 11 W. 3. B. R. Huſſey v. Fidel.

Gilb. Equ. Rep. 140. S. C. —— Equ. Abr. 54 pl. 7. S. C.

12. When the Commiſſioners have *aſſigned the Bankrupt's Eſtate and given the Bankrupt his Certificate* and Diſcharge, they have executed their Power, and the *Debts*, which the Bankrupt owed to the Creditors before the Bankruptcy, *are now extinct by Act of Parliament*, and a Legacy given to the Feme on a Contingency and which happened after the Bankruptcy, but was not aſſigned over before the Certificate and Diſcharge, is as a new acquired Eſtate by the Husband in Right of his Wife. Wms's Rep. 385, 386. per Ld. C. Parker. Mich. 1718. Jacobſon v. Williams.

(T) Liable. What.

1. 13 *Eliz. cap.* 7. *S.* 11. IF *any Perſon, declared a* Bankrupt *by Virtue of this Act, ſhall at any Time after* purchaſe Lands or Chattles; or *any Lands or Chattles* ſhall deſcend *or come to ſuch Bankrupts, before their Debts ſhall be fully ſatisfied or agreed for, the ſaid Lands and Chattles ſhall, by the Commiſſioners, be bargained, ſold, extended, delivered and uſed for Payment of the ſaid Creditors, in like Manner as other the Lands and Chattles of the ſaid Bankrupts.*

Gilb. Treat. of Ten. 169 S. P. and that Copyhold Lands are within the Statutes of Bankrupts, becauſe the Stat. 13 Eliz. expreſsly mentions them, and though the other Statutes do not, yet they being made for further Remedy in the Matter aforeſaid, are not to be expounded by the former, eſpecially ſince that has taken Care that no Prejudice ſhall happen to the Lord.

2. By the Statute 13 *Eliz. cap.* 7. it is expreſsly provided, that the Copyhold Land, as well as the Freehold *Land, of a Bankrupt*, ſhall be ſold for the ſatisfying of the Creditor. Co. Comp. Cop. 61. S. 52.

3. 1 *Jac.* 1. *cap.* 15. *S.* 12. *All* Money *which ſhall be* forfeited *by this Act*, ſhall be recovered by the Creditors *only, or any of them that will ſue for the ſame by Action of Debt &c. in any of the King's Courts of Record*; and *the Money ſo recovered, the Charges of Suit being deducted*, ſhall be diſtributed towards Payment of the Creditors.

4. If an *Obligation* be *taken in the Name of another to the Uſe of a Bankrupt*, the Commiſſioners may well aſſign that, unleſs the other Party hath of his own Money paid and ſatisfied Debts due by the Bankrupt. In Conſideration of that alſo, Creditors within 13 Eliz. are intended, for Merchandizes &c. and not Creditors upon Counter Bonds. And the Commiſſioners ſhall judge of that; for if they make an Aſſignment to ſuch Creditors, ſuch Allegations afterwards come Tarde; for the Statute veſts the Thing aſſigned in the Party to whom &c. Per Cur. Noy 142. Calchman's Caſe.

5. 21 *Jac.*

5. 21 *Jac. cap.* 19. *S.* 11. Enacts that, *if at any Time hereafter any Perſon or Perſons ſhall become Bankrupt, and at ſuch Time as they ſhall ſo become Bankrupt, ſhall,* by the Conſent of the true Owner *or Proprietary,* have in their Poſſeſſion, *Order and Diſpoſition,* any Goods or Chattels whereof they ſhall be reputed Owners, *and take upon themſelves the Sale, Alteration and Diſpoſition as Owners, in every ſuch Caſe, ſuch Goods ſhall be liable to the Bankrupt's Debts, as if they had been the proper Goods of the Bankrupt.*

A delivered Diamonds to B. to ſell, and then B. became Bankrupt. Upon Trover brought by A. againſt the Aſſignees of the Commiſſioners, it appearing upon the Trial before Holt Ch. J. that the real Property of them belonged to the Plaintiff, the Clauſe of 21 *Jac.* 1. *cap.* 19. *S.* 10, 11. being inſiſted upon by the Defendant's Counſel, and it ſeeming an Hardſhip on the Plaintiff, it was made a Caſe in B. R. where it was adjudged upon Argument, that the general Words ought to be explained by the Preamble, and that the Jewels being originally the Plaintiff's, and that the *Bankrupt having no more than a bare Authority to ſell them for the Plaintiff's Uſe,* were not liable to the Bankruptcy. 2 Wms's Rep 318. cites it, Arg. as determined Mich 1708 In Caſe of L'Apoſtre v Le Plaiſtrier.

A *Bill of Sale of Leaſes and Perſonal Eſtate* was made by A. *to B. and C. in Truſt for Payment of A's Debts.* B. at firſt acted in the Truſt, but afterwards *C. took the whole into his Poſſeſſion,* and acted alone, *and became a Bankrupt.* Upon a Bill by A. againſt C and the Aſſignees of the Bankruptcy for an Account, Ld. C. Cowper doubted, by reaſon of the 21 *Jac.* 1. *cap* 19. *S.* 10, 11. but afterwards held this Caſe not within thoſe Clauſes, in regard this *Aſſignment* to B. and C. *was with an Honeſt Intent,* viz. for the Payment of the Debts of the Aſſignor, and therefore decreed the Aſſignees under the Commiſſion againſt C. to account for all the Eſtate of A. and that the ſame ſhould not be liable to C's Bankruptcy. Wms's Rep, 314. 321. Trin. 1716. Copeman v. Gallant.

It was argued, that if a *Factor becomes a Bankrupt,* the Goods bought by him as Factor ſhall not be ſubject to his Debts. Ld. Chancellor ask'd if there is any Caſe of that? and ſaid, that if a *Factor continues a long Poſſeſſion, by which they are taken as his own,* and Credit given to him on that Account, it would alter the Caſe; for if Poſſeſſion and Diſpoſition be given to a Perſon that becomes a Bankrupt, though no Intent of Fraud appear, yet if it gives *a falſe Credit,* there is the ſame Inconvenience as if Fraud was intended; for if the Bankrupt appear the viſible Owner ſo as to gain a falſe Credit, there is the ſame Inconvenience, and it matters not whether it was by Fraud, or only by Neglect, or out of a Humour. MS. Rep. Trin. 1716. in Canc. Copeman v. Gallant.

6. *S.* 12. *The* Commiſſioners ſhall have Power *by Deed indebted and inrolled within ſix Months after the making, in ſome of his Majeſty's Courts of Record at Weſtminſter,* to bargain, ſell and convey any Manors, or Hereditaments, whereof any Bankrupt ſhall be ſeiſed of any Eſtate in Tail, *in Poſſeſſion, Reverſion or Remainder, and* whereof no Reverſion or Remainder ſhall be in the King of the Gift or Proviſion of his Majeſty, his Progenitors, or Succeſſors, *for the Benefit of the Creditors, and all ſuch Bargains, Sales and Conveyances ſhall be good againſt all Perſons whom the Bankrupt by common Recovery, or other Means, might debar from any Remainder, Reverſion, Rent Title, or Poſſibility, of the ſaid Manors or Hereditaments.*

7. Two Merchants became *bound in a Statute* 21 Jac. 1. for a true Debt, which being forfeited, the Cogniſee ſued forth an *Extent* 30 *October* 3 *Car. and extended the Goods* 31 *October following,* and the 3 *November the Cogniſors became Bankrupts,* and upon the 6 *November the Defendant brought a Liberate* upon the Extent, *and the Goods were delivered to him according to the Appraiſement;* 8 *November a Commiſſion of Bankruptcy was awarded* againſt the Cogniſors, and the 23 *November the Commiſſioners ſold the Goods* to the Plaintiff, who brought Trover againſt the Cogniſee, and the Queſtion was, if this Sale was good? It was per tot. Cur. reſolved, that as the Goods were extended before the Cogniſors became Bankrupt, though delivered by the Liberate afterwards, they could not be ſold by the Commiſſioners, becauſe after the Extent they were *in Cuſtodia Legis,* ſo as the Cogniſors had no Power to give, ſell, or diſpoſe of them; beſides, the Extent was returned before they became Bankrupts, and the Goods were delivered to the Cogniſee are the Liberate, before the Commiſſion ſued out, and when the *Liberate* is brought, it *ſhall have Relation to the Extent,* and they be quaſi but one Extent. Cro. C. 148. Hill. 4 Car. 1. B. R. Audley v. Halſey.

Jo 202. pl. 3. S. C. agreed Una Voce againſt the Plaintiff.

Jo 215. pl. 4. S. C. held accordingly. —— S. C. cited by Ventris. 2 Vent. 95. —— If the Sheriff takes the Goods of a Bankrupt in Execution, though it before the Commiſſion taken out, yet it ſeems that the Commiſſioners may ſell them, if it be executed after the Party became a Bankrupt.

8. Upon a Fieri Facias *Money was levied* by the Sheriff *on an Execution for Damages* and Coſts *in an Action on the Caſe for Words*, and *before the Return of the Writ*, the *Plaintiff*, at whoſe Suit the Execution was taken out, *became a Bankrupt*, and his Creditors having ſued out a Commiſſion of Bankruptcy, the Commiſſioners aſſigned this Money in the Sheriff's Hand to them; adjudged, that the Aſſignment was void, becauſe it was made after the Execution executed, and that was before the Party became a Bankrupt, and it can't be ſaid to be the Bankrupt's Money, till it is paid to him, ſo that the Money was in Cuſtodia Legis, and no Body could give a Legal Diſcharge for it, but he who was a Party to the Record. Cro. C. 166, 176. pl. 24. Mich. 5 Car. B. R. Benſon v. Flower.

Freem. Rep. 397. pl. 516. b. Trin. 1675. Anon.

9. If a Gentleman *buys and ſells Land*, he is not within the Statute; For it ought to be taken of thoſe who buy and ſell Perſonal Things; Per Crooke J. Mar. 35, 36. pl. 67. Trin. 15 Car.

Lev. 173. S. C. adjudg'd for the Officer, and Windham and Twiſden held, that the Goods are bound by the Act of Bankruptcy, and ſubject to the Diſpoſal of the Commiſſioners. —— Keb. 930. pl. 36. S. C. it was agreed by the Court and Counſel, that ſuch Execution of the Writ was not ſufficient to hinder a Diviſion amongſt the Creditors. —— 2 Keb. 34. pl. 66. S. C. the Court agreed a Right in the Creditors by the Act of Bankruptcy, and that thereby the Goods are bound, though the Creditors have no Action till Aſſignment.

10. A Bailiff took Goods in Execution by Vertue of a *Fi. Fa.* which *bore Teſte* 4 *Junii*, *but not taken out before* 11 *Junii* following, and *between thoſe two Days* (viz.) 6 Junii, *the Owner of the Goods became a Bankrupt*, and in an Action of Trover brought by the Aſſignee of the Commiſſioners of Bankruptcy againſt the Bailiff, in whoſe Poſſeſſion the Goods were, it was the Opinion of the Court, that they were *liable to the Judgment from the* Time of the *Teſte of the Fieri Facias*, for that is properly the Emanatio Brevis, though in Fact it be at another Time. Sid. 271. Trin. 17 Car. 2. B. R. Baily v. Bunning.

11. On Motion for *Money* out of Court *brought in by the Sheriff on a Vend. exponas Teſte* before, but *after Commiſſion of Bankrupts taken out*, the Court ſaid, that unleſs the Goods were ſeiſed before the Party became a Bankrupt, though they were ſeiſed before the Teſte of the Commiſſion, yet the Goods are bound by the Bankruptcy. 3. Keb. 480. Trin. 27. Car. 2. B. R. Bingley v. Warcop.

12. In a Special Verdict in Aſſumpſit brought by an Aſſignee of the Commiſſioners of Bankrupts, the Caſe was, T. obtained a *Judgment againſt W.* for 400 l. and *on the* 19 *June brought a Fi. Fa.* which was *delivered to the Sheriff* 30 *June* in the Morning, and *at Night W. left his Houſe, and became a Bankrupt. On the* 1*ſt of October following, the Sheriff levied of the Goods of W. to the Value of* 400 *l. and paid the ſame to T.* and afterwards the *Commiſſioners aſſigned this Money to the Plaintiff*, who brought this Action againſt T. It was held by all the Juſtices, that the Aſſignment by the Commiſſioners was good; for the New Statute makes no Difference in this Caſe; becauſe *before* that Statute was made, *the Goods were bound from the Teſte of the Writ*, *but now they are bound from the Delivery of the to the Sheriff*; that is, they are bound that the Bankrupt himſelf cannot diſpoſe them, but the Commiſſioners may, by the expreſs Words of the Statute 21 *Jac.* 1. *c.* 19. *no Execution thereof having been ſerved and executed.* But then all the Judges (except Levinz, who at laſt aſſented) held clearly, that the Commiſſioners could not aſſign the Money, for their Power is only over the Bankrupt's Goods, but *the Money for which they were ſold was never the Bank-*

Bankrupt's Money, and ſo no Action would lie for it. 3 Lev. 69, 191. Mich. 36 Car. 2. C. B. Phillips v. Thompſon.

13. When a *Judgment* is once *executed*, the Goods are in Cuſtodia Legis, and ſhall not be taken away by an Exchequer Proceſs, or Aſſignment of Commiſſioners of Bankrupts. 3 Mod. 236. Trin. 4 Jac. 2. in B. R. Letchmere v. Thorowgood, & al'. Comb. 121. Trin. 1 W. & M. in B. R. the S. C. and Judgment accordingly for the Defendant. —— Show. 146. Letchmore v. Toplady, S. C. adjudged for the Defendant. —— 2 Vent. 169, 170. S. C the Court was of the ſame Opinion, but upon Importunity Leave was given to ſpeak further to the Caſe the next Term.

14. A. puts out 1000 l. at Intereſt to the Eaſt India Company, and *takes Bond for it in the Name of J. S.* his Wife's Relation, and afterwards A. is Bankrupt; J. S. is ſummoned before the Commiſſioners, but before his Examination, tells the Company that the Money was not his, but that they ſhould pay it to the Perſon as ſhould bring the Bond. Accordingly A's Wife brought the Bond, and receiv'd the Money. The Court will not enforce J. S. to pay the Money. Ch. Prec. 18. pl. 17. Hill. 1690. Hill v. Moor.

15. Two Foreigners beyond Sea *conſign Goods to B.* then in good Circumſtances in London, but before the Goods arrive B. becomes a Bankrupt; If they can by any Means *prevent the coming of the Goods to B.* or the Aſſignees, they may; and B. or the Aſſignees ſhall have no Relief in Equity. 2 Vern. 203. pl. 187. Hill. 1690. Wiſeman v. Vandeputt.

16. *Till an Aſſignment*, the property of the *Goods* is not transferr'd out of the Bankrupt. 1 Salk. 108. Paſch. 1 W. & M. in B. R. Cary v. Criſp.

17. The *Father on his Son's Marriage ſettles Lands on himſelf for Life*, Remainder *to his Son for Life* &c. *and covenants during his own Life, to pay the Son 15 l. a Year.* The *Son becomes a Bankrupt*; The Plaintiff as Aſſignee, brings a Bill againſt the Father, to have the Benefit of this Agreement, and to compel the Payment of the Annuity. But per Cur. an *Aſſignee* under a Statute *is not intitled to have the Performance of an Agreement made with the Bankrupt.* 2 Vern. 194, pl. 176. Mich. 1690. Moyſes v. Little.

18. If a Bankrupt be *outlawed after* he has committed an act of Bankruptcy, and upon the Outlawry the *K. leaſes the Profits of his Lands, and grants his Chattles*, and after a Commiſſion of Bankrupts is taken out, this will not defeat the Intereſt which the Creditors have by the Bankruptcy in his Eſtate. 1 Salk. 108. pl. 2. Hill. 2 W. & M. in C. B. Pain & al' v. Teap, & al.'

19. An *Award* is made in an Adverſary Suit between A. and B. Partners in Iron Mills; on a Reference by Conſent, and after Exceptions taken to, it was confirm'd by the Court. A. was *then a Bankrupt* but *not known* to be ſo, a Commiſſion is afterwards taken out; Aſſignee brought a Bill againſt B. for an Account of A's Eſtate; But per Cur. there appearing no Fraud in obtaining the Award, but it being in an Adverſary Suit, and the Award after excepted to &c. though A. might be then a Bankrupt, yet not being known to be ſo at the Time of the Award, ſuch Award ought to ſtand. 2 Vern. R. 229. Paſch. 1691. Whitacre v. Pawlin. Ibid 230 at the End adds a Quære, if the Decree on a Rehearing was not reverſed.

20. A Man had *deviſed Lands*, which were *in Mortgage, to be ſold, and the Surplus* of the Money *to be paid to his Daughter*; the Daughter *married a Man, who* ſoon after *became a Bankrupt*, and the Commiſſioners aſſigned this Intereſt of the Wife's; the Husband died, and the Aſſignees brought this Bill againſt the Wife and Truſtees, to have the Land ſold, and the Surplus of the Money paid to them; but the Court would not aſſiſt in ſtripping the Wife (who was wholly unprovided for) of this Intereſt,

Intereſt, but diſmiſſed the Bill at the Rolls. Abr. Equ. Caſes. 54 Mich. 1698. Parker v. Dykes.

21. It was ruled by Holt Ch. J. upon Tueſday January 31. Hill. 10 W. 3. at Niſi Prius at Guild Hall, upon Evidence in a Trial, 1ſt. That if the *Goods* of A. be *ſeiſed upon a Fieri Facias* on a Judgment againſt A. *and after the Seiſure A. becomes Bankrupt*; this act of Bankruptcy cannot affect the Goods levied in Execution as aforeſaid. *But if A was a Bankrupt before the Seiſure*, and after the Bankruptcy, the Sheriff upon a Writ of Fieri Facias to him directed upon a Judgment obtained againſt A. ſeiſes the Goods and ſells them, and a Comiſſion of Bankruptcy is granted, and the ſaid Goods aſſign'd by the Commiſſioners, the Aſſignee of the Commiſſioners may maintain Trover againſt the Vendee of the Goods; but no Action will lie againſt the Sheriff, becauſe he obey'd the Writ. Ld. Raym. Rep. 725. Cole v. Davis.

22. It was reſolv'd in this Caſe, that if *Goods* of A. are *ſeiſed upon a Fieri Facias, and ſold to B. Bona Fide* upon valuable Conſideration; though *B. permits A. to have the Goods in his Poſſeſſion, upon Condition that A.* ſhall *pay to B. the Money, as he ſhall raiſe it by the Sale* of the Goods, this will not make the Execution fraudulent. And in ſuch Caſe a ſubſequent Act of Bankruptcy by A. will not defeat the Sale. But though the original Debt was Juſt, yet, if the Execution was fraudulent, viz. upon *any Truſt*, a ſubſequent Act of Bankruptcy will defeat it. Ruled by Holt Ch. J. Ld. Raym. Rep. 725. Cole v. Davies, & al' Aſſignees of Maul a Bankrupt.

A Legacy was left *to a Feme Covert*, and afterwards

23. A *Legacy* was given to A. before he became a Bankrupt, for which he had a Decree. *Aſſignee* ſhall have the Benefit of the *Decree*. 2 Vern. R. 432. Hill. 1701. Toulſon v. Grout.

her Husband became Bankrupt; the Commiſſioners aſſigned over the Legacy, and then the Bankrupt died. Decreed that the Wife *ſurviving* ſhould have the Legacy; Arg. Ch. Pree. 121. Trin. 1700. in Caſe of Burnet v. Kinaſton.

6 Mod. 68. S. P. in S. C. by Holt Ch. J. that if the Aſſignee dies during the Life of Copyholder-Bankrupt, there will be a Caſe out of the Cuſtom by the Tranſmutation of the Grant by the Act of Parliament,

24. In a ſpecial Verdict in Ejectment the Caſe was, the *Cuſtom* of a Manor was, *that a Copyholder might ſurrender for three Lives ſucceſſive, and that an Heriot was due on the Death of every Tenant.* A Copyholder ſurrendered to W. R. for his own Life, and for the Lives of A. B. and C. D. and the Queſtion was, Whether this was warranted by the Cuſtom? and adjudg'd that it was, for there could be no Occupancy; But Powell Juſtice doubted, becauſe of the Statute of Bankrupts; Sed per Holt. Ch. J. that Statute makes no Difference, for *if the Copyholder becomes Bankrupt, and his Eſtate is aſſigned* by the Commiſſioners, the *Aſſignee would have it determinable upon the Life of the Copyholder Bankrupt*, and that the Heriot would be then due, but not upon the Death of the Aſſignee, becauſe it was ſo originally, and cannot be altered by the Act of the Copyholder himſelf. 3 Salk. 181. pl. 1. Hill. 1701, in Caſe of Smartle v. Penhallow.

and yet the Lord ſhall have his Heriot, for it never was the Intent of the Statute, to put the Aſſignee in a better Condition than his Principal, whoſe Eſtate he has, would have been in, nor to work an Alteration of Tenement to the Prejudice of the Lord; This is ſuppoſing the Copyholder ſurviving ſhould not have it back again, and if he ſhall have it again upon the Death of the Aſſignee, during his Life, then the Lord by original Cuſtom ought to have a Heriot, and a ſubſequent Act of Bankruptcy ſhall not defeat him of it; and if the Copyholder had died, living the Aſſignee, and thereby his Intereſt determined, as ſome thought it would, Quære, who ſhall pay the Heriot? But upon this Point they ſeemed cautious of delivering any Opinion, but reſerved themſelves till that Matter would come to be a Queſtion; for they ſaid it was worth Conſideration.

25. If

25. If there be ſeveral *Joint-Traders*, *Payment to one* of them *is Payment to all. So if* they *all, except him to whom the Payment was made, were Bankrupts*, the Payment is only unavoidable as to his Proportion. At Niſi Prius coram Holt. 12 Mod. 447. Paſch. 13 W. 3. Anon. See (Y)

26. And if there be *four Partners, whereof three are Bankrupts*, and their Shares aſſigned, and a Payment was made to him that was no Bankrupt, it is a Payment to all the Aſſignees, for now they are all Partners. Ibid. See (Y)

27. Tho' a Surrender of a *Coppyhold* be void in Law for *want of a Preſentment*, and that might be the Laches of the Mortgage in not procuring it, yet the Surrender was a Lien and bound the Land in Equity; and the Surrenderor, or if he become Bankrupt, the Aſſignee, who ought not to be in better Caſe than the Bankrupt, is plainly bound in Equity by this defective Conveyance. (Et come moy ſemble, ſays the Reporter; He became a *Truſtee for the Purchaſor.*) 2 Salk. 449. pl. 2. Mich. 5 Ann. in Canc. Taylor v. Wheeler. 2 Vern. 564. pl 513 S. C. decreed accordingly, though the Neglect was for 4 Years, and though the Lord Keeper inclined on the firſt Hearing to diſmiſs the Bill. —— S. C. cited by Mr. Vernon. Wms's Rep. 280. —— S. C. cited by Mr. Vernon. Chan. Prec 524. —— S. C. cited 10 Mod. 492. 494. 495.

28. Commiſſioners of Bankrupt of one S. *aſſign a Bond* of 80 l. which was *made to* one W. who was *former Husband to the Wife of S. and to whom ſhe was Executrix*, and held per Cur. that they could not aſſign any Thing but what the Bankrupt had in his own Right. The Power the Husband had of diſpoſing of it, does not make it his till he has diſpoſed of it. Per Holt Ch. J. and Powell J. ſed adjornatur. 11 Mod. 138. pl. 5. Hill. 6 Ann. Reg. B. R. Ludloe v. Browning.

29. A. was *Aſſignee* of a *Commiſſion of Bankruptcy* iſſued out againſt one Boſvil, who had *contracted* with the Defendant *for Goods to the Value of* 244 *l.* but not having ready Money to pay for them, offered to *mortgage* to him *an Eſtate* he had *in Poſſeſſion*, as a Security for the Money; and for that Purpoſe left with Defendant the *Title Deeds* to get the *Aſſignment* drawn; Defendant carried the Deeds to an Attorney to draw the Aſſignment, who died without doing it; after that, he carried them to a Serivener, but before the Aſſignment was perfected, Boſvil became a Bankrupt. A. now brought his Bill *to have the Deeds delivered up* for the ſelling of the Eſtate to ſatisfy the Creditors. Defendant's Council urged, that this was more than a Pledge of the Deeds, for that an Aſſignment was intended to be made; that if it had been made, the Court would not have taken it from him without Payment of the Money; that it's not being made, was owing to the Death of the Attorney, which was an *Accident*, and this Court often relieves Accidents; and therefore the Deeds ought not to be delivered up without Payment of the Money. The Court decreed the Deeds to be brought before the Maſter, and to be deliver'd by Schedule to the Plaintiff. But, note, no Reaſon was given for this Decree. Ch. Prec. 375. Mich. 1713. Brander v. Boles. Gilb. Equ. Lep. 35, 36. Brander v. Robbs, S. C in totidem Verbis, but adds that, Sed hoc Durum habebatur.

30. *Feme before Marriage veſts her Eſtate in Truſtees for her ſeparate Maintenance*; her Debts will not be diſcharged by the Bankruptcy, nor her Eſtate out of the Reach of the Creditors; But ſuch Settlement or Conveyance quoad the Creditors ſhall be deem'd void and fraudulent; Per Parker Ch. J. in delivering the Opinion of the Court. 10 Mod. 247. Trin. 13 Ann. B. R. Miles v. Williams. S P. by Ld. Ch J Parker, Trin. 1714. Wms's Rep. 258. in Caſe of Miles v. Williams.

31. M. a Feme *ſole entred into a Bond, and married A. who after became Bankrupt.* It was reſolved by the Court of B. R. that by the Bankruptcy of the Husband, the Bond-Debt of the Wife is diſcharged, and 10 Mod. 160. 243. S.C. reſolved accordingly.

alſo that *Debts due to the Wife, though unrecovered*, are within the Act of 4 Annæ, cap. 17. to be aſſign'd by the Commiſſioners of the Bankruptcy. Wms's Rep. 249. Trin. 1714. B. R. Miles v. Williams.

Gilb. Equ. Rep. 140. S. C.

32. A Feme ſole *Legatee of* 1000 *l. payable after the Death of the Teſtator's Wife, and at her Age of twenty Years, if ſhe ſhould live ſo long*, at about eighteen Years of Age married J. S. who after became a Bankrupt. Then the Widow died, and the Legatee became of twenty Years of Age. The Aſſignees of the Bankrupt's Eſtate brought a Bill, claiming the 1000 l. which was decreed by Baron Price in the Abſence of Ld. C. Cowper. But upon an Appeal to Ld. Chancellor, his Lordſhip declared, that the Aſſignees were in no better Condition than the Bankrupt himſelf, and that, had he ſued for the Legacy, the Court would oblige him to make a *Proviſion for the Wife and Children*, and that ſo muſt the Aſſignees, if they come here for Equity. Wms's Rep. 382. Mich. 1717. Jacobſon v. Williams.

33. *But as to the Intereſt of the* 1000 *l.* that having been commonly allow'd to be received by the Bankrupt, ſo ought the Aſſignees to receive the ſame during his Life. Ibid. 383.

34. *And if* the Bankrupt's *Wife ſhould die without Iſſue*, then the Bankrupt would have been allow'd to receive the whole Money, and therefore in ſuch Caſe the Aſſignees ſhould be allowed to receive it alſo. Ibid. 384.

35. *Feme ſole takes a Mortgage* for 800 l. *and marries B. a Tradeſman, who becomes Bankrupt.* The Commiſſioners aſſign all his Eſtate Real and Perſonal. *B. dies.* The Wife claim'd the Benefit of the Mortgage, and brought her Bill for that Purpoſe, and to have the Writings from the Aſſignees. The Maſter of the Rolls delivered his Opinion ſolemnly, firſt for the Wife, and afterwards for the Aſſignees; But ſaid, that if there had been any *Articles before the Marriage, purporting that this Money ſhould continue in the Wife as her Proviſion*, or ſhould be aſſigned in Truſt for her, this would have been a *Specifick Lien* upon the Mortgage, and have preſerved it from the Bankruptcy. Wms's Rep. 458. Trin. 1718. Boſvil v. Brander.

36. *And* his Honour held, that *if the Aſſignees had in this Caſe brought their Bill againſt the Widow*, Equity would hardly have lent any Aſſiſtance againſt her; becauſe they claiming under the Husband, could be in no better Plight than the Husband would have been, and had he ſued for the Money, or prayed a Foreclоſure, Equity would (probably) not have compelled the Payment to him, without his making ſome Proviſion for his Wife, or at leaſt upon her Application the Court might have prevented Payment to him, unleſs he make ſome Proviſion for her. Wms's Rep. 459. Trin. 1718. Boſvil v. Brander.

37. *A. living in a remote Part* of England *from B.* and having Dealings with him, *ſends him a Quantity of Goods*; *B.* apprehenſive he ſhould ſoon be a Bankrupt, and not thinking it reaſonable, that theſe Goods ſhould go to the Payment of other Creditors, *delivers a Quantity of Goods*, which were *moſtly the very ſame that were ſent him, to C. for the Uſe of A.* After that, but *before A's Acceptance of them, B. breaks.* The Queſtion was, whether the Delivery of theſe Goods to C. for the Uſe of A. did not veſt the Property of them in A. ſo abſolutely, as to put them out of the Diſpoſal of the Commiſſioners of Bankruptcy; and upon this appearing by Evidence, at the Trial, to be the Caſe, it was ſtated by the Direction of Parker Ch. J. who try'd the Cauſe, for the Opinion of the Court, who all delivered their Opinion Seriatim this Term, that the Property of the Goods was ſo veſted in A. by the Delivery of the Goods to C. for his Uſe, that they were not ſubject to the Diſpoſal of the Commiſſioners. 10 Mod. 432. Paſch. 5 Geo. 1. B. R. Atkins v. Berwick.

38. A

38. A Trader in London having Money of J. S. (who reſided in Holland) in his Hands *bought S. S. Stock as Factor for J. S. and took the Stock in his own Name, but entred it in his own Name, but enter'd it in his Account Book as bought for J. S.* after which the Trader became Bankrupt. Determined by the Lord Parker, that the Truſt Stock was not liable to the Bankruptcy, and ſaid, it would leſſen the Credit of the Nation to make ſuch a Conſtruction. 3 Wms's Rep. 187 in a Note of the Reporter cites Trin. 1721. Ex parte Chion.

39. *Aſſignee* is the *ſame Condition* (as to the Right) with the Bankrupt himſelf, and conſequently if he was *barred* by the Statute *of Limitations*, ſo ſhall the Aſſignee. 8 Mod. 171. Trin. 9 Geo. Grey v. Bendiſh.

Ibid. cites the Caſe of Maſon v. Plunket. — One *Joint Trader* becomes a Bankrupt, and the other receives 100 l. of a Joint Debt. Aſſignee brought *Trover for the whole Money received*; But reſolved he could only maintain Action for a Moiety, for he can only have ſuch Action as the Bankrupt could. 2 Show. 103. Paſch. 32 Car. 2. B. R. Ruſhward v. Hodſon.

40. In an Action of Trover for certain *S. S.* Bonds, this Queſtion fell out upon the Trial, Whether if a *Bankrupt's Wife employs another to buy Bonds with the Bankrupt's Money, and he accordingly does ſo, and delivers them to the Wife*, the Aſſignees under the Commiſſion may come upon the Buyer. Upon which Queſtion, the Ld. Ch. J. whom the Cauſe was tried before, ordered the Poſtea to be ſtayed. And now the *Court ſeemed to be of Opinion, that the Commiſſioners could not come upon the Buyer*; for they ſaid, if they could, it would be of dangerous Conſequence; becauſe he only acts as an Agent or Servant to the other. *However it ſtood over.* Barnard. Rep. 77. Trin. 2 Geo. 2. Wilſon v. Polton.

41. An Eſtate was deviſed to be ſold, and the *Monies* ariſing by ſuch Sale *to be divided among ſuch of the Children of A. as ſhould be living at A's Death. B. One of A's Children became Bankrupt*, and the Commiſſioner's aſſigned over his Eſtate; After which B. got his Certificate allowed, and then *A. died.* Decreed that this Share of the Money which on A's Death belonged to B. ſhould be paid to the Commiſſioners; becauſe not only *the later Statutes*, relating to Bankrupts, *mention the Word (Poſſibility)* but alſo becauſe 13 *Eliz. cap. 7. S. 2.* impowers the Commiſſioners to aſſign all which the *Bankrupt might depart with*; And here B. in the Life-time of A. might have releaſed this contingent Intereſt. Beſides the 21 *Jac. 1. cap. 19.* enacts that the Statutes relating to Bankrupts ſhall be conſtrued in the moſt beneficial Manner for Creditors. Wms's Rep. 385. in a Note there, cites it as decreed at the Rolls. Mich. 1731. and affirmed by Ld. Ch. King Mich. 1732. Higden v. Williamſon.

S. C. cited 3 Wms's Rep. 132. and in a Nota, 137. the Reporter cites the Stat. 5 Geo. 2. cap. 10. the Words of which are, All ſuch Effects of which the Party was poſſeſſed or intereſted in, or wherein he has, or may expect any Profit, Poſſibility of Profit, Benefit, or Advantage whatſoever.

42. *5. Geo. 2. cap. 30. S. 9. In Caſe any Commiſſion of Bankruptcy ſhall iſſue againſt any Perſon, who after the 24th of June 1732 ſhall have been* diſcharged *by Virtue of the Act*, or ſhall have compounded with his Creditors, *or delivered to them his Effects and been releaſed by them*, or been diſcharged by any Act for Relief of Inſolvent Debtors, *then* the Body only of ſuch Perſon conforming ſhall be free *from Arreſt and Impriſonment*; but the future Eſtate of ſuch Perſon ſhall remain liable to his Creditors *(the Tools of Trade, neceſſary Houſhold Goods, and neceſſary Wearing-Apparel of ſuch Bankrupt and his Wife and Children excepted) unleſs the Eſtate of ſuch Perſon ſhall produce clear 15 s. in the Pound.*

43. J. S. *by Will gives to his Daughter* A. then *Wife of One Beavis, his Gold-Watch, Jewels, China and Houſhold Goods to be at her Diſpoſal,* and

and to do therewith as ſhe ſhall think fit. Teſtator dies. Beavis becomes a Bankrupt.

This is a Deviſe to the ſeparate Uſe of the Time and not aſſignable by the Commiſſioners of the Bankrupt &c.

A Caſe was cited as before Ld. Chancellor Cowper, viz. *Deviſe to Feme Covert for her Uſe and Beneſit*, and held that becauſe it was not *for her ſeparate Uſe*, but only for her Uſe and Benefit, it was the Husband's; But the Maſter of the Rolls ſaid he was very much diſatisfied with that Determination, and here the Intent appears to give it to the ſeparate Uſe of the Wife; and a Married Woman could not have &c. to her own Diſpoſe, if in the Power of the Husband, and the Things were proper for her ſeparate Uſe and decreed for the Wife. MS. Rep. 1733. at the Rolls. Kirk v. Paulin.

44. If J. ſends *Goods to B. from beyond Sea to the Uſe of B. and before theſe Goods are paid for, B. dies inſolvent*, I cannot have my Goods again; but but if I *ſend Goods to a Factor to diſpoſe of to my Uſe, and he becomes a Bankrupt*, theſe Goods are not liable to the Debt of ſuch Bankrupt. 3 Wms's Rep. 185. Trin. 1733. Godfrey v. Furzo.

45. *Stat.* 19. *Geo.* 2. *No Perſon who is or ſhall be* bona fide a Creditor *of any Bankrupt, for or* in Reſpect of Goods really and bona fide ſold to ſuch Bankrupt, or *for, or in Reſpect of any Bill, or* Bills of Exchange really and bona fide drawn, negotiated, or accepted by ſuch Bankrupt, *in the uſual and ordinary Courſe of Trade and dealing, ſhall be liable to refund or repay to the Aſſignee or Aſſignees of ſuch Bankrupt's Eſtate, any Money which before the ſuing forth of ſuch Commiſſion was really and bona fide, and in the uſual and ordinary Courſe of Trade and Dealing*, received *by ſuch Perſon of any ſuch Bankrupt*, before *ſuch Time as the Perſon receiving the ſame ſhall know, underſtand, or have* Notice, that he is become a Bankrupt, *or that he is in inſolvent Circumſtances.*

(U) Liable. What. Settlements or Securities on, or Claims by Wife or Children.

Jo. 451. pl. 4. Palmer v. Blake, S. C. accordingly. —— S. C. cited per Cur. 2 Vern. 194, 195. Mich 1690. —— S. C. cited 4 Mod. 252, 253. —— Gilb. Treat. of Ten. 294. cites S. C. & S. P. for after Sale of the Lands by Deed indented and inrolled, if the Husband dies, he does not die ſeiſed.

1. IN Treſpaſs, upon Not Guilty pleaded, it was found, that the Land was *Copyhold of Inheritance*, held of the Manor of C. and that there was a *Cuſtom* in that Manor, *that if a Copyholder in Fee, died ſeiſed, living his Wife, ſhe ſhould have the Copyhold during her Life, and Twelve Years after*; then they found the Statute 13 Eliz. and 1 Jac. 1. of Bankrupts, and that upon a Commiſſion of Bankruptcy, the Husband was adjudged a Bankrupt, and that he being ſeiſed in Fee of the ſaid Copyhold, the Commiſſioners made a Bargain and Sale thereof to the Plaintiff for the Uſe of the Creditors &c. They find, that the Widow, at the Court held &c. was admitted Tenant ſecundum conſuetudinem Manerii before the Plaintiff was admitted; It was held by Berkley and Croke Juſtices, that the Bargain and Sale binds the Copyholder, and bars his Eſtate, and that he is no longer a Copyholder after the Bargain and Sale inrolled; and that when the Bargainee is admitted by the Lord, the Eſtate ſhall veſt in the Bargainee, and the Admittance ſhall have Relation to the Bargain and Sale and deveſt the Eſtate, which the Feme claimed by the Cuſtom; and Judgment accordingly. Cro. C. 568. Hill 15 Car. B. R. Parker v. Bleek.

2. A

2. A. *purchaſed a Copyhold to him and and his Son for their Lives, Remainder to his Wife in Fee*, and about Two Years after *turned Innkeeper*, and about *Twelve Years afterwards became a Bankrupt, and his Copyhold was ſold by the Commiſſioners* to the Defendant; A. the *Bankrupt died*. [The Wife died.] B. his *Son entered and made a Leaſe* &c. to the Plaintiff, who brought Ejectment; It was reſolved, that tho' a *Copyhold Eſtate is liable* to the Statutes, yet this Copyhold is not, becauſe it was bought two Years before the Purchaſor was an Innkeeper; ſo that he was not an Offender when he bought the Eſtate, and Judgment was given for the Plaintiff. March 34. pl. 67. Trin. 15 Car. B. R. Criſp v. Prat. Cro. C. 548. pl. 3. S C. but ſtates it, that the Leſſor of the Plaintiff was the Perſon to whom the Commiſſioners ſold the Land for the Benefit of the Creditors, and adjudged for the Defendant [the Son,] by all the Juſtices, but Berkley contra; For they held, that the Purchaſe being before A. the Father became a Trader, and ſo long before he became a Debtor is not within the Statute; For the Statute intends ſuch Perſons only as get their Living by buying and ſelling, and by Fraud had paſſed away their Lands to Friends in Truſt, and became indebted, and committed ſuch Acts of a Bankrupt; that for ſuch Acts done by them after, it ſhould be within the Commiſſioners Power to ſell ſuch their Lands. But here, many Years before, when he was a clear Man, he procured this Land to be ſettled upon his Son. (No Fraud or Purpoſe of being a Bankrupt being found.) It would therefore be a miſchievous Caſe, and full of Inconveniences, if it ſhould be within the Statute; For none might know with whom to deal by way of Marriage or otherwiſe, when he is not a Tradeſman, and ſettles Land upon his Wife and Children Bona fide, and without Cauſe of being ſuſpected to be a Bankrupt, and afterwards becomes a Tradeſman, and then a Bankrupt, if this Act ſhould overthrow a Conveyance duly ſettled. ——— Jo. 437. pl. 3. S. C. ſtates it, that the Ejectment was brought by the Son, and that Judgment was given by all for the Plaintiff, præter Barkely, who held for the Defendant in Omnibus.

But it was reſolv'd, that Copyhold Lands otherwiſe were within the Statutes, and might be ſold. Cro C. &c. ibid. ——— Supp. to Co. Comp. Cop. 88. cites S. C. ——— S. C. cited Hardr. 435, 436, and ſays, that the Reaſon why Copyhold Lands were adjudg'd in that Caſe to be included in the general Words of all Lands, Tenements, and Hereditaments in the Statute 21 Jac. touching Bankrupts was, becauſe Copyholds are expreſsly mentioned in the Statute 13 *Eliz. concerning Bankrupts*, and the Statute 21 Jac. being ſubſequent and explanatory, and a very beneficial Law, therefore Copyholds have been adjudged to be within thoſe ſubſequent Laws; beſides, the Lord of the Manor, in the Caſe of a Bankrupt Copyholder, can be at no Prejudice, becauſe the Aſſignee of the Commiſſioners is to be admitted, and to pay his Fine to him.

3. A Tradeſman *in Conſideration of Marriage made a Conveyance* of his Lands *to himſelf and his Wife*, and afterwards became a Bankrupt; It was held per Cur. that the Wife was within the Statute 1 Jac. 1. and the providing for his Wife and Children to be a providing for himſelf. Sty. 288. Trin. 1651. B. R. Tucker v. Coſh.

4. It is a Common Caſe, that if a Man *voluntarily pays Money to a Bankrupt after he becomes ſo*, it is in his own Wrong and he may be forced to pay it again. But otherwiſe it is, if the *Bankrupt recover it againſt him* by Courſe of Law; Per Ld. Chancellor. Vern. 94. Mich. 1682. in the Caſe of Noel v. Robinſon.

5. Deviſe of 800 l. *to be inveſted in Land for the Benefit of the Wife of J. S.* for her Life, and afterwards to her Children, and the Intereſt of the Money to go in the mean Time to ſuch Perſon as would be intitled to receive the Profits. J. S. the *Husband becomes Bankrupt*; Per Cur. this not being a Truſt created by the Husband, nor any thing carved out of his Eſtate, but given by a Relation of the Wife's and intended for her Maiutenance, it is not liable to the Creditors of the Husband, and decreed the *Intereſt to be paid to the Truſtee* to be laid out in Land and ſettled according to the Will. 2 Vern. 96. Paſch. 1689. Vandenanker v. Desbrough.

6. A. a Trader on Marriage gives *Bond* to a Truſtee *to leave his Wife worth* 500 *l.* or a Third Part of his Perſonal Eſtate, at her Election. A. becomes Bankrupt; Decreed that the Wife come in as a Creditor on the 500 l. Bond, and what ſhould be paid in Reſpect thereof to be put out at Intereſt and received by the Creditors during the Life of the Husband It was ſaid, that Ld. C. Macclesfield doubted of this. 2 Wms's Rep. 298.

cites it as Hill Vac. 1720. on a Petition Ex Parte Baily. Husband, and if the Wife ſurvived, then the Money to paid to her. 2 Vern. 662. Trin. 1710. Holland v. Calliford.

——But where a *Bond* was given *by the Husband for payment* of a Sum of Money *to his Wife, in Caſe ſhe ſurviv'd him*, and the Husband after became a Bankrupt, Ld. Ch. King held, that no Part of the Eſtate ſhould be deferred from being diſtributed, the Act ordering a Diſtribution within Months; eſpecially here being neither Debitum in præſenti, and perhaps might never be Debitum in futuro; for ſhe might die in her Husband's Life; Beſides, after Certificate allowed, he might Trade again and become ſolvent, and able to pay the Bond. But though the Debt was *contingent when the Obligor became Bankrupt*, yet if the *Contingency happen'd before the Diſtribution made*, then ſuch contingent Creditor ſhould come in for his Debt. 2 Wms's Rep. 497. Mich 1728. Ex. Parte Caſwell, Ex Parte Cazalet, Ex Parte Bateman.

So if ſuch *Contingency happened before the ſecond Dividend* made, the Creditor ſhould come in for his Proportion thereof, though after the firſt Dividend. By Ld. C. King. Ibid. 499.

7. *Lands deviſed to* his Daughter being *a Feme Covert for her ſeparate Uſe, without appointing any Truſtees*, and it being expreſsly declared to be excluſive of the Husband, ſhall not be ſubject to the Bankruptcy of the Husband, and decreed at the Rolls accordingly. 2 Wms's Rep. 316 to 319. Mich. 1725. Bennet v. Davis.

8. *One not in Debt, nor then a Trader makes a voluntary Settlement on a Child*, and afterwards becomes a Trader and a Bankrupt; this Settlement is not liable to the Bankruptcy. 3 Wms's Rep. 298. pl. 75. Trin. 1734. Lilly v. Osborn.

(W) How far any Mortgagees or Purchaſors of Lands or Goods from a Bankrupt ſhall be affected by the Bankruptcy.

1. 21 *Jac.* 1. *cap.* 19. *S.* 13. IF *any Bankrupt ſhall convey, or* aſſure any Lands, Goods, *or Eſtate, unto any Perſons*, upon Condition, or Power of Redemption *at a Day to come, by Payment of Money, or otherwiſe, it ſhall be lawful for the* Commiſſioners, *before the Time of the Performance of ſuch Condition* to appoint, *under their Hands and Seals*, Perſons to make Tender *of the Money, or other Performance, according to the Nature of ſuch Condition, as fully as the Bankrupt might have done; and the Commiſſioners* ſhall, after ſuch Tender *or Performance, have Power to* ſell ſuch Lands, Goods *and Eſtates for the Benefit of the Creditors, as fully as they may ſell any the Eſtate of the Bankrupt.*

2. *S.* 14. *No Purchaſor, for a Valuable Conſideration, ſhall be impeached by any of the Acts againſt Bankrupts, unleſs the* Commiſſion *be* ſued out within five Years *after the Perſon became a Bankrupt.*

3. If the Copyhold Lands of a *Bankrupt* be ſold according to the Statute of the 13 Eliz. cap. 7. the *Vendee* ſhall be admitted and pay a Fine. Co. Comp. Cop. 62. S. 56.

2 Chan. Rep. 41. S. C. ſays, the Defendants demanded

4. The *Plaintiffs and the Defendant were all Creditors of one S.* who was a Lead Merchant, and who on 19 Jan. 18 Car. 2. was declared *a Bankrupt*; and the *Commiſſioners aſſigned his Eſtate to the Plaintiff* and others in the Month of October, Anno 19 Car. 2. The *Defendant was then in Poſſeſſion of his Eſtate*, and refuſing to deliver it to the *Aſſignees*, they

they *brought their Ejectment.* Now, though *the Deed under which the Defendant held the Lands was dated in February after S. was declared a Bankrupt*, yet the Plaintiffs were nonſuited. Then they brought a Bill to diſcover whether the Defendant did not know at the Time of executing his Deed, that S. had committed an Act of Bankruptcy, and ſo to ſet forth the Fraud of obtaining the Deed, and to have a new Trial. The Defendant pleaded his Deed, and that S. was really indebted to him at the Time it was executed, and demanded Judgment, whether he ſhould diſcover any Thing to weaken his Title? And upon long Debate, the Plea was allowed. Nelſ. Chan. Rep. 141, 142. 22 Car. 2. Gladwin & al' v. Savill.

Judgment, whether they ſhall diſcover any thing to weaken their Eſtates, or whether the Plaintiffs ſhall examine againſt them as Purchaſors, and that upon long Debate it was allowed, that the Plaintiffs may at any time bring any new Action.

5. The *Aſſignee* of a Bankrupt *exhibits his Bill* againſt the Defendant, *to diſcover Goods* of the Bankrupt, that came to his Hands after the Bankruptcy. The Defendant, by way of *Plea*, ſets forth, *that he had no Goods* of the Bankrupt's, or that ever were his, *but what he bought for full and valuable Conſideration, and bona fide; and* that at the Time of the Sale and Payment of his Money, he *had no Notice either of the Commiſſion, or of any Act of Bankruptcy committed* by the Bankrupt. On long Debate, the Plea was allowed by the Ld. North, and to take what Remedy they could before the Commiſſioners, or at Law. Hutchins, Counſel for the Defendant, cited a former Preſident, but was not produced. 2 Chan. Caſe 135. Hill. 34 and 35. Car. 2. Brown v. Williams.

6. Aſſignee of the Commiſſioners of Bankruptcy againſt P. exhibited his *Bill* againſt the Defendant, *to diſcover Goods* &c. which were the Bankrupt's at the Time of his Breaking; the Defendant *pleaded, that he was Purchaſor for full and valuable Conſideration, and* at the Time of his Purchaſe, until the now Bill, *had no Notice* that P. was a Bankrupt, nor of any Commiſſion, and pleads this Matter againſt any Diſcovery. After long Debate, Ld. K. North ſeemed to incline that the Defendant, being a Purchaſor without Notice, ſhould not be prejudiced by this Court; But that if the Sale were at an extreme Under-Value, as for 5 s. or the like, then ſuch a General Plea ſhall not ſtand. And after long Debate, whether the Defendant ſhould ſet forth what the Goods were, or what the Defendant paid for them, it was concluded that he ſhould, ſo as the Plaintiff ſhould conſent to take no Advantage of the Diſcovery, but here in this Court only, and not at Law, which the Plaintiff conſented to by his Counſel, and to ſubſcribe his Conſent with the Regiſter, and then the Defendant was to anſwer. 2 Chan. Caſe 156, 157. Mich. 35 Car. 2. Wagſtaff v. Read.

7. A. *purchaſes* of a Man, who had committed an Act of Bankruptcy, but *without Notice* thereof; afterwards a Commiſſion is taken out, and there being a Term ſtanding out in Truſtees, the *Aſſignee brings a Bill* againſt them and the Purchaſor, to have the Term aſſigned to him. *Bill diſmiſſed.* 2 Vern. 599. pl. 537. Mich. 1707. Wilker v. Bodington.

(X) Diſ-

(X) Diſtribution. To Whom; and How; and When.

Hutt 37, 38. Trin. 17 Jac. C. B Rugle's Caſe, S. C. & S. P. reſolved accordingly, and alſo, that the Commiſſioners may ſell and prepare for Diſtribution preſently upon the Execution of the Commiſſion, but until the 4 Months are paſt, they may not proceed to Diſtribution; for the Creditors which inhabit in the remote Parts of the Realm perhaps cannot have Notice; and it may be carried ſo ſecretly, that if they might diſtribute preſently, that they, which ſued out the Commiſſion, ſhould be only ſatisfied, when, indeed, there was no Default in the others. Alſo it was reſolved, that the Offer of Creditors to be joined, and before they be Partakers, is not an effectual Offer, without offering to be contributary to the Charges; but to offer any particular Sum is not neceſſary, becauſe they know not what Sum is diſburſed, and that is to be aſſeſſed by the Commiſſioners. And the Words (for the Charge of the Commiſſion) is to be extended to all Charges ariſing in ſuing forth the Commiſſion, and in Execution and Defence thereof.

1. UPON View of the Statute of 17 Eliz. and 1 Jac. it was reſolved by the Court, that if certain *Creditors ſue a Commiſſion*, and *others within four Months* after or more, being Creditors, *come before Diſtribution, and will join in the Charge of the Commiſſion*, and all that belongs to it, *and tender their Parts*, that they ſhall not be refuſed, but have their equal Parts as Creditors. But if any Diſtribution be made of any Part of the Eſtate, no Creditors are to be admitted after, that came not in before. Hob. 287. Pl. 375. Rugle's Caſe.

One ſeiſed of Lands in Fee *owes a Debt by Statute*, and afterwards *becomes a Bankrupt*, and the *Creditor by Statute extends the Lands*, then a Commiſſion of Bankruptcy is ſued out; Upon a Reference by the Lord Chancellor to the Judges of C. B they held that the Clauſe of the Statute was full and plain, that *all the Creditors of the Bankrupt, unleſs where there was a Mortgage, ſhould be equally paid.* Wms's Rep. 92, 93. Paſch. 1706. Sir Geo. Newland and Beckley v. ———

And Trevor Ch J. ſaid, a *Judgment or Recognizance did no more bind the Lands, than the Teſte of a Fi. Fa. bound the Goods* at the Time of the making of this Statute; and it was plain, *if* the Fi. Fa. was *not ſerved and executed*, ſuch Creditor, notwithſtanding his ſuing out his Fi. Fa. ſhould come in only in Proportion with the Creditors even by ſimple Contract. Wms's Rep. 93. Paſch. 1706. Sir Geo Newland and Beckley v. ———

2. 21 *Jac. cap* 19. *S.* 9. *The Commiſſioners are impowered to examine upon Oath any Perſon, for the Diſcovery of the Certainty of the ſeveral Debts due to the Creditors; and Creditors having their* Debts ſecured by Judgments, Statutes, *or other Specialties*, with or without Penalty, *or having made Attachments in* London *&c. where there is* no Execution or Extent ſerved *or executed before the Perſon became Bankrupt, ſhall not be relieved for more than a ratable Part of their juſt Debts, without Reſpect to any Penalty contained in ſuch Judgment, Statute, or other Penalty.*

3. Bill againſt the Commiſſioners and Aſſignees of a Statute of Bankruptcy *to be let into the Statute*, paying Contribution-Money, and decreed accordingly, the Plaintiff likewiſe accounting for what Eſtate of the Bankrupt came to the Hands of the Plaintiff's Father, and repaying Money, which himſelf had recovered at Law. Fin. Rep. 60. Hill. 25 Car. 2. Vanaker v. Naſh, & al'.

4. *Creditors excluded* were let in for their Shares according to a prior Agreement, though an Aſſignment and Dividend had been made of the Eſtate. Fin. R. 326. Mich. 29 Car. 2. Ebſworth and Manſell v. Kent, & al'.

5. A. mortgaged Lands, and afterwards becomes a Bankrupt. The Title of the *Mortgagee* is not to be impeached by the Statute, and the Mortgagee being a Creditor likewiſe by Bond, was decreed to *come in*, he

he paying his Contribution-Money. Fin. R. 466. Mich. 32 Car. 2. Tanner v. Chapman, & al'.

6. Where there are *Lands unſold*, and the *Commiſſioners make a Diſtribution on a ſuppoſed Value thereof*, without having any Money to diſtribute, this was held by the Court to be a good and regular Diſtribution, and the Words of the Act are, that the *Commiſſioners ſhall have the ordering of the Bankrupt's Eſtate*, ſo that there is no Neceſſity to ſell and diſtribute the Money, but if they *allot a Proportion* of the Land to each Creditor, it is well enough. 2 Vern. 158. Trin. 1690. Hitchcox v. Sedgwick.

7. Ld. Hutchins ſaid, that *fraudulent Diſtribution* may be ſet aſide by the Ld. Chancellor, even upon a Petition, and that it had been ſo done in the Ld Clarendon's Time. And in the principal Caſe a new Diſtribution was order'd, and Land, ſold before fraudulently, was ordered to be ſold again, and other *Creditors not taken in before to have their Proportions*. 2 Vern. 156. to 162. Trin. 1690. Hitchcock v. Sedgwick.

8. If one *quits his Trade*, and a Commiſſion of Bankruptcy is afterwards ſued out againſt him by his old Creditors, yet an *after Creditor* ſhall be admitted to have his Share in the Bankrupt's Eſtate. Ld. Raym. Rep. 287. Hill. 9 W. 3. in Caſe of Meggot v. Mills.

9. A. being *indebted to a Feme Covert becomes a Bankrupt*, the *Husband pays the Contribution Money, and dies* before Diſtribution, and then the *Wife died*. The Executors of the Wife are intitled to the Dividend; for the Husband paying the Contribution Money does not alter the Property of the Bond. 2 Vern. 707. Mich. 1715. Anon.

10. A. *drew a Bill* of Exchange *for* 100 *l. on B.* in Holland, *payable to C.* which *B. accepted*, and afterwards *A. and B. become Bankrupts*, and *C. receiv'd* 40 *l. of the* 100 *l. out of B's Effects*. Ld. C. Macclesfield directed, that the Creditors of A. come in for the 60 l. Reſidue of the 100 l. and that if the 40 l. paid to C. ſhall appear to have been paid out of *B's own Effects*, then the Creditors of A. ſhould come in for the whole 100 l. out of which they muſt anſwer the other 40 l. to the Creditors of B. that being to be taken by A's Creditors in ſuch Caſe only as Truſtees for B's Creditors. 2 Wms's Rep. 89. Hill. 1722. Ex Parte Ryſwicke.

11. *A. gives a Promiſſory Note* for 200 l. *payable to B. or Order, B. indorſes it to C. who indorſes it to D. A. B. and C. become Bankrupts*, and D. *receives 5 s. in the Pound on a Dividend* made by the Aſſignees *againſt A.—D. ſhall come in as a Creditor for* 150 *l. only out of B's Effects*, and if D. paid Contribution Money for more than 150 l. it ſhall be returned. 2 Wms's Rep. 407. pl. 129. Paſch. 1727. Ex Parte Lefebure.

12. Upon Petition to Ld. Chancellor, the Caſe was, *Hugh Payne and Deborah Bullock* May 1716 *gave Bond to Mary Tirrel for payment of* 120 *l.* In 1727 *Mary Tirrel aſſign'd a Bond to Rachel her Daughter the Petitioner*; Hugh Payne and Deborah Bullock both died. Hugh Payne died inſolvent. *Deborah* Bullock *left a conſiderable Real Eſtate, which devolv'd to Hugh Payne her Grandſon.* Hugh Payne the Grandſon enter'd *and ſold Part of the Lands, and after became a Bankrupt*; his *Aſſignees were in Poſſeſſion of the Lands* that were Deborah Bullock's, *unſold* by Hugh Payne the Grandſon. Petitioner therefore *pray'd that thoſe Lands in the Hands of the Aſſignees might be liable to the Bond Debt of Deborah, preferable to the general Creditors of Hugh Payne* the Grandſon. It was inſiſted for the Petitioner, that ſince the *Stat. 3 & 4 W. & M. cap. 14. of fraudulent Deviſes, Lands in Hands of Deviſees are made liable to Bond Debts*, as in the Hands of the Heir, and here the *Aſſignees ſtand in the Place of the Bankrupt*, and ſubject to the ſame Equity, and the Bankruptcy and Aſſignment is no Alienation bona fide within the Exception

and Intention of the Statute, and the Caſe of Executors becoming Bankrupts, having Affets remaining in Specie is common, and always held the Creditors of Teſtator to have a Preference. But it was inſiſted e contra, that there is no Specifick Lien. The Aſſignment is an Alienation, and the Caſe of Executors differs; Executor is look'd upon as a Truſtee. Ld. Chancellor ſaid, this is a Point of too much Difficulty to determine in this ſummary Way. Let the Petitioner bring Bill by Eaſter Term, and ſtay ſufficient of the Eſtate in the mean Time in the Aſſignees Hands. MS. Rep. Trin. Vac. 1733. Ex Parte Warren, & Ux'.

13. Upcot a *Merchant mortgaged Lands* to W. *for* 1157 *l. and afterwards mortgaged the ſame together with other Lands to Holwell, as a collateral Security for* 500 *l. due by the ſaid U. to H. by Bond*, and about 10 *Days afterwards U. was declar'd a Bankrupt.* Part of the Premiſſes were ſold for 1050 l. and the Money paid to W. but the Commiſſioners refuſing to ſell the Reſidue, and the Aſſignees refuſing to ſatisfy the Demand of *H.* or to admit him to have any Share of the Bankrupt's Eſtate, he *petition'd for a Sale to be made of the Reſt of the mortgaged Premiſſes, and the Money to be applied towards the Diſcharge of the Demands of W. and himſelf, and in Caſe of any Deficiency, then to be admitted a Creditor* on the ſaid Bankrupt's Eſtate, *for what ſhould remain due after ſuch Sale and Application as aforeſaid, and to ſtay any Dividend in the mean Time.* Whereupon the Ld. Chancellor, upon hearing Counſel, referr'd it to the Commiſſioners to take an Account of what was due to W. and H. reſpectively, for Principal and Intereſt on their reſpective Mortgages, and ordered, that ſo much of the ſaid mortgaged Premiſſes as remain unſold, to be ſold to the beſt Bidder, and the Monies ariſing to be applied the Diſcharge of all Principal and Intereſt due to the ſaid W. in the firſt Place, and then of the ſaid H. together with his Coſts of Application, by Petition to this Court to be ſettled by the ſaid Commiſſioners, and in Caſe the Petitioner and Aſſignees ſhould differ about the ſame, and if the ſame ſhould not prove ſufficient to pay the Petititioner his Principal and Intereſt and Coſts as aforeſaid, then the Petitioner to be admitted a Creditor for ſuch Deficiency, and be admitted to a Dividend &c. for the ſame; And that the ſaid W. and H. be examined touching the Account, and to produce upon Oath all Deeds, Books of Account, and Vouchers, &c. MS. Rep. 31 May 1737, upon the Petition of Wm. Holwell of Exeter Eſq;

See (T) pl. 25, 26.

(Y) Diſtribution to whom; and how. In Caſe of Partnerſhip.

On a joint Commiſſion of Bankruptcy againſt two Traders, ſeparate Creditors are allowed to come in, for the joint Effects are to be applied, firſt to pay the Partnerſhip Debts, and then the ſeparate Debts; and the ſeparate Effects to pay firſt the *ſeparate Creditors*, and afterwards the *Partnerſhip Creditors*; Per Cowper Chancellor. 2 Vern. 706. Mich. 1715. Crowder's Caſe. —— Wms's Rep. 326. S. P. per Ld. Cowper.—— S. P. 2 Wms's Rep. 500. by Ld. C. King, Mich 1728. Ex Parte Cook.

1. JOINT *Debts* are to be *out of the Joint Stock firſt*, and if there be an *Overplus*, then that ought *to be applied to pay particular Debts of each Partner*; But if there be not enough to pay all the Joint Debts, *and if either of the Partners ſhall pay more than a Moiety of the Joint Debts*, then *ſuch Partner is to* come in before the Commiſſioners of the Bankrupts, and be *admitted as a Creditor for what he ſhall ſo pay over and above his Moiety.* 2 Chan. Rep. 226. 34 Car. 2. E. of Craven & al' v. Knight & al'.

2. Two

4. Two Partners in Trade *put in each an equal Stock, and agreed by* Covenant, *that the Stock ſhould pay the Debts of the Stock, and neither of their ſeparate Debts ſhould charge the Stock*, but only his own Eſtate, or to that Effect. They *both became Bankrupts*, and a Commiſſion againſt them both; *one of them owed ſeparately more than the other*. The Queſtion was between the ſeparate Creditors of each Bankrupt, and the Creditors on Account of the joint Stock; for theſe would exclude the ſeparate Creditors from charging the joint Stock, but that it ſhould ſatisfy the Stock-Debts. But the Lord North was of a contrary Opinion; for the Covenant of the Partners cannot bind any of their Creditors, but only themſelves. 2 Chan. Caſes 139. Paſch. 35. Car 2. 27. Ld. Craven v. Widdows.

A Quære is added, How the ſeparate Creditors could have other Title than thoſe under whom they claim? Ibid.

3. *R. S. and G.* where *Partners* together in the Trade of a Dry-Salter; *G. embezzles and waſtes the Joint-Stock, contracts private Debts, and becomes a Bankrupt.* The Commiſſioners aſſihn the Goods in Partnerſhip. Bill by R. the Plaintiff for an Account, and to have the Goods ſold to the beſt Advantage; and inſiſted that out of the Produce of the Goods, the *Debts owing by the Joint-Trade ought to be paid in the firſt Place, and that out of G's Share Satisfaction muſt be made for what G. had waſted or embezzled*; that the Aſſignees could be in no better a Caſe than the Bankrupt himſelf, and were intitled only to what his Third Part would amount unto clear after Debts paid and Deductions for his Embezzlement; and the Court ſeemed to be of that Opinion; but ſent it to a Maſter to take the Account and ſtate the Caſe. 2 Vern. 293. pl. 283. Trin. 1693. Richardſon v. Goodwin & al'.

9. If *One* or more *of the Joint Traders becomes Bankrupt*, his or their Proportions only are aſſignable by the Commiſſioners to be held in Common with the reſt, who were not Bankrupts; At Niſi Prius before Holt. 12 Mod. 446. Paſch. 13 W. 3 B. R. Anon.

5. Trover for Three *Bank Notes*, which were *payable to A and Co.* and upon the Trial it was objected that the ſole Intereſt of theſe Notes was not in A. alone &c. and that *A. had once a Partner*, one J. *who died before the drawing of theſe Notes*, and ſo his Executors having not renounced the Partnerſhip were ſtill intereſted in all Things relating to their Trade. And J. Powell held that this was true enough, for Prima Facie the *Executors of J. ſhall be taken to continue in the Partnerſhip till they renounce it*, and no Renunciation being made out in this Caſe, but ſome of the Executors having proved the Will, they were intereſted in theſe Notes too, though they never acted in the Trade. Per Powell J. Somerſet Aſſizes, 5 Ann. in Arthur's Caſe.

6. *Seperate Creditors* allowed to come in under a *Joint Commiſſion againſt Two Partners*; but the *Joint Effects are to be applied, firſt to pay the Partnerſhip Debts*, and then the ſeparate Debts; and as to the ſeparate Effects, firſt, the ſeparate Creditors, and after the Partnerſhip Creditors, are to be paid out of the ſame. 2 Vern. 706. Mich. 1716. Ex Parte Crowder.

On a Joint Commiſſion, the Joint Creditors are firſt to come in on the Partnerſhip Effects, vnd if there remains a Surplus, then the ſeparrte Creditors are to be admitted. 3 Wms's Rep. 25 Hill. 1729. Horſey's Caſe.

7. If a Joint Commiſſion of Bankruptcy iſſues out againſt Two Joint Traders, it was queſtioned, if ſeparate Creditors may come in under it? And that they may, it was argued, That if there are Two Joint Traders, and *one becomes Bankrupt one Day, and the other the next Day*, and a *Joint Commiſſion* is taken out, different Relations muſt be had under the Joint Commiſſion with regard to the different Times of the Bankruptcy, and the Diſtribution under it muſt be the ſame, as if ſeparate Commiſſions had been taken out. For in both Caſes the Joint Fund

Fund is primarily applied to the Joint Debts, and the *ſeparate* Fund to the ſeparate Debts, and then in an *Average* to the Joint Debts & vice verſa. So are the Orders in the Court of Chancery in the following Inſtances, viz. A. and B. were Partners, but the Partnerſhip being diſſolved, and A. ſetting up for himſelf became Bankrupt, and a Commiſſion iſſued out againſt him, and then B. failed, and a Commiſſion iſſued againſt him, the *Joint Creditors* were admitted to *prove their Joint Debts under the ſeparate Commiſſions*, and cites 22 Jan. 1738, the Caſe of **Stephens v. Brown** and **Adlamb**. —— And that 22d April 1729, it was ordered, that the Joint Eſtate ſhould go to the Joint Creditors, and the remaining Part of the Joint Eſtate, which reſpectively belonged to each, ſhould go to their *ſeparate Creditors* upon a *Joint Commiſſion* ſued out againſt the then Defendants, and cited **Horſey v. Heyham and Heyham.** —— And that 2 Geo. 2. in C. B. two being *Joint Obligors*, and after Bankrupts, ſeparate Commiſſions were taken out againſt them, and the ſeparate Commiſſioners refuſing to let in the Obligee, he brought an Action againſt one of the Obligors, but the Defendant having got a Certificate under the ſeparate Commiſſion was diſcharged, **Matthews v. Aland**. Which proves that Joint Creditors may come in under ſeparate Commiſſions, and by the ſame Reaſon, ſeparate Creditors may come in under a Joint Commiſſion, and the Law being ſo, *every Aſſignee may recover* by ſetting forth the ſpecial Matter; and beſides, if the *Aſſignee of the other Part will not join*, he may be ſummoned and ſevered. And the Court thought the laſt Caſe cited came fully to the Point of the principal Caſe, and therefore inclined to give Judgment accordingly; Sed adjornatur. Gibb. 282. Paſch. 4 Geo. 2. B. R. Grace v. Heyham.

(Z) Diſtribution, where Debts are due to the Crown.

MS. Rep. Hill. 8 Ann. in the Exchequer, the Queen v. Arnold.

1. ON a Scire Facias on an Extent, the Caſe was this. Dixon, a *Receiver General*, as Principal, and George Newell and Joſeph Newell (as his Securities) became bound to the Queen in 23000 l. Upon this Bond an *Extent Iſſues* againſt the Body Lands and Goods of G. Newell and J. Newell, *dated 3 December, and upon the 8 December an Inquiſition* was taken upon the ſaid Extent, whereby it was *found that the Defendant Arnold was indebted to George Newell* in 109 l. 12 s. Upon the Return of this Inquiſition, a Scire Facias is ſued out againſt Arnold, and he comes in and *pleads, that upon the 2d of the ſame December G. Newell became a Bankrupt, and* that thereupon *a Commiſſion of Bankruptcy iſſued*, and that Proceedings were had thereupon according to the ſeveral Statutes made concerning Bankrupts, *and that 6 December G. N. was found a Bankrupt, and* that thereupon *the Commiſſioners aſſign'd over his Eſtate and Effects to one Taylor, ſo that he the Defendant was not indebted to the ſaid G. N. but to the Aſſignees of the Commiſſion of Bankruptcy.* Upon this Plea, the *Attorney General demurrs*, and ſhews for Cauſe two Things, 1ſt, That it was *not ſet forth what Act of Bankruptcy the ſaid G. Newell had committed*; and, 2dly, That he had *not ſet forth the Commiſſion, and that the Commiſſioners had adjudged and declared G. N. to be a Bankrupt, and that the Plea amounted to the General Iſſue.* The Barons deliver'd their Opinions Seriatim.

And Baron Lovell ſaid, that the Plea in this Caſe was naught, 1ſt, Becauſe the Defendant had not ſet out what Act of Bankruptcy George Newell

Newell had committed; for this being in the Caſe of the Crown, it is not ſufficient to ſay only, that ſuch a Day G. N. manifeſtly became a Bankrupt, though this Sort of Pleading to bar a Subject may be good enough, a Plea to a Common Intent being good, but in Caſe of the Crown it muſt be certain; and, 2dly, Becauſe he had not ſet forth that the Commiſſioners had found him a Bankrupt, for the Commiſſioners are to proceed upon the Statutes, and they ought to bring the Party within the Extent of the Acts; and of this Opinion was Ward Ch. Baron.

But Baron Lovell obſerv'd, that there was another Fault in the Plea, becauſe in ſetting out the Aſſignment it was *not pleaded with a Profert in Cur'*.

Baron Price held, that the Pleading was ſufficient. As to the firſt Cauſe aſſign'd, he ſaid, that the old Precedents in the Caſe of Bankrupts, did ſet forth all the Proceedings, as the Petition, the Granting of the Commiſſion &c. and what was done thereupon, but the Precedents of late were otherwiſe, and they do not ſet forth any Particulars, but only in General, that ſuch a Day he became a Bankrupt. Lut. 104. In an Aſſumpſit by Aſſignees of Commiſſioners of Bankrupts, the ſhort Way is now only uſed, when a Perſon is declared a Bankrupt by Commiſſioners, it is not any way material; For on an Iſſue whether a Man be a Bankrupt or not, *though a Particular Act of Bankruptcy is aſſign'd in the Plea, yet any other Act of Bankruptcy may be given in Evidence.*

The Judgment or Declarations of the Commiſſioners is no Evidence in a Trial, and conſequently it cannot be material. But now as to the Matter, whether this Matter ought to be more particularly ſet out in the Caſe of the Crown, he did not think it neceſſary, for by the ſame Reaſon that one Act of Bankruptcy ought to be ſet forth, all the Acts of Bankruptcy ought to be ſet forth; and the Act of Bankruptcy, or the Declaration of the Commiſſioners, is not anywiſe material, neither is it any Evidence. As to the 2d Exception, that this Sort of Pleading *amounted to the General Iſſue*, and that, though this Sort of Pleading might be good in the Declaration, yet it is not good in a Plea; he ſaid, that a Declaration required more Certainty than a Plea. Co. Litt. 303. In a Declaration every Thing muſt be affirm'd particularly. Now as to the ſaying that he was indebted to Taylor, and not to the Crown, whether or no this amounted to the General Iſſue; he ſaid, that to make a General Iſſue, they ſhould have gone into a Particularity, but here this is done not full enough. By 21 Jac. cap. 4. it is enacted, that whenſoever the King, and ſuch from under whom the King claims &c. hath been, or ſhall be, out of Poſſeſſion for twenty Years, and ſhall not &c. have taken the Profits of any Lands &c. within twenty Years before the Information or Intruſion to be brought to recover the ſame; the Defendant &c. may plead the General Iſſue, if he &c. think fit, and ſhall not be preſſed to plead ſpecially; and where any Information of Intruſion may fitly and aptly be brought on the King's Behalf, no Scire Facias ſhall be brought whereunto the Subject ſhall be forced to a Special Pleading, but the Party was before obliged to ſet forth his Title. Where a Man would take Advantage of a Matter pleaded that amounts to the General Iſſue, upon a Demurrer, he muſt aſſign it for Cauſe. 1 Cro. 146. Ward v. Blunt. Baron Bury was of the ſame Opinion, that the Pleading was good.

The Queſtion of Law in this Caſe was, What Operation this Extent had, and whether or no the Goods and Chattles of G. Newell were not bound from the Teſte of the Writ of Extent? As to this Point it was reſolved per tot. Cur. that Judgment ſhould be given for the Queen.

Baron Price argued, that it is agreed of all Hands, that in Caſe of an Execution for a Subject, whether it be an Elegit, or Fieri Facias, or

an Extent, the Goods and Chattles of the Party were bound from the Teſte of the Writ, before the Statute of Frauds and Perjuries, by Virtue of which Statute, the Property of the Goods of the Party againſt whom a Writ of Execution is ſued out, is not bound, but from the Time that ſuch Writ is delivered to the Sheriff &c. to be executed. But this Statute does not extend to the Caſe of the Crown. On an Extent on a Statute acknowledged according to 23 H. 8. when a Liberate is ſued out, and the Goods are delivered by the Sheriff, according to the Appraiſment in the Extent, the Goods of the Party are ſo bound hereby, that he cannot either give, ſell, or diſpoſe of them, neither can he forfeit them, nor can they be diſtrained for Rent. The Liberate here has Relation to the Teſte of the Extent, though the Extendee had no Right in the Goods until the Liberate, 1 Cro. 148. Jones 202. Audley v. Halſey. The Writ to ſeiſe does not give a Property, but it is only a Protection from the Crown to have the Goods delivered over to the Party, the Liberate is but a finiſhing of the Execution. There is ſuch a Lien upon the Goods from the Teſte of the Execution, that if the Party die, or aſſign away his Goods, the Sheriff may execute the Writ againſt the Executor, or againſt the Aſſignee, Rolls Ab. 896. The Intereſt of the Goods is bound though the Property be not transferred. See Keb. 930. 932. Bailey againſt Bunning. Sid. 271. 1 Lev. 173.

Now it will be hard to vary this in the Caſe of the Crown, or to make a Conſtruction to leſſen the Prerogative of the Crown.

Of Extents there be ſeveral Sorts, for ſome are general to ſeiſe Body Body, Land and Goods, ſome have a Commiſſion them to find Debts by Inquiſition, or otherwiſe, ſome are to ſeiſe into the Queen's Hands until the Debts are ſatisfied, and ſome of theſe Extents are to ſell the Goods of the Party, and others are that the Goods ſhould not be ſold but by Order from the Court. But this is only as a Check upon the Officer, not but that the Crown hath the Property.

In Caſe of a Statute Staple, according to 27 E. 3. cap. 8. the Goods of the Party are to be ſeiſed and delivered to the Party; now this gives an immediate Property. But in Caſe of a Statute Merchant this is not ſo, for there goes firſt, Proceſs againſt the Body, and then upon a Return of a Non eſt inventus, or a Mortuus, there goes an Extent againſt the Lands and Goods. This muſt be much ſtronger in the Caſe of the Crown.

Executions for the Crown have Relation to the Time of the Execution awarded, and the Goods and Chattles of the Party are bound from that time into whoſe Hands ſoever they come; 2 R. Ab. 157. 171. Sir George Fleetwood's Caſe.

In Dyer 67. **Stringfellows Caſe.** Stringfellow ſued a Writ of Extendi Facias, out of the Chancery, to have Execution of a Statute Staple againſt one Browneſope, and takes the Goods accordingly, and ſeiſes them into the Kings Hands, but there is no Liberate. Then there comes a Prerogative Writ out of the Exchequer, rehearſing the King's Prerogative, that he ought to be ſatisfied his Debt, and commanding the Sheriff to levy upon Browneſope a Debt of 500 l. which he owed the King, and if he had not ſufficient to extend his Land, and this Writ was delivered to the Sheriff after the Day of the Return of the firſt Writ, but the firſt Writ was not returned at the Day. And the Sheriff hereupon returned the Special Matter, and it was held in the Exchequer, that the Sheriff ſhould be amerced if he would not amend his return (i. e.) Return that he had ſaved the King's Debt; for the Property of the Goods was not in Stringfellow, before that the Goods were delivered to him by Virtute of the Liberate.

There is a very ancient Statute, 25 E. 3. 19. reciting that foraſmuch as the King had made Protections to diverſe Perſons which were

were bounden to him in ſome Manner of Debt, that they ſhould not be impleaded of the Debts which they owed to others, till they had made Gree to the King of that which was due to him by Reaſon of his Prerogative, and ſo during ſuch Time no Man hath uſed, or durſt implead ſuch Debtors, whereby it is aſſented and accorded, that notwithſtanding ſuch Protections, the Parties which have Actions againſt their Debtors ſhall be anſwered in the King's Court by their Debtors, and if Judgment be thereupon given for the Plaintiff, the Execution of the ſame Judgment ſhall be put in Suſpence, till Gree ſhall be made to the King of his Debt. And if the Creditors will undertake for the King's Debt they ſhall be thereto received, and ſhall have Execution of the Debtors of the Debt due to them, and alſo ſhall recover againſt them, as much as they ſhall pay to the King for them.

As to the Objection that this Caſe differs from the common Caſe of Extents for the Crown, for that here is a Debt found which is in a third Perſon's Hands, the Extent has bound the Money, Goods, and Chattles of the Party himſelf, but not the Debt in the Hands of Arnold.

Now, this Debt in Arnold's Hands is a Chattle, though it be but a Choſe in Action, which in the Caſe of a Subject is not aſſignable nor liable to any Execution; But in the Caſe of the Crown it is aſſignable and liable to Execution. But it is ſaid, that this is not the Chattle of George Newell. Vid. Stamf. Prerog. 45. 17 E. 2. cap. 16. under the Word Catalla are only comprehended Leaſes for Years, the Iſſues and Profits of the Lands of thoſe that fly for Felony, until ſuch Time as they ſhall be attainted, and acquitted, and of Clerks convict, until he has made his Purgation, Emblements growing upon the Ground at the Time the Forfeiture of the Goods firſt began to take Place, a Right of Action to Goods, as where Goods are taken away wrongfully from a Felon, or where one is indebted to a Felon by Obligation, or is accountable to the Felon for any Receipts or otherwiſe. This Statute of E. 2. does not give any Thing, but only ſhews what ſhall be forfeited. Under the Word Catalla are ſometimes taken, Goods which the Felon has no Property in; as if a Man delivers Money out of a Bag or Corn out of a Sack to one to keep, who is afterwards attainted of Felony, the Money or Corn in ſuch Caſe is forfeited. Stamf. Pr. 45. 6. 6 H. 7. 9. a. 19 H. 7. 47.

It was objected, that it was not the Extent, but the Inquiſition that bound the Goods. But it was anſwered, that the Inquiſition was only an Act in purſuance of the Extent, and imply'd within the Extent itſelf. It is an Inquiſition of Information and Inſtruction only, and not of Intitling. It has ſuch a Relation to the Extent, that the whole together makes but one Execution. Suppoſe that there ſhould be an Extent and no Inquiſition at all ſhould be taken upon it, but the Sheriff ſhould return that he had ſeis'd the Debt; this would have been good, though the Debt were in the Hands of a third Perſon; now, if this be ſufficient Grounds for you to bring an Action for the Crown, the Inquiſition is not material. It is but an Inquiry to find the Debt, but when there is an Inquiſition it is fuller and more entire And there is a Miſtake in the Concluſion of the Plea Abſque hoc, that the Defendant was indebted to the Queen tempore Inquiſitionis; For it ſhould be that he was not indebted to the Queen at the Time of the Teſte of the Extent.

If there be a Difficulty in making this Relation, the Inquiſition finds every Thing that was before the Extent, but not any Thing ſince the Extent, but in purſuance of the Power of the Extent. It is but a bare Information, and it doth relate to the Extent. An Inquiſition upon an Elegit relates to the Elegit; So a Bargain and Sale inroll'd, relates to the Date of the Bargain and Sale. So if a Feoffment be made with a Letter of Attorney to deliver Seiſin, and after an Aſſignment is made by Commiſſioners of Bankruptcy, and then Livery is made, this ſhall relate

relate to the Feoffment; for all is but one Conveyance. If Goods are bail'd or ſold upon Condition, and the Bailee or Vendee becomes Bankrupt, and the Commiſſioners aſſign his Eſtate and Effects, and then the Condition is perform'd, this over-reaches the Bankruptcy.

It was further objected, that it would be of dangerous Conſequence that Extents ſhould over-reach the Debts which are to be diſtributed among the Creditors. But it was anſwer'd, that an Extent was a Matter of Record, whereof every Perſon ought to take Notice. When an Inquiſition is taken, though it be 100 Miles off, it is no more than the Extent itſelf. But it was ſaid, that without this Proceeding it might be of great Damage to the Crown; for Tradeſmen may commit an Act of Bankruptcy in a covenous Manner, and ſo as it cannot be known, as it was done in this Caſe; for here the Creditors were very quick, and a Commiſſion of Bankruptcy was taken out before the Inquiſition was taken, and it was their Intereſt to defeat the Extent, ſo that the Danger attends the Crown more than the Subject. The Perſon indebted is not any way prejudiced; for it is the ſame Thing to him, whether he pays the Money to the one or to the other.

The Act of Bankruptcy itſelf does not bind the Property, but that continues in the Bankrupt until the Aſſignment is made. 3 Keble 616. In Debt on an Obligation the Defendant pleaded, that before the Action brought, the Plaintiff became a Bankrupt; to which the Plaintiff demurred; and per Cur. the Plea is ill, and until an Aſſignment, the Debtor is defenceleſs. Payment of a Debt to a Bankrupt before the Commiſſion ſued out, is good enough, and ſo it is before his Debt be aſſign'd. Andrews v. Spicer. By 1 Jac. cap. 15 S. 14. No Debtor of the Bankrupt ſhall be endanger'd for the Payment of his or their Debts truly and bona fide to any ſuch Bankrupt, before ſuch time as he ſhall underſtand, and know that he is become a Bankrupt.

Now in this Caſe Arnold could not be damaged; for he did not know that Newell had committed an Act of Bankruptcy, but after he had Notice of the Bankruptcy, it was equal to him whether he paid it to the Queen, or to the Aſſignees of the Commiſſioners.

Beſides *the Crown is taken Notice of in* 21 *Jac. cap.* 19. *S.* 10. It is thereby enacted, that if it ſhall happen, any of the Lands, Tenements, Goods, Chattles, Debts, or other Eſtate of any Bankrupt, to be extended, after ſuch Time, as he, or ſhe, is become Bankrupt, by any Perſon or Perſons, under Colour or Pretence of his or their becoming an Accomptant, or any way indebted to the King, his Heirs, or Succeſſors, it ſhall be lawful to and for the Commiſſioners to examine upon Oath, whether the ſaid Debt was due to each Debtor, or Accomptant, upon any Bargain or Contract originally made between ſuch Accomptant and the ſaid Bankrupt, the ſaid Debtor and Accomptant, and his or their Servants, and if ſuch Bargain or Contract was originally made to and with any other Perſon or Perſons, then the ſaid Debtor or Accomptant, and for the Uſe and Truſt of any other Perſon or Perſons. The Commiſſioners, or the greater Part of them, may order and diſpoſe of all ſuch Lands &c. Goods, Chattles and Debts, ſo extended as aforeſaid, to and for the Uſe of the Creditors &c. And this is now, as if it had ſaid, that where a Man ſhall be a Bankrupt before ſuch Time, as that there is an Extent ſued out for a juſt and true Debt, the CommiſſioSers ſhall not intermeddle with, nor ſell the Goods, there being ſuch a Lien upon the Extent, ſo that upon the whole, the Miſchief and Inconvenience will be on the Part of the Crown. Judgment for the Queen. Per Cur.

(A. a) Partners. Where one is Bankrupt. How the other ſhall be charged &c.

1. B. And S. were two *joint Obligees*; *S. became a Bankrupt*, and the Commiſſioners *aſſigned the Debt to B.* the Plaintiff, the Co-obligee, (being himſelf a Creditor) for the Benefit of himſelf and the other Creditors; the Queſtion was, whether this was a good Aſſignment? Per Windham J. if there be two Obligees, the one cannot releaſe the other, becauſe a Thing in Action; And per Twiſden J. the Statute ſaith, that the Aſſignee ſhall have the ſame Action; but here the Bankrupt cannot have an Action without the other; Adjornatur. Raym. 6. Hill. 12 Car. 2. B. R. Boylſtone v. Radcliffe.

Lev 17. S. C. it was argued by Finch, that B. may bring Action alone, and that this was the only Method to recover the Debt; for if it had been aſſigned to another, he alone could not bring Action for the Moiety, and the Action muſt be brought by the Aſſignee, by the Statute, in his own Name, as before the Bankruptcy it ought to be brought in the Name of the Obligee, and now all the Intereſt is in B. the Obligee, one Moiety in his own Right, and the other Moiety for the Advantage of the Creditors, and therefore he alone ſhall maintain the Action in his own Name, he being Obligee as to one Moiety, and Aſſignee as to the other, and all one and the ſame Perſon, and therefore to be ſued by him alone; For after the Aſſignment it cannot be ſued by him and S. and to this Windham J. inclined; but no one being ready on the Part of the Defendant, Adjornatur.

2. Jones moved, that one who was Partner with his Brother a Bankrupt, being arreſted, might be ordered to put in Bail for the Bankrupt as well as for himſelf. Twiſden ſaid, that if there are two Partners, and *one breaks*, *you ſhall not charge the other with the Whole*, becauſe it is ex maleficio; *But if* there are two Partners, and *one* of them *dies*, the Survivor ſhall be charged for the Whole. In this Caſe you have *admitted him no Partner*, *by ſwearing him before the Commiſſioners* of Bankrupts; ſo not granted. Mod. 99. Hill. 21 and 22. Car. 2. B. R. Anon.

3. Action of *Trover* well lies *by the Aſſignee of one Partner a Bankrupt againſt the other*; and ſo ruled on a Trial, and agreed now. 2. Keb. 750. pl. 3. Paſch. 23 Car. 2. B. R. Thomas v. Day.

4. If there are *Accounts between two Merchants*, and *one* of them *becomes Bankrupt*, the Courſe is not to make the other, who perhaps upon ſtating the Accounts, is found indebted to the Bankrupt, to pay the Whole that originally was intruſted to him, and to put him for the Recovery of what the Bankrupt owes him, into the ſame Condition with the reſt of the Creditors; but to make him *pay that only which appears due to the Bankrupt on the Foot of the Account*, otherwiſe it will be for *Accounts* betwixt them *after the Time of the other's becoming Bankrupt*, if any ſuch were. Per North Ch. J. Mod. 215. pl. 1. Trin. 28. Car. 2. C. B. Anon.

5. Joint Debts are to be paid out of the Joint Stock firſt, and if there be an Overplus, then that ought to be apply'd to pay *particular Debts* of each Partner; But if there be not enough to pay all the Joint Debts, and if either of the Partners ſhall pay more than a Moiety of the Joint Debts, then ſuch Partner is to come in before the Commiſſioners of *Bankrupts*, and be admitted as a Creditor for what he ſhall *pay over and above his Moiety*. 2 Chan. Rep. 226. 34 Car. 2. E. of Craven & al' v. Knight, & al'.

On a joint Commiſſion of Bankruptcy againſt two Traders, ſeparate Creditors are allowed to come in, but the joint Effects are to be applied, firſt to pay the Partnerſhip-Debts, and then the ſeparate Debts; and the ſeparate Effects to pay, firſt the *ſeparate Creditors*, and afterwards the *Partnerſhip Creditors*; Per Cowper C. 2 Vern. 706. Mich 1715. Crowder's Caſe. —— Wms's Rep. 326 S. P. per Ld. Cowper. —— S. P. 2 Wms's Rep. 500. by Ld. C. King. Mich 1728. Ex Parte Cook.

6. If one or more of the Joint Traders become Bankrupt, his or their *Proportions only are aſſignable* by the Commiſſioners, to be held in common with the reſt who were not Bankrupts. At Niſi Prius Coram. Holt Ch. J. 12 Mod. 446. Paſch. 13. W. 3. B. R. Anon.

7. If there be ſeveral Joint Traders, Payment to one of them is Payment to all; So if they all, except him to whom the Payment was made, were Bankrupts, the Payment is only unavoidable as to his Proportion. At Niſi Prius Coram. Holt Ch. J. 12 Mod. 447. Paſch. 13. W. 3. B. R. Anon.

(B. a) Creditors. Inter ſe.

1. IF a Trader, being *indebted on Simple Contract*, *pledges Goods* for the Payment, *and promiſes Intereſt*, ſuch Creditor ſhall have Intereſt even between the Act of Bankruptcy and the Commiſſion; and for *Debts on Specialty*, the Creditor ſhall have Intereſt as well between the Act of Bankruptcy as before. Trin. 1716. Croſly's Caſe.

2. *Clerk of a Commiſſion in the Preſence of the Perſon at whoſe Inſtance he ſued out the Commiſſion, no other Perſon being by, opened a Scrutore, and took out ſeveral Papers, and made a pretended Sale*; ordered to be examined on Interrogatories, and pay the Real Value of the Goods, and to be removed from the Clerkſhip. Select Caſes in Chancery in Lord King's Time. 45. Trin. 11 Geo. Mozene &c. Creditors of Abraham.

3. A *Mortgagee ſhall have his Intereſt run on* upon a Bankrupt's Eſtate, becauſe he hath a Right in Rem, *but as to other Intereſt, it ceaſeth on the Bankruptcy*. Per Ld. Chan. King, 18 July 1729.

(C. a) Suits and Actions by Aſſignees; and Pleadings, &c.

1 *Jac.* 1. *cap.* 15. *S.* 13. *THE* Commiſſioners *of Bankrupts ſhall* have Power to aſſign, *or diſpoſe all the Debts due to, and for the Benefit of the Bankrupt, to the Uſe of the Creditors, and the ſame Diſpoſition of the Debts ſhall* veſt the Property in the Perſons to whom *it ſhall be* aſſigned *by the Commiſſioners, as fully, as if the Bond, Judgment, or Contract, where upon the Debt ſhall ariſe, had been made to the Perſons to whom the ſame ſhall be aſſigned; and after ſuch Aſſignment, neither the Bankrupt, nor any other, to whom ſuch Debt ſhall be due, ſhall have Power to recover the ſame, nor to make a Diſcharge thereof; neither ſhall the ſame be attached as the Debt of the Bankrupt, or ſuch other Perſon; but the Party to whom the ſame ſhall be aſſigned ſhall have Remedy to recover the ſame in the Name of the Perſon, to whom the ſame ſhall be aſſigned, or ordered, as the Party himſelf might have had.*

2. Aſſignees may ſue Actions *in their own Names* for the Debts due to the Bankrupt; for they are transferred by Act of Parliament, but yet it is a Debt upon Record; But as in Debt upon a Contract, Defendant might have *waged his Law* againſt the Bankrupt, ſo he may againſt the Aſſignees. Cro. J. 105. Mich. 3. Jac. B. B. Bradſhaw v. -----

3. A Bankrupt *indebted to A. in* 20*l*, *and to B. in* 10*l. hath a Debt due to him on a Bond of* 20*l.* The Court was of Opinion that this Bond-Debt may be *aſſigned* by the Commiſſioners *reſpectively* to the Creditors *in Proportion to their Debts*, and per Warburton J. when it is ſo aſſigned, they may ſeverally ſue for the ſame, becauſe the Act of Parliament operates upon the Aſſignment. Trin 10 Jac. C. B. Godb. 195. pl. 282. Anon.

4. *Debt againſt Adminiſtrator* and declared that the Inteſtate was indebted to J. S. 120 l. for Wares ſold, and that J. S. became Bankrupt, and was ſo adjudged by the Commiſſioners, and this Debt was aſſigned to the Plaintiff being a Creditor; it was inſiſted that by the Aſſignment this is now quaſi a Debt on Record, and the Plaintiff enabled to this Suit by Act of Parliament, and that Ley-gager lies not; but reſolved the Action did not lie; for that Debt upon a ſingle Contract lies not againſt an Executor or Adminiſtrator; and that the Aſſignment by the Commiſſioners of Bankrupts did not alter the Law, but that againſt an Aſſignee, Wager of Law did lie; adjudged for the Defendant. Cro. C. 187. pl. 6. Paſch. 5 Car. B. R. Morgan v. Green.

Jo. 223. pl. 2. S. C. adjudged; For that the Aſſignee ſhall not have other Remedy than the Dettee himſelf had, which was by Action of Debt, or Action on the Caſe,

in the Life of the Debtor, and after his Death by Action on the Caſe againſt his Executor; for the Statute which gives Power of Aſſignment, does not alter the Courſe of the Law for Recovery thereof in other Nature than the Law before allowed, and gives no greater Advantage to the Aſſignee than the principal Creditor himſelf had.

5. Though in Caſe of Bankruptcy it was once held that no *Trover* lay but on ſpecially ſhewing the Bailment before and Converſion meſne, yet it has been ſince held to lie generally; Per Cur. 3 Keb. 294. in pl. 22. Paſch. 26 Car. 2. B. R.

6. Aſſignees brought a Bill to have an Account againſt the Defendant of the Bankrupt's Eſtate; the Defendant *pleaded that he was but a Servant to the Bankrupt, and likewiſe he had been examined by the Commiſſioners upon the whole Matter.* But the Plea was over-ruled and ordered to anſwer. 2 Vent. 358. Mich. 33 Car. 2. in Canc. Anon.

7. *Caſe by the Aſſignee* of the Commiſſioners of Bankrupt; The Defendant *pleaded Non aſſumpſit infra ſex Annos.* Holt mov'd, that the Aſſignment and Promiſe, which give a New Cauſe of Action, are within the Six Years, and the Aſſignee ſhall have a new Six Years. Cur. contra. The Six Years ſhall be *accounted from the original Action*, and the new Promiſe is but a Fiction in Law. The Court inclined to give Judgment for the Defendant but a Diſcontinuance was granted &c. Comb. 70. Mich. 3 and 4 Jac. 2. in B. R. Aſhbrooke v. Manby.

Statute of Limitations was pleaded to an Aſſignee of Commiſſioners of Bankruptcy, and reſolved by the Court, that the *Statute*

of Bankruptcy transfers the Right to the Aſſignee, but it is *no more than the old Right which the Bankrupt had before he had committed any Act of Bankruptcy*, and therefore the Aſſignee muſt take it in the ſame Plight and Condition as the Bankrupt himſelf had it, and ſo it hath been adjudged in the Caſe of Maſon and Plunkett, that the Aſſignee was in the ſame (as to the Right) with the Bankrupt himſelf, and conſequently, if he was barred by the Statute of Limitations, ſo ſhall the Aſſignee. 8 Mod. 171. 172. Trin 9 Geo Grey v. Bendiſh.

Though the Aſſignee of the Effects of a Bankrupt claims under the Act of Parliament, yet as the Statute of Limitations might be pleaded againſt the Bankrupt, by the ſame reaſon it is pleadable againſt ſuch Aſſignee; Per Ld. Chancellor. 3 Wms's Rep. 144. Mich. 1732. South Sea Company v. Wymondſell.

8. *Notice* of the Aſſignment of the Debt is not neceſſary to be given *to the Debtor* before Action brought by the Aſſignee for the Debt. Lutw. 456. Trin. 4 Jac. 2. Slaughter v. Pierpoint.

9. In a ſpecial Action on the Caſe brought by the Plaintiff as Aſſignee of the Commiſſioners of Bankrupts, he *need not ſhew how the Perſon became Bankrupt.* Carth. 79. Paſch. 1 W. & M. in B. R. Pepys v. Low.

Show. 7. S. C. but no Judgment or Opinion.

10. In

Show. 200. to 208. S. C. adjornatur. The Reporter adds, that we moved it ſeveral Times, but could never get over the Exception.

10. In *Ejectment* brought by the Aſſignees of Commiſſioners of Bankrupt, upon the Bankruptcy of Alderman Backwell, in which theſe Aſſignees were Leſſors of the Plaintiff in Ejectment, and a ſpecial Verdict being found, which was now to be be argued, the Attorney-General Trevor interrupted the arguing it, for that the Verdict had abated the Declaration, for it appeared by the Verdict, that *the Demiſe to the Plaintiff*, upon which this Ejectment was brought, *was made by the Aſſignees* of the Bankrupt *before the Enrollment of the Bargain and Sale, by which the Commiſſioners had aſſigned the Lands to the Leſſors of the Plaintiff*, and though the Enrollment of a Deed ſhall relate to the Delivery of the ſame Deed to avoid Meſne Incumbrances; yet every Bargain and Sale before Enrollment is void, and cannot be made good by any Relation, becauſe the Bargainee hath no Eſtate before Enrollment, and if ſo, he could not grant any Eſtate; and here it appears, that the Leſſors of the Plaintiff had not any Title at the Time of the Demiſe, upon which the Plaintiff declared; And the Court held this to be a fatal Exception. Carth. 178. Hill 2 & 3 W. & M. in B. R. Bennet v. Gandy.

5 Mod. 444. S. C. and as to the laſt Exception, the Court held it ſupplied by thoſe other Words, and Judgment for the Plaintiff. ——Ibid. ſtates the Caſe as an Action of Debt brought by the Aſſignees, and Exception was taken, becauſe it was not ſaid that the Defendant had Notice of this Aſſignment; But per Holt Ch. J. no Notice is neceſſary.

11. Action upon the *Caſe by Aſſignee* of Commiſſioners of Bankrupt, ſetting forth, that the Bankrupt had recovered ſuch a Sum againſt Defendant's Teſtator, and that Execution remained to be done, and the Debt was aſſigned to Plaintiff; and that Goods to ſuch a Value of Teſtator came to Defendant's Hands, which he converted to his own Uſe. After Verdict it was moved in Arreſt of Judgment, becauſe *not ſaid that his Commiſſion was obtained upon Petition in Writing* as Statute directs; ſed non allocatur; for though Chancery may refuſe to grant a Commiſſion without a Petition in Writing; yet if they will do it, it ſhall not vitiate; and this may be a *Supplemental Commiſſion*, which *requires no Petition in Writing*; That it was *not ſaid* in the Declaration, *that the Money was not paid to the Bankrupt before the Act committed*; but per Cur *ſaying that Execution remained to be made, ſupplies that* and Plaintiff had Judgment. 12 Mod. 306. Mich. 11 W. 3. Turner v. Main.

3 Salk. 59. pl. 2. S. C. & S. P.

12. *Indebitatus Aſſumpſit* by the Aſſignee of Commiſſioners of Bankruptcy *for Goods ſold after Bankruptcy* committed, lies, or may bring *Trover*, but not both. 12 Mod. 324. Mich. 11 W. 3. Huſſey v. Fiddall.

A Doubt ariſing, whether an Aſſignment over of a Term by the Bankrupt was abſolute, or by way of Mortgage only; the Queſtion, at a Meeting of the Creditors for that Purpoſe was, whether the Aſſignees ſhould bring a Bill to redeem this Leaſehold Eſtate, or not; But the Majority of the Creditors were of Opinion not to do it, and the Aſſignees being thereby diſabled from doing it by this Clauſe in this Statute, the *reſt of the Creditors*, who were of Opinion for bringing ſuch Bill, *brought a Bill in their own Names againſt the ſuppoſed Mortgagee and Aſſignees of the Commiſſioners praying to be let in to redeem.* The Aſſignees anſwered, that they were deſirous it ſhould be redeemed, but the ſuppoſed Mortgagee oppoſed it. The Queſtion now was, whether this Bill was well brought? And Parker J. who ſat for the Lord Chancellor, thought that it was, and that if the *Aſſignees refuſe to bring a Bill, that is for the Benefit of the Bankrupt's Eſtate, any Creditor has a Right to bring ſuch Bill, under Peril of Coſts*; and decreed, That the Aſſignees, in the firſt Place, have Liberty to redeem, and in Default thereof that the Plaintiffs (the minor Part of the Creditors) ſhall have this Redemption. Barn. Chan. Rep. 30 Paſch. 1740. Franklyn v. Fern. ——— But he ſaid, that in general where there are proper Perſons to get in the Eſtate of another, a Court of Equity will not ſuffer either the Creditors of the Teſtator, or the Creditors of a Bankrupt, to bring a Bill in Equity, in order to get in that Eſtate; But if an Executor or Aſſignees, under a Commiſſion, will collude with a Debtor, there is no Doubt a Creditor may bring his Bill in order to take Care of that Eſtate, and charge the Aſſignees or Executors with ſuch Colluſion. Barnard. Ch. Rep. 32.

13. 5 *Geo.* 2. *cap.* 30. *S.* 38. Enacts, that *no Suit in Equity ſhall be commenced, by the Aſſignees, without the* Conſent of the major Part in Value of the Creditors preſent, *at a Meeting, purſuant to Notice in the Gazette.*

14. When

14. When an Action is brought by an Aſſignee under a Commiſſion of Bankruptcy, it *need not be ſet forth in the Declaration how he became Aſſignee.* 2 Barnard. Rep. in B. R. 309. Trin. 6 Geo. 2. Hutchins v. Smith.

15. Where a Perſon makes *Payment* of a Debt to a Creditor, *ſoon after he becomes a Bankrupt, and the Creditor had no Notice of the Bankruptcy* at the Time he received the Money; the Aſſignees under the Commiſſion ſhall not be allowed to recover the Money back again in an *Indebitatus Aſſumpſit*, but only in an Action of *Trover*. And the Reaſon is, that they cannot inſiſt upon having the Money by Way of Contract, but as a Tort. Barnard. Chan. Rep. 207. Mich. 1740. Bourne v. Dodſon.

(D. a) Power of Aſſignees. As to making Dividends.

1. 5 *Geo.* 2. *cap.* 30. *S.* 33. *Perſons choſen* Aſſignees ſhall, after *the Expiration of* 4 Months, and within 12 Months *from the Time of iſſuing ſuch Commiſſion*, cauſe 21 Days Notice, to be given in the Gazette, of the Time and Place the Commiſſioners and Aſſignees intend to meet and make a Dividend, at which Time the Creditors, who have not before proved their Debts, ſhall be at Liberty to prove the ſame; *which Meeting for the City of London, and all Places within the Bills of Mortality, ſhall be at Guildhall; and upon every ſuch Meeting the* Aſſignees ſhall produce Account of their Receipts and Payments, and of what ſhall remain out-ſtanding, and *ſhall (if the Creditors preſent require the ſame)* be examined *upon Oath or ſolemn Affirmation*, touching the Truth of ſuch Account; *and the Aſſignees ſhall be allowed all juſt Allowances, and the* Commiſſioners ſhall order *ſuch Part of the neat Produce of the ſaid Bankrupt's Eſtate, in the Hands of the Aſſignees, as they ſhall think fit, to be divided amongſt the Creditors. and ſhall make ſuch Order for* a Dividend in Writing, *and ſhall cauſe one Part of ſuch Order to be filed amongſt the Proceedings under the Commiſſion, and ſhall deliver unto each of the Aſſignees a Duplicate of ſuch Order, which Order ſhall contain an Account of the Time and Place of making ſuch Order, and the Sum Total of the Debts prov'd, and the Sum Total of the Money remaining in the Hands of the Aſſignees, and how much in the Pound is then ordered to be paid; and the Aſſignees in purſuance of ſuch Order, and without any Deed of Diſtribution, ſhall forthwith make ſuch Dividend, and take Receipts in a Book from each Creditor.*

2. *S.* 37. Within 18 Months after the iſſuing forth of any ſuch Commiſſion, *the* Aſſignees ſhall make a ſecond Dividend, *in caſe the Eſtate was not wholly divided upon the firſt, and ſhall* cauſe Notice *to be inſerted in the Gazette, of the Time and Place the ſaid Commiſſioners intend to meet to make a ſecond Dividend, and* for the Creditors, who ſhall not before have proved their Debts, to come and prove the ſame; *and at ſuch Meeting* every Aſſignee ſhall produce upon Oath or Affirmation his Accounts, and what, *upon the Balance* ſhall appear to be in his Hands, ſhall *by like Order of the Commiſſioners* be forthwith divided, *which ſecond Dividend ſhall be final, unleſs any Suit ſhall be depending, or any Part of the Eſtate ſtanding out, or unleſs ſome* future Eſtate *of the Bankrupt ſhall afterwards* come to the Aſſignees, *in which Caſe the Aſſignees ſhall, as ſoon as may be, convert ſuch future Eſtate into Money, and* ſhall within two Months after, *by the like Order of the Commiſſioners*, divide the ſame.

3. Commiſſioners of Bankruptcy appoint a Dividend to be made of the Bankrupt's Eſtate; a *Creditor under the Commiſſion neglects to receive of the Aſſignees his Proportion of that Dividend*; the *Aſſignees afterwards break, and run away* with the Dividend that was in their Hands; the Creditor ſhall not be allowed to come upon the Bankrupt's Eſtate for that Money, but muſt take this Remedy againſt the Aſſignees as well as he can. Cited by Ld. Chancellor as a Caſe that had been put; But his Lordſhip ſaid, That Caſe *wholly depends upon the Deed of Diſtribution made by the Commiſſioners aſcertaining the Dividend*; for if no ſuch Deed of Diſtribution had been made, the Creditor would have been allowed to have come upon the Bankrupt's Eſtate, and would not have been confined to have taken his Remedy againſt the Aſſignees. Barnard. Chan. Rep. 419, 420. Hill. 1740, in Caſe of Smith v. Duke of Chandois.

(E. a) Aſſignees. Relation. To what Time their Intereſt relates.

Vent. 360. S. C and the Court ſaid, that he is in en le Poſt, and by the Statute. It would be very inconvenient to admit of Relation, becauſe no Time prefix'd for the Inrolment. Sed Adjornatur. ——Skinn. 30. pl. 6. S. C. argued ——2 Show. 156. pl. 142. Berris v. Bowyer. S. C adjudg'd, per tot. Cur. that Inrolment is neceſſary before any Thing can paſs by ſuch Deed of Aſſignment, or Bargain and Sale from the Commiſſioners.

1. COmmiſſioners of Bankrupt have only a Power, and no Eſtate, and to paſs the Eſtate, there muſt not only be a Deed indented, but the *Indenture muſt be inrolled* alſo, and in ſuch Caſe there is *No Relation*; for in this Caſe no Time is mentioned within which it is to be done, ſo that it might extend to Seven or Twenty Years, which would be dangerous, and Judgment accordingly. 2 Jo. 196, 197. Perry v. Bowers.

2. J. H. by Special Verdict appeared to be a Bankrupt, *and was committed Two Months in* 1651, *and recommitted for another Act in* 1657, and then the *Term for Years, whereof he was poſſeſſed, was ſold to the Defendant by the Bankrupt*, and *in* 1660, *the Commiſſioners ſold to the Plaintiff*. The Words of the Act are not after he ſhall firſt be a Bankrupt, for then the earlier being a Bankrupt, would after Five Years be a perpetual Superſedeas to all Tradeſmen; but *if one has ſold, and then Five Years paſs, without any Act of Bankruptcy, the Purchaſor is ſafe*, and no after Act can hurt him; *But where the Bankrupt continues in Poſſeſſion, any after Act is ſufficient to bind the Term*; Judgment clearly for the Plaintiff. Keb. 722. pl. 54. Paſch, 16 Car. 2. B. R. Spencer v. Vanacre.

Mod. 93. pl. 1. S. C. and the Counſel agreed to take out a Special Scire Facias, and try the Special Matter whether he be a Bankrupt or not; and the Court granted it.

3. The *Plaintiff obtained a Judgment* in Debt, *and afterwards became Bankrupt*; the Defendant brought *Error* in the Exchequer Chamber, and there the *Judgment was affirmed*, and the Record ſent back into B. R. Then a Commiſſion of Bankruptcy was taken out, and the Commiſſioners aſſigned this Judgment; but the *Plaintiff ſued out Execution and the Money was levied* by the Sheriff, *and brought into Court*, and then the Aſſignee moved, that it might not be delivered to the Plaintiff, ſurmiſing that the Judgment was aſſigned to him as before; the Court thought it would be hard to ſtay the Money on a bare Surmiſe, and for aught appeared it was the Plaintiff's Due. But, however, becauſe it might be hazardous to deliver it to him, they conſented to detain it, ſo as the Aſſignee would forthwith *take out a Scire Facias* in Order *to try the Bank-*

Bankruptcy, or otherwiſe that it ſhould be delivered to the Plaintiff. Vent. 193. Paſch. 24 Car. 2. B. R. Monk v. Morris.

4. *Payment* by Debtor of a Bankrupt *either to the Bankrupt* himſelf, *or to his Creditor before Notice* of the Bankruptcy and before the Commiſſion ſued forth, is a Diſcharge againſt the Commiſſioners, or the Aſſignee; Per Hale Ch. J. and Cur. 3. Keb. 190. pl. 38. Trin. 25 Car. 2. B. R. Grove v. Smith.

Per Cur. Payment to Bankrupt after Notice is void, but if no Notice, or if the Party be compelled to pay by Suit, as here, before any Commiſſion ſued out, it is a good Diſcharge. And Judgment for the Plaintiff, and anciently, till the Commiſſion ſued out, the Debtor ought not to re-pay, though he had Notice of Bankruptcy. 3 Keb. 230. Mich. 25 Car. 2. B. R. Prin v. Beal.

5. If a Man *pays Money* due to a Bankrupt *before Notice*, he ſhall not be charged for it again; but *if he have Notice, and it be recovered from him by Law* he ſhall not be charged neither; for perhaps Nobody will take any Commiſſion out againſt him. Freem. Rep. 349. pl. 435. Mich. 1673. Pym v. Benſon.

6. In a ſpecial Verdict in Trover for 120 l. the Caſe was, *P.* a Trader *committed an Act of Bankruptcy in* 1673, *and kept on his Trade till* 1677, and *then bound his Son Apprentice to F.* the Defendant, *and paid him* 120 *l. being the uſual Sum given in ſuch Caſes*; and *in* 1679 *a Commiſſion* of Bankruptcy *iſſued againſt P.* and he was found a Bankrupt, and *this* 120 *l. was aſſigned* by the Commiſſioners *as the Money of the Bankrupt* in the Hands of F. to the Plaintiff. All the Court held, that *the Aſſignment was ill*, it being ſo long before the Commiſſion, that the Money was paid, and when there was no Suſpicion of his being a Bankrupt, and no manner of Fraud or fraudulent Intention found, or to be imagined. 3 Lev. 58, 59. Trin. 34 Car. 2. C. B. Rider v. Fowle.

Skin. 21. pl. 21. S. C. ſtates it, that P. was a Trader, and ſtood upon his Privilege of Parliament, as being the King's Servant, and thereupon was diſcharged from an Arreſt, and that he ſuffered himſelf to be outlawed, having Notice of the Exigent. Then he bound his Son Apprentice to F. the Defendant, giving 120 l. with him, which the Commiſſioners aſſigned to the Plaintiff. North and Windham J. held the Payment of the 120 l. not to be a Proviſion, but Charlton and Levins doubted; & adjornatur. But afterwards adjudged for Defendant.

7. *Aſſignment of a Term* by Commiſſioners of Bankruptcy *was made to a Creditor, who before Inrollment* of the Deed of Aſſignment *made a Leaſe to the Defendant, and then the Deed was inrolled.* Per Cur. ſuch a Leſſee cannot maintain an Ejectment, becauſe the Leaſe could not have been before the Inrollment; The Words of the Statute are, that Commiſſioners may ſell by Deed inrolled; So without Inrollment no Sale. 12 Mod. 3. Mich. 2 W. & M. Elliot v. Danby.

8. By Bankruptcy the *Property is in the Creditors*, and Aſſignee has the ſame Remedy as Bankrupt would have had. 12 Mod. 324. Mich. 11 W. 3. Huſſey v. Fiddall.

2 Barnard. Rep. in B R. 343. Mich. 7 Geo. 2. in Caſe of Bracey v. Dawſon, the Ch. J. ſaid, He could not agree, that the Bankrupt ceaſed to have the Property of his Goods at the Time of the Act of Bankruptcy committed; the Property does continue in him even till the Aſſignment. The Property is never in the Commiſſioners, they have only the Power given them of aſſigning the Effects.

9. If there be an *Act of Bankruptcy committed*, and a Creditor obtains a *Judgment ſubſequent to it*, and then a Commiſſion is taken out; now the Judgment is thereby avoided. At Niſi Prius coram Holt Ch. J. 12 Mod. 446. Anon.

10. Trover the Plaintiff's Title was under a *Bill of Sale from the Sheriff*; the Defendant's under an Aſſignment from Commiſſioners of Bankrupt, the Caſe was, A. *was arreſted* at the Suit of J. S. *and put in Bail*; then *ſurrendered himſelf in diſcharge of the Bail, and continued in Priſon*

Priſon two Months; So that by 21 Jac. cap. 19. by relation he became a Bankrupt from the Time of the Arreſt, which being prior to the Bill of Sale, the Plaintiff had no Property, and of that Opinion was Holt Ch. J. but in this Caſe the *Commiſſion of Bankruptcy being taken out before the two Months were expired*, he directed the Jury to find for the Plaintiff. Trin. 2 Ann. apud Guildhall.

1 Salk. 111. pl 8. Kiggil v. Player, Paſch. 7 Ann. B. R. the S. P. and ſeems to be S. C. and upon Evidence, this being made a Caſe, it was argued, that by the Aſſignment the Aſſignee had a Property from the Time of the Bankruptcy, and there was no meſne Interval of Time: As where one takes out Letters of Adminiſtration, he has the Property from the Death of the Inteſtate, and may declare generally, Ut de Bonis ſuis propriis, even before an Adminiſtration ſued out; But Holt denied this, and ſaid, he ought to declare ſpecially, and ſo the Plaintiff might have done in the principal Caſe, and he relied on the Caſe of Perry v. Bowyer, and ſaid, the Aſſignee was in by Relation from the Time of the Bankruptcy ſo as to avoid all meſne Acts, but not ſo as to be actually inveſted with the very Property; Adjornatur.

11. One *Mills* the 14th of Oct. *became a Bankrupt*; afterwards a *Judgment &c. and a Fi. Fa. was had againſt his Goods, &c. which were ſeiſed and ſold. In December following a Commiſſion is taken out*, and in *March an Aſſignment is made of the Goods*; And the Aſſignees bring Trover generally. Held, that if a Man becomes a Bankrupt, the Property of his Goods continues in him until Aſſignment, but the Property from the Act of Bankruptcy is ſo bound, that it cannot be altered until Aſſignment. The Aſſignee ſhall have all the Goods the Bankrupt had at the Time of the Bankruptcy being committed. The Aſſignee doth come in the Place of a Bankrupt, but doth not repreſent him as an Adminiſtrator doth his Inteſtate. And if there had been a Demand proved in this Caſe, the Trover would have lain, but without proving an actual Demand by the Aſſignee; It was held, that the Action will not lie, Per Holt, but Powell J. contra. No Judgment. Paſch. 7 Ann. Hidgell v. Clare.

12. An Aſſignment from the Commiſſioners has to many Reſpects a Relation to the Time when the Act of Bankruptcy was committed. And therefore *if after ſuch Act the Bankrupt diſpoſes of his Effects*, the Aſſignment ſhall certainly over-reach it. Agreed by the Ch. J. 2 Barnard. Rep. in B. R. 343. Mich. 7 Geo. 2. in Caſe of Bracey v. Dawſon.

13. And he agreed the ſame too, where a *Sheriff takes Goods in Execution of a Bankrupt, and does not deliver them over to the Party before the Aſſignment* made, the Aſſignment ſhall not have a Relation to defeat that Execution; becauſe there the Execution was compleated. 2 Barnard. Rep. in B. R. 343. Mich. 7 Geo. 2. in Caſe of Bracey v. Dawſon.

(F. a) Aſſignees Choſen. When; How; and by Whom; and How the Aſſignment is to be made.

1. 5 Geo. 2. cap. 30. S. 26. *THE Commiſſioners ſhall forthwith, after they have declared the Perſon a Bankrupt, cauſe* Notice *thereof to be given* in the Gazette, *and ſhall appoint Time and Place for the Creditors to meet (which Meeting for the City of London, and all Places within the Bills of Mortality, ſhall be at Guildhall) in order* to chooſe Aſſignees.

2. *S.* 27. *No Creditor, or other Perſon on the Behalf of any Creditor, ſhall be permitted to vote in ſuch Choice of Aſſignees whoſe* Debt *ſhall* not amount to 10 l.

3. *S.* 30

3. *S.* 30. *It ſhall be lawful for the Commiſſioners* immediately *to* appoint Aſſignees, which *Aſſignees* ſhall be removed at the Meeting of the Creditors *for Choice of Aſſignees*, if the major Part in Value *of them then preſent, and of ſuch Perſons authorized as aforeſaid*, ſhall think fit; *and ſuch* Aſſignees *as ſhall be* removed, ſhall deliver up the Effects unto the Aſſignees choſen by the Creditors, *and all the Eſtate; and if ſuch firſt Aſſignee ſhall neglect by the Space of ten Days (after Notice in Writing) to make ſuch Aſſignment and Delivery, every ſuch firſt Aſſignee ſhall forfeit 200 l. to be diſtributed amongſt the Creditors, and to be recovered by ſuch Perſon as the Commiſſioners ſhall appoint to ſue for the ſame.*

4. *S.* 31. *It ſhall be lawful for the Lord Chancellor*, upon Petition of Creditors, *to make ſuch Order for the Choice of* new Aſſignees *as he ſhall think juſt; and in caſe a new Aſſignment ſhall be ordered, then ſuch Effects of ſuch Bankrupt ſhall be thereby effectually veſted in ſuch new Aſſignees, and it ſhall be lawful for them to ſue for the ſame in their Names, and to give Acquittance for Debts as the Aſſignees in the former Aſſignment might have done; and the Commiſſioners ſhall cauſe publick Notice to be given in the two Gazettes that ſhall immediately follow the Removal of ſuch Aſſignees, and the Appointment of others.*

5. *S.* 42. *Enacts, that* no Schedule *ſhall be annex'd* to any Deed of Aſſignment *of the Perſonal Eſtate of ſuch Bankrupt.*

(G. a) Aſſignees. Bound by what Agreement &c. made or done by Bankrupt.

1. SIR Stephen Evans had *Diamonds conſigned to him* by Governor Pitt *to ſell* for his Uſe; *he charged them* fraudulently *at a leſs Value than he ſold them for*, and after became a Bankrupt; upon which a Queſtion aroſe, whether the *Aſſignees* under the Commiſſion of Bankruptcy ſhould *pay Coſts?* And reſolved they ſhould *out of the Eſtate*; for if he had been here himſelf, he muſt have paid Coſts, and the Aſſignees ſtand in his Place, as to his Eſtate. But it appearing that the Paper, in which he charged then at a leſs Value than what he ſold them for, was not delivered to Mr. Pitt, it was look'd upon not as actual Fraud, but only a Preparation to it, of which he might have repented, ſo no Coſts againſt the Aſſignees. Select Caſes in Canc. in Lord King's Time, 16, 17. Trin. 1725. Child v. Pitt.

2. A *Perſon that ſues out a Commiſſion may be diſcharged by the Aſſignees*, for they are Truſtees for the Creditors, and may employ whom they pleaſe, and therefore the former one to deliver up all Papers &c. on being paid his Bill. 23 December 1728. Ld. Chan. King.

(H. a) Commiſſioners or Aſſignees. Puniſhable or Relieved. In what Caſes.

1. H. And other the Plaintiffs are Creditors of a Bankrupt, but H. the Plaintiff was the Principal Creditor, and they all complain againſt the Defendants, who were *Aſſignees* of the Commiſſioners; for that they have *recovered Judgment for* 331 *l. of the Bankrupt's Eſtate in the ſaid H's Hands; whereas the ſaid Bankrupt was indebted to him in* 700 *l. and that H. and ſome other of the Creditors, are willing to take their Proportion of the ſaid* 331 *l. whoſe Debts are now in Danger of being loſt, if the Whole ſhould be received by the Defendant K. and others Aſſignees &c. who had obtained the ſaid Judgment*; and therefore they exhibited a Bill for Relief. The Defendants demurred, for that there is no Equity in the Bill to change the Law, by which the Aſſignees are enabled to recover the Bankrupt's Eſtate, and there is no particular Charge in the Bill that makes the Demands of the Aſſignees unreaſonable. The Court decreed, that H ſhould prove his Debt before the Commiſſioners, and pay to the Defendants their Proportion of the ſaid 331 l. and Coſts to be diſtributed to them reſpectively. Fin. Chan. Rep. 264, 265. Trin. 28. Car. 2. Hawkins v. King.

2. W. a *Victualler*, was greatly *indebted to M. his Brewer, and quitted that Trade, and turn'd Innkeeper*, and *borrow'd Money of N. his Landlord to buy Goods to furniſh his Houſe, and for Security thereof, made a Bill of Sale to N. but kept the Poſſeſſion of them.* Afterwards W. *became further indebted to M. for Drink deliver'd after his becoming Innkeeper*; but not being able to go on with his Trade, he *agrees with N. to give him Security by a New Bill of Sale of the ſame and other Goods, but before the Execution W. by Contrivance with M. commits an Act Act of Bankruptcy*; and *N. not knowing of the Trick, accepts a New Bill of Sale.* M. ſues out a Commiſſion, and gets an Aſſignment, and then brought Trover for theſe Goods. Holt Ch. J. held, Quod nullus dedixit, that if theſe Goods of W. had been aſſign'd to any other Creditor, the keeping Poſſeſſion of them had made the Bill of Sale fraudulent as to the other Creditors; but ſince the Original Agreement was as here, and ſo honeſtly and really made for ſecuring the Defendant's Money lent to W. for the ſaid Purpoſe, the Agreement was good and honeſt. Ld. Raym. Rep. 286. Hill. 9 W. 3. B. R., Meggot v. Mills.

3. 5 *Geo.* 2. *cap.* 30. *S.* 26. *The Aſſignees ſhall be obliged to* keep Books of Account, *wherein they ſhall enter all Sums of Money, or other Effects, which they ſhall have received out of the ſaid Bankrupt's Eſtate, to which Books every Creditor ſhall have free Reſort.*

4. *S.* 42. *If any Commiſſioner ſhall order Expences of Eating and Drinking* to be made, or ſhall eat or drink at the Charge of the Creditors, or *out of the Eſtate of ſuch Bankrupt, or receive above* 20 *s. each* Commiſſioner *for each Meeting*, every ſuch Commiſſioner ſhall be *diſabled to act in any Commiſſion of Bankrupts.*

(I. a) Frauds between Bankrupt and Creditor after Commiſſion iſſued.

1. 5 *Geo.* 2. *cap.* 30. *S.* 11. EVERY Security *to be given* to the Uſe of any Creditor, *as a Conſideration* to perſuade him to ſign *ſuch* Certificate, *ſhall be void*; *and the Party ſued on ſuch Contract may plead the general Iſſue.*

2. *S.* 24. *If any Bankrupt, after a Commiſſion iſſued againſt him, ſhall pay any Money to the Perſon who ſued out the ſame, or deliver him Goods, or other Satisfaction, for his Debt, whereby he ſhall privately receive more in the Pound than the other Creditors, ſuch Payment or Satisfaction given ſhall ſuperſede the Commiſſion, and the Lord Chancellor ſhall award to any Creditor petitioning another Commiſſion, and the Perſon taking ſuch Goods, or Satisfaction, ſhall forfeit all he has received, or the Value thereof, to be divided amongſt the Bankrupt's other Creditors.*

(K. a) Purchaſors affected. In what Caſes.

1. LORD Chancellor ſaid, There are Frauds which Equity can only relieve againſt; and there are other Frauds where particular Acts of Parliament make the legal Act void &c. but that does not take away the Juriſdiction of this Court, which can give fuller and more particular Relief. And a *pretended Sale of Lands* by Ward, *ſhortly before his Bankruptcy*, to his Brother, on 1 Jac. 1. cap. 15. was ſet aſide, on Bill by Aſſignees, whereby voluntary Conveyances, by Perſons who after become Bankrupts, are void.

Objection, That ſuch a Conveyance would be void at Law, and need not come into this Court to ſet it aſide; ſed non Allocatur. Mſſ. Rep. Hill. 1733. De Golls v. Ward.

2. Upon further hearing of this Cauſe, Iſſue being directed to try the Bankruptcy of *John Ward*, upon Trial at Bar in B. R. in Eaſter Term laſt, he *was found to become Bankrupt* 26 *Auguſt* 1725. And now upon the Equity reſerved, *Plaintiffs* (Truſtees for the S. S. Company) *prayed an Account, and to ſet aſide Conveyances* that J. W. had made *ſince his becoming Bankrupt.* MS. Rep. 1739. Read v. Ward.

For Defendant Knox Ward and Wife it was inſiſted, that previous to their Marriage by Settlement *in June* 1729, *in Conſideration of* 4000 l. *Portion and* the *Marriage*, *J. W. agreed to purchaſe Lands* of 1000 l. per Ann. *out of the Sale of particular Lands mentioned* in that Settlement, which Lands were ſubject to ſeveral Truſts precedent *to the Uſe of the Marriage*; and that they, being Purchaſors, were protected by the *Stat.* 21 *Jac.* 1. whereby it is provided, *that no Purchaſe made from a Bankrupt ſhall be impeached, where the Commiſſion does not iſſue within five Years after the Bankruptcy committed*, and in this Caſe it did not, for the finding him to become Bankrupt is in Auguſt 1725, and the Commiſſion did not iſſue till November 1730.

Mr. Attorney General for Knox Ward and Wife argued, that though their Settlement is not by actual Conveyance, yet it is a Covenant which

which binds Specifick Lands, and a Purchaſor in Equity and *by Act* is within the Intent of the Statute, for the Aſſignees are bound by the ſame Equity as the Bankrupt himſelf was, and cited the Caſe of **Taylor and Wheeler** per Lord Cowper. Beſides, here Defendants had no Notice of the Bankruptcy, which includes Notice of all the Acts which conſtitute the Bankrupt, As being indebted and trading &c. and of this Opinion was Ld. Talbot in the Caſe of Mr. **Tyſon's** Bankruptcy, where Iſſue was directed as tothe Notice of his being a Trader; But the Statute Jac. 1. does not mention or regard the Caſe of Notice or no.

Mr. Floyd cited Lev. 13, 14. Radford v. ..... as in Point on the Statute Jac. 1. And in Equity the Settlement covenanted to be made, is to be conſidered as made. The Conſideration is unqueſtionable, viz. Marriage and a Portion.

Mr. Brown for the Plaintiffs argued, that Defendants have ſhewn no Conveyance to Defendant Knox Ward; ſo the Queſtion is, whether Plaintiffs are intitled to any Relief againſt Knox Ward and Wife? He agrees, that if they had been antecedent Purchaſors by Conveyance, and for valuable Conſideration, they would be protected. As to the Objection, That the Articles in Equity are to be conſidered as a Purchaſe; he ſaid, that in the Articles John Ward does not covenant to ſettle &c. but only as far as in himſelf lies he would ratify and confirm the Articles; and the Covenant &c. to ſettle is by Knox Ward, who under former Deeds was intitled to the Surplus of the Eſtate, which former Deeds were all ſubſequent to J. W. his Father's Bankruptcy. As to the Stat. 21. Jac. it extends to actual Conveyances, and that are fairly and honeſtly made; and by Stat. 13 Eliz. cap. 7. as to Conveyances before Acts of Bankruptcy, they are void, if the Purchaſors have Notice of the Fraud &c. And it is ſtrange to ſay, that a Purchaſer, after the Bankruptcy, ſhould be protected, though with Notice of the Fraud &c.

As to the Covenant by Knox W. on the Marriage Articles, it only relates to the General Surplus — So that this is in Nature only of a Security to raiſe &c. to purchaſe &c. — All the Declarations of the former Truſts for the Benefit of Knox Ward are void by the Bankruptcy, and he was privy and Party to all thoſe Deeds which were fraudulent (and it was ſaid was the ſole Foundation of the Jury finding J. W. a Bankrupt.) As to Knox W. not having Notice of the Bankruptcy, it is without Doubt he had, and knew his Father to be a Trader; Beſides, the Statute, which makes the Acts done amount to a Bankruptcy, is Notice to him and every Body. As to the Wife and her Father, the ſeveral Deeds &c. and pretended Tranſactions between J. W. and K. W. are all recited in the Marriage Articles &c. — But per Ld. Chancellor, the Notice of the Deeds are not ſufficient, but that they were made with fraudulent Purpoſe. Whereupon Mr. Brown ſaid further, that the Purpoſe of the Deeds appear particularly from the very Deeds themſelves, and the Wife and her Father ſhould have made Inquiry as to the Nature and Intent of thoſe Deeds &c. And that there is no Proof of Payment of the 4000 l. Portion, or of any Part.

Lord Chancellor ſaid, The great Difficulty of this Caſe is with Reſpect to Mrs. Ward, the Wife, and the Iſſue of the Marriage; for as to Knox Ward, he appears to have been Party and Privy to the fraudulent Tranſactions of his Father. — It is very rare that Attempts in Equity are made to ſet aſide a Marriage Agreement. — He remembers **Shipton v. Wycherly** as the only one. — As to the Objection, that this is only a legal Conveyance, he agrees it is not, but by the Articles the Surplus is ſubjected to make good the intended Purchaſe and Settlement &c. and J. W. is Party to the Articles --- There was no Notice to the Wife, or Father, of the Acts of Bankruptcy. --- As to

Notice

Notice of the Deeds whence the Bankruptcy aroſe, that is not ſufficient --- And you can't come to impeach a Purchaſor in Equity without Notice, any more than you can a legal Conveyance &c. --- It is not ſufficient to ſay that Knox W. was intitled to the Surplus only as a Volunteer; for if ſuch ſell for a valuable Conſideration, the Purchaſor ſhall protect himſelf &c. --- And he thought a Purchaſor by Articles is a Purchaſor within the Saving of the Statute of 21 Jac. 1. ſo as to defend himſelf in Equity &c. --- Knox W. is not within the Statute, and he takes leſs by the Articles than he had before &c. Adjornatur.

Afterwards Lord Chancellor declared that he had ſpoke with the Ch. J. of B. R. who had told him that the Jury found J. W. Bankrupt from executing the Deed of 25 Auguſt, 1725, and that no Act of Bankruptcy was proved before or after, but the Execution of that Deed. —— And no other Act of Bankruptcy till 1726. The Parties then by Direction of his Lordſhip went on into the Cauſe. ——The Marriage Articles of Knox W. were read, and Mr. Attorney-General of Counſel for Knox W. & Ux. ſaid, that the Statute ſecures Purchaſors *generally, whether directly, or indirectly from Bankrupts &c.* —— And in Equity it is not material, whether the Purchaſe be by Actual Conveyance, or by Articles &c. and the Covenant binds, &c. and deſcends &c. and cited the Caſe of **Kirk v. Clark** Preced. Ch. 223. — As to the Objection, that Knox W. and his Wife &c. are to be conſidered as having Notice &c. there was no Evidence as to that, except what is collected from the Articles but that is not ſufficient; —Nor any Thing but Notice of the Deeds which made the Bankrupt in 1725; But then there ſhould be Notice that the Creditors, for whom thoſe Deeds were made, were fictitious &c. which was what made the Bankrupt — But ſuppoſe there was Notice that there had been an Act of Bankruptcy by Mr. J. W. in 1725, they nevertheleſs were protected by the Statute, becauſe the Statute is general, that no Purchaſor ſhould be impeached where the Commiſſion does not iſſue in Five Years &c. and asked, if that is ſaying, a Purchaſor without Notice? ——And the Statute which mentions Purchaſors, as the Statute of Eliz for making void Voluntary Settlements, don't regard whether there is Notice or not of the preceding Settlement. —And the Reaſon of the Statute is, that if a Man continues to deal for ſo many Years &c. without a Commiſſion of Bankruptcy taken out, his Acts ſhall be valid where they were for a Conſideration. —An Equitable Purchaſor is within the Statute, as in the other Caſe on the Statute of Eliz. As ſuppoſe A. pays a Conſideration for an Equity of Redemption, he ſhall be preferred in Equity to a Voluntary Conveyance of the Equity of Redemption preceding, upon the Equity of the Statute. ——It was alſo objected, that this Purchaſe by the Marriage Articles is ſubject to the Power by J. W. in the Deed of September 7, 1725, where the Power is to charge the Premiſſes with any further Sum for Payment of his Debts. ——And objected that the Marriage Articles is ſubject to this &c. ——Then as to theſe Two Queſtions; 1ſt. Whether the Marriage Settlement is ſubject to this Power? —And 2dly, Whether, if it be, this Power is transferred to the Plaintiffs or the Aſſignees? ——1ſt. The Power is not reſerved in the Marriage Articles, all that is there is, that after the Truſts performed in this former Deed &c. *Mr. J. W. ratifies and confirms &c. the Power and Truſt*; And J. W. agrees that the Settlement be made of 1000 l. a Year out of a Surplus ariſing after the Truſts &c. as in the former Deed. —The Power therefore is extinguiſhed by the Marriage Agreement inconſiſtent with it as much as if it had been releaſed. ——Suppoſe J. W. had ſold the Eſtate, could he after execute the Power &c? —— Beſides, here J. W. in 1727 did appoint ſeveral Debts to be paid &c. --- The next Queſtion will be, whether the Aſſignees (if the Power did ſtill exiſt) could have the Benefit of it? for the Plaintiffs was cited **Jordan v. Savage**

Savage heard before Ld. King.—But the Execution of this Power would charge the Eſtate he had ſold &c. i. e. contracted for; which is a Sale in Equity.—If the Statute had not transferred Eſtates in Tail, the Court would not have compelled the Bankrupt to have ſuffered a Recovery, or levied a Fine &c. and yet this is a Power in the Bankrupt.—If the Conveyance in 1725 by the Bankrupt was void, then it remained in J. W. to convey for a valuable Conſideration.—So if conſidered as voluntary only, he would have it ſtill in his Power to convey to a Purchaſor.

Lord Chancellor ſaid, this is an extraordinary Caſe, and he believed none like it before, and hopes never will again, and therefore it is incumbent on the Court to do all they can to prevent the like. Here appears a Scheme of Fraud, through many Years, to defraud juſt Creditors.—The Nature of the Caſe is of a Gentleman having a very great Eſtate, and not greatly indebted, except the Demand by the S. S. Company.—The Deeds begin with the Conveyance of 25th and 26th Auguſt, 1725. And by ſubſequent Deeds all the Real and Perſonal Eſtate, even to Houſhold Goods, are veſted in Truſtees to pay pretended Creditors, the Son joining with the Father, but not one of the pretended Creditors;—And no Diſtreſs from any Creditor &c.—Amongſt other Truſts is the extraordinary Power in the Deed of 7 Sept. 1725 for J. W. to charge any other Debts.—And laſt of all the whole Surplus of all the Eſtates is veſted in the Son Knox W.——Then comes the Marriage Articles in June 1729, and therein every one of the former Deeds are recited to be in Conſideration of the Marriage of K. W. with Mrs. ..... and 4000 l. Portion (but not proved paid.) The Surplus agreed to be ſubject to a Term of 200 Years to pay 400 l. a Year to Mr. J. W. for Life, if he ſhall particularly demand it, and then for K. W. and his Wife; then to purchaſe Lands of 1000 l. per Ann in Tail General to K. W. Remainder to his Right Heir, with Power, as to Portions for Children, and Power for Truſtees to provide Coach and Horſes for Mr. J. W.—Then there is another Deed of ſooner Date by K. W. the Son, ſubjecting the Manor of W. to ſome Uſes.—A Bill was brought by the Aſſignees to ſet aſide theſe Deeds &c. an Iſſue was directed and the Jury find J. W. Bankrupt 26th Auguſt 1725, being the Date of the firſt Deed of Releaſe, by which that Deed is overreached—And the Judges certify, that this Deed was the Act of Bankruptcy, as being made to defraud his Creditors.—The Queſtion is, What the Conſequence of this Verdict is?—1ſt. in Law,—and next, how in Equity—At Law this Deed and all ſubſequent ones are void. But it was objected from the Statue 21 Jac. 1. that the Commiſſion of Bankruptcy was not taken out till 20th November, 1730, above Five Years after the Act of Bankruptcy, and by a Clauſe in that Statute, Purchaſors in ſuch Caſe are not to be impeached, &c.—But he holds that this Clauſe only protects Purchaſors bona fide, without Notice of the Fraud and Act of Bankruptcy.——And here Knox W. muſt have had Notice of the Act of Bankruptcy, becauſe Party to the very Deed that made the Bankruptcy, ſo that K. W. is not protected by this Deed;—Next here in Equity,—And here muſt take Notice, that there are Circumſtances of Actual Fraud, and here appears a long Series from 1725.—The Power in the Deed of September 1725 to charge the Eſtate with any other Debts is Fraud apparent, becauſe it reſerves in Effect the whole Eſtate in the Bankrupt himſelf &c.—The next Conſideration is, how far the ſeveral Defendants are to be affected.—This is to be conſidered in two Reſpects; 1ſt. Under the Deeds from 1725, prior to the Articles; 2dly, How upon the Marriage Articles?---1ſt. As to the Deeds prior to the Articles they concern the Truſtees for the pretended Creditors, and thoſe Creditors; but no

Proof

Proof of any Real Debts; and the firſt Deed for that Reaſon found void, and therefore this is out of the Caſe. Then the Queſtion is under thoſe Deeds, how it ſtands with Mr. K. W. and he holds that he is affected with the Act of Bankruptcy and Fraud, being Party to the firſt Deed &c. and at beſt, it is all voluntary as to him, and the Surplus in all the ſubſequent Deeds is reſerved to him.---Next as to the Marriage, and here is the only Appearance of Difficulty;---So as to the Perſons provided for; and as to J. W. himſelf he cannot partake of the Conſideration, ---- All the Parties to be conſidered are, Knox Ward and Mrs. Nettleton the intended Wife, and the Iſſue. ---1ſt. As to Knox Ward, his Caſe is not immediately the Marriage Articles, he had Notice of the Bankruptcy of his Father before. It was objected that K. W. is to be conſidered as a Purchaſor by the Articles, and the Statute not mentioning Notice, and where the Commiſſion is not ſued out within Five Years &c.---He holds that Articles in Equity are the ſame as Actual Conveyance at Law, and no more to be impeached in Equity; but holds, that K. W. takes nothing under the Articles but what he had before.---And it is ſtrange for him to take more and better Intereſt than before; but ſuppoſe it ſo, he holds the Clauſe in the Statute 21 Jac. 1. not to be conſidered in the large Senſe contended for ſo as toextend to all Purchaſes, but holds that this Clauſe is to be compared to the Clauſe in the Statute 13 Eliz. cap. 7. which provides againſt Purchaſors having Notice of the Fraud &c. The Statute 21 Jac. takes Notice of the former Acts againſt Bankrupts, and is for further Proviſion for Creditors &c.---Therefore holds this like the Caſe, and warranted by the Conſtruction made on the ſeveral Statutes about Leaſes by Eccleſiaſtical Perſons., 1 Vent. 244. **Bayly v. Burn**, the laſt Reſolution in that Caſe.--- And ſo holds that all the Statutes againſt Bankrupts are to be conſtrued together and to be conſidered all as one Statute &c.---And no Pretence but Mr. Knox W. had Notice &c. and therefore holds that Mr. Knox W. cannot protect himſelf under the Statute. ---Next as to the Wife and Iſſue. Mrs. N. for what appears, is an Innocent Perſon;---No Evidence to ſhew her Father had any other Notice than what appears from the Deeds;---But thinks Notice of the Deeds is not Notice of the Fraudulent Intent of theſe Deeds, other than as to Mr. K. W. who was Party &c.---And if Mrs. N. had not Notice of the Bankruptcy, ſhe cannot be affected in Equity by the Bankruptcy.---Next as to the Iſſue of the Marriage. Firſt, as to the Heirs of the Body of Mr. K. W. that is an Eſtate Tail in him.---Agrees that in Marriage Articles where the Limitation is to the Heirs of the Body by the Wife, there it ſhall be carried into ſtrict Settlement, but otherwiſe where the Limitation is general to all the Iſſue, and that this was the real Intent appears by the Proviſion of 6000 l. which is expreſsly for the Iſſue of the Marriage, and extends to the Eldeſt Son, as well as to the reſt of the Children. --- This 6000 l. is ſecured by a Power and Truſt. He holds that the Iſſue are to be affected with the Notice to the Father, and Mother, and Truſtees.---As to the Objection by Plaintiffs, that the Proviſion is of the Surplus only after the fictitious Debts &c. ---but this would be ſtrange, and their Proviſion ought to be after what was really due.---As to Mr. J. W's Power to charge other Debts, he holds his joining in the Marriage was an Extinguiſhment of that Power, and amounted to a Revocation.---Therefore held and decreed the Marriage Articles to be ſet aſide, as to all the Uſes, except as to the Jointure of the Wife, and the 6000 l. for the Iſſue. MS. Rep. Mich. 1739. Read v. Ward.

(L. a) Reward to Diſcoverers of Bankrupt's Eſtate.

1. 5 *Geo.* 2. *cap.* 30. S. 20. EVERY *Perſon who ſhall (after the Time allowed to ſuch Bankrupt) voluntarily make Diſcovery of any Part of ſuch Bankrupt's Eſtate, not before come to the Knowledge of the Aſſignees, ſhall be* allowed Five per Cent, and ſuch further Reward as the Aſſignees, and the major Part of the Creditors, in Value, preſent *at any Meeting of the Creditors*, ſhall think fit.

(M. a) Concealments of Bankrupt's Eſtate puniſhed.

1. 13 *Eliz. cap.* 7. S. 8. IF the Creditors *of any Bankrupt* be ſatisfied *their Debts with the proper Lands, Goods, and Debts of the Bankrupts, or with the ſame and ſome Part of the Forfeitures, and there ſhall remain an Overplus of the ſaid Forfeitures of the double Values*; the one Moiety *of the Overplus* of the Forfeitures, ſhall be *by the Commiſſioners* paid unto the Queen, and the other Moiety *ſhall be diſtributed* amongſt the Poor *within the Hoſpitals in every City, Town, or County where ſuch Bankrupt ſhall be.*

2. A *Commiſſion being ſued out by the Bankrupt's Father-in-Law*, to whom the Bankrupt, before ſuing out the Commiſſion, had made over all his Effects except a few Shillings, and ſome deſperate Debts was held by Ld. C. Parker, to have been plainly ſued out fraudulently to diſcharge the Bankrupt. Wms's Rep. 1560. 563. Trin. 1719. Ex Parte Salkeld.

3. A *Goldſmith* being much indebted *ſhut up his Shop, and having a Stock likewiſe in Partnerſhip in the Wine Trade, aſſigned two* * *Thirds thereof to J. S. a Creditor*, (who had been particularly aſſiſting to him) *without his Knowledge*, being worth about 300 l. and never after opened his Shop again, but the next Day went of, and was after found to have become Bankrupt ſuch a Day after the Day of the Aſſignment. On a Bill by J. S. againſt the Aſſignee, and the Partner in the Wine Trade, the Maſter of the Rolls held the Aſſignment good. And held, that there *might be juſt Reaſon for one becoming Bankrupt to prefer one Creditor to another*, as where he was a faithful Friend, or Money lent in Extremity without Profit, and all that ſuch Creditor has to ſubſiſt upon, whereas Dealers in Trade may have been Gainers. And that the *Time of the Aſſignment*, if made before the Bankruptcy, *is not Material, but the Juſtice of the Debt.* And its being made *without Notice of the Creditor* is no Objection; for this ſhews that there was no Fraud or Importunity. And if ſuch Aſſignment to a ſingle Creditor be a *Choſe en Action*, he may apply for Relief here, for he can go no where elſe. Otherwiſe if a *Legal Eſtate* had been conveyed. His Honour cited ſome Precedents, and ſaid, that though preferring ſome Creditors, in hopes of after Favours, may be of miſchievous Conſequence, yet by reaſon of the Precedents, he muſt Decree in favour of the Aſſignment. 2 Wms's Rep. 42[illegible] Mich. 1727. Small v. Oudley.

* But the Counſel inſiſted, that the Aſſignment was of all his Stock in the Wine Trade. —— If the Aſſignment had been, *of all his Goods and Effects, or of all his Eſtate, or all his Stock in Trade*, as Goldſmith &c. this had been too general, and would hardly have ſtood; But here it was not of the Trader's own Trade, but *a ſmall Branch of a different Trade*, of a Stock in Wine,

Wine, in all not above 300 l. and but two thirds of that. Ibid. 431. in a Note added by the Reporter, (as it ſeems) at the End of the Caſe, ſays it was ſo ſaid by the Maſter of the Rolls.

4. A. a Trader was juſt on the Brink of Bankruptcy, a *Deed ready Ingroſſed was brought to him, which he executed a little before his Bankruptcy*, and in Contemplation thereof, *to give a Preference to ſome of his Creditors*. Cited by the Maſter of the Rolls, as the Caſe of **Jacob v. Shepherd**, and ſaid, that he doubted thereof; but that on Appeal, Ld. Macclesfield ordered a Trial, to be informed when the Trader became a Bankrupt, and the Execution of the Deed being found to have been before the Bankruptcy, it was decreed in favour of the Deed. 2 Wm's Rep. 431. in Caſe of Small v. Oudley.

S. P. cited by the Maſter of the Rolls. 2 Wms's Rep. 431. to have been decreed in Sir Stephen Evans's Caſe.

5. 5 *Geo.* 2. *cap.* 30. *S.* 21. *Every Perſon who ſhall have accepted of any Truſt, and ſhall wilfully conceal any Eſtate of any Bankrupt, and ſhall not, within* 42 *Days after ſuch Commiſſion ſhall iſſue, and Notice given in the Gazette, diſcover ſuch Truſt and Eſtate in Writing to one of the Commiſſioners or Aſſignees, and ſubmit it to be examined (if required)* ſhall forfeit 100 l. and double the Value of the Eſtate concealed *to the Creditors*.

(N. a) Of ſetting off where there are mutual Debts between Bankrupt and Creditor, and of ſubmitting to Arbitration, and compounding Debts due to Bankrupts.

1. WHERE there is mutual Credit betwen a Bankrupt and a Creditor, the Balance ſhall only be paid, and the Clauſe in the Statute is not to be conſtrued of Dealings *in Trade* only, or in Caſe of *mutual running Accounts*, but alſo where one Credit is upon Mortgage, and the other upon Note, Per Ld. Cowper, and he ſaid, that in all Caſes of mutual Credit it is natural Juſtice and Equity, that only the Balance ſhould be paid. Wms's Rep. 325, 326. Trin. 1716. Ld. Lanesborough v. Jones.

2. Sir Stephen Evans in the Year 1711 had 5000 l. *Stock in the Hudſon's Bay Company*, and was their Banker or Caſhier, and upon that Account was indebted to the Company in 800 l. and ſoon after became a Bankrupt; the Aſſignees bring a Bill againſt the Company to transfer the 5000 l. Stock to them with all Dividends due thereon; the Company by their Anſwer inſiſt, that by Virtue of a *By-Law* in theſe Words, (viz.) "That the Stock and Dividend of each Adventurer ſhall be "obliged for ſuch Debts and Engagements as ſuch Adventurer ſhall "become engaged in to the Company, and that the Committee of the "Company for the Time being, ſhall and may Diſtrain the ſame until "ſuch Debts and Engagements are fully ſatisfied," the Company is not obliged to transfer the Stock to the Complainants, until they pay the 800 l. due to the Company, and they likewiſe inſiſt upon the Clauſe in the *Statute of Bankrupts*, 5 *Geo.* that, "where it ſhall ap"pear to the Commiſſioners, that there has been mutual Credit by the "Bankrupt, and any other Perſon, at any Time before the Perſon, "againſt whom ſuch Commiſſion is or ſhall be awarded, became Bank"rupt, the ſaid Gommiſſioners ſhall ſtate the Account between them, "and what ſhall appear to be due upon the Balance of ſuch Account, "and no more ſhall be claimed or paid on either Side." And that Sir

MS Rep. Mich 12 Geo. Gibſon & al' Aſſignees of Sir Stephen Evans, Bankrupt, v. Hudſon's Bay Company.

Stephen Evans having Credit in their Books for 5000 l. Stock, and the Company on the other Side having Credit in Sir Stephen Evans's Book for 800 l. they ought to *deduct and have an Allowance* of the 800 l. out of the 5000 l. Stock.

It was argued for the Plaintiffs, that the By-Law to diſtrain the Adventurer's Stock for a Debt due to the Company, was contrary to Law, and a void By-Law, That it gave the Preference to a Simple Contract before a Debt by Specialty or Judgment, That it ſubverted the legal Courſe of Adminiſtration, That if an Adventurer died indebted by Simple Contract to the Company, that Debt by Simple Contract would be ſatisfied before Debts by Specialty or Record to other Perſons; That this By-Law was contrary to the Statute of Bankrupts, which makes all Debts equal, and to be paid Pari Paſſu, which is moſt agreeable to natural Juſtice and Equity, and ſuppoſing it might bind the Adventurer himſelf as an Agreement, yet it would not bind the Aſſignees, who are Truſtees for the Creditors, and the Stock and Effects of the Bankrupt veſted in them, by Act in Law, and not by the Party; That this Caſe was out of the Clauſe of the Statute 5 Geo. cap. 24. of ſtating Accounts where mutual Credit had been given, that Clauſe extends only to mutual Debts, here the Company is not Debtors to the Proprietors of the Stock, nor can they demand the Value of the Stock from the Company, the Company is only a Truſtee for the Proprietor, and not their Debtor &c.

It was argued for the Defendant, that this was a good By-Law to bind the Members of the Company, That ſuch an Agreement among Partners in Trade would be good, That if any of the Partners borrow'd or took any Money out of the Joint Stock, that his Share and Intereſt in the Joint Stock ſhould be liable to make Satisfaction for ſuch Debt, that the Company having the Controul and Power over the Proprietors Stock, might reaſonably detain the Stock, till they were ſatisfied, for a Debt due to them from ſuch Proprietor, That the Aſſignees were in the ſame Condition with the Bankrupt himſelf, they ſtand in his Place, and muſt take his Eſtate and Effects, ſubject to the Engagements and Charges they were liable to in the Hands of the Bankrupt. 2dly, That this Caſe was within the Clauſe of the Statute 5 Geo. cap. 24. of mutual Credit &c. and that Sir Stephen Evans was a Creditor of the Company for his 5000 l. Stock, and the Company a Creditor of Sir Stephen Evans for the 800 l. due to them, that the Stock is called Credit in the Books of the Company, and he has a Demand againſt the Company for the Intereſt and Produce of the Stock, and though there was nothing due to Sir Steven Evans for Dividends at the Time of his Bankruptcy, yet, the Stock itſelf was a Debt from the Company, and ſo within the Clauſe of the Act of ſetting one Debt againſt another, and only the Balance due to Sir Stephen's Aſſignees, That it would be very unreaſonable where there are mutual Dealings and Credit, that the Debtor to the Bankrupt ſhould be bound to pay the Whole due from him to the Bankrupt's Eſtate, and e contra ſhould only come in as a Creditor, under the Commiſſion for all due to him, and receive perhaps only two or three Shillings in the Pound for his whole Debt &c.

King C. was of Opinion that the By-Law was not good. It was aſſuming a Legiſlative Power, and altering the Law, it was different from an Agreement between private Partners in Trade; theſe Sorts of Companies were of a publick Nature, all People were admitted into them, and great Part of the Perſonal Eſtates of the Kingdom were inveſted in them; That it did not only make Debts by Simple Contract, equal to Specialty and Judgments, but gave them the Preference. It

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gave them a Power to attach their Creditors Effects, and to be their own Carvers; It ſubverted the legal Courſe of Adminiſtration, and was inconſiſtent with the Statute of Bankrupts, which makes all Debts equal &c.

But Raymond Ch. J. and Mr. Baron Price, who aſſiſted his Lordſhip, thought it a good By-Law, it extends only to their own Members, and tends to the Benefit and Advantage of the Corporation. All By-Laws for the Benefit and Advantage of Trade are good, unleſs ſuch By-Laws be unreaſonable or unjuſt, That this, in their Opinion, was neither; not unreaſonable, becauſe it extends only to their own Members, whoſe Conſent is implied in all By-Laws, and every Man that buys Stock muſt take it ſubject to the Engagements laid upon ſuch Stock by the Company; it is not unjuſt, becauſe the Stock is only to be retain'd as a Pledge till the Debt be ſatisfy'd, which every Debtor in Juſtice is bound to do; That the Aſſignees ſtand in the Place of the Bankrupt, and can be in no better Condition than the Bankrupt himſelf.

King C. ſaid, I think this Caſe is within the Clauſe of the Statute 5 Geo. of ſetting off Debt againſt Debt, ſo need not give any direct Opinion as to the By-Law, here is mutual Credit given, and therefore I think the Company may retain the 800l. due to them, out of the Dividends due to the Bankrupts Eſtate, ſubſequent to the Bankruptcy, and ſhall not be oblig'd to come in as a Creditor under the Commiſſion, and decreed accordingly. MS. Rep. Mich. 12. Geo. Gibſon, & al' Aſſignees of Sir Steven Evans Bankrupt v. Hudſons Bay Company.

N. B. The Judges gave no direct Opinion as to this laſt Point, but ſeem'd to agree with the Chancellor.

3. 5 *Geo.* 2. *cap.* 30. *S.* 28. *Where it ſhall appear that there has been mutual Credit given, or mutual Debts between the Bankrupt and any other Perſon, the* Commiſſioners or Aſſignees ſhall ſtate the Account, *and one Debt may be ſet againſt another, and the Balance of ſuch Account ſhall be claimed or paid.*

4. *S.* 34. *It ſhall be lawful for the Aſſignees, with the* Conſent of the major Part, in value of the Creditors preſent, at any Meeting purſuant to Notice in the Gazette, *to ſubmit any Difference between ſuch Aſſignees, and any Perſon whatſoever, or by reaſon of any Matter relating to ſuch Bankrupt, to the determination of Arbitrators, or otherwiſe to compound the Matters in difference, as the Aſſignees with ſuch Conſent can agree.*

5. *S.* 35. *The Aſſignees are impowered with conſent of Creditors, to make Compoſition with any Debtors to ſuch Bankrupts,* where the ſame ſhall appear neceſſary.

(O. a) Demeanor and Crime in Bankrupt's not appearing and diſcovering his Effects; and How the Commiſſioners are to proceed for that Purpoſe.

1. 13 *Eliz. cap.* 7. *S.* 9. IF any ſuch Perſons, *which ſhall be* indebted, do of Purpoſe withdraw themſelves from their uſual Manſion Houſes, *upon Complaint, the* Commiſſioners ſhall *have Power to* award five Proclamations, *to be made in the Queen's Name, upon five Market-Days, in ſuch Places near the Place where ſuch Bankrupt has moſt commonly made his Abode, commanding him to return with all convenient*

nient Speed, and to yield his Body before the Commiſſioners, or one of them, at ſuch Time and Place as by the Proclamation ſhall be appointed; and if he do not, according to ſuch Proclamation, yield his Body, *then the Body of ſuch* Offender ſhall be adjudged out of the Queen's Protection; *and every Perſon that ſhall willingly help to hide or convey, or ſhall willingly receive, or keep ſecretly, any Perſon ſo demanded by Proclamation, ſhall ſuffer Impriſonment, or pay ſuch Fine to the Queen, as to the Lord Chancellor (being informed thereof by the Commiſſioners) ſhall ſeem meet.*

2. 1 *Jac.* 1. *cap.* 15. *S.* 8. *If he refuſe to be examined, or to anſwer fully, the Commiſſioners may commit him cloſe Priſoner till he conform.*

3. *S.* 9. *If, upon his Examination, it ſhall appear that he has committed any wilful or corrupt Perjury, to the Damage of his Creditors, to the Value of* 10 *l. and be convicted thereof in any Court of Record, he ſhall have one of his Ears nailed to the Pillory, and cut off.*

4. 21 *Jac.* 1. *cap.* 19. *S.* 7. *If any Bankrupt ſhall, upon his Examination before the Commiſſioners, be found* fraudulently *to have* conveyed away his Goods, *Lands, or other Eſtate,* to the Value of 20 l. to the End to hinder the Execution of the Statutes, *or to defraud or hinder his Creditors of the ſame, and ſhall not, upon his Examination, diſcover unto the Commiſſioners, and (if it lie in his Power) deliver unto them all that Eſtate ſo fraudulently conveyed away or detained, or that cannot make it appear unto the Commiſſioners that he has ſuſtained ſome caſual Loſs, whereby he is diſabled to pay what he then owed,* may be indicted for ſuch Fraud *or Abuſe* at the Aſſizes, or General Seſſions of the Peace of the County or Place where *he ſhall become Bankrupt*; and if *the Bankrupt be thereof* convicted, *he* ſhall be ſet upon the Pillory *for two Hours*, and have one of his Ears nailed *to the Pillory*, and cut off.

5. 5 *Geo.* 2. *cap.* 30. *S.* 1. *If any Perſon who ſhall become Bankrupt, and againſt whom a Commiſſion of Bankrupt under the Great Seal ſhall be iſſued, whereupon he ſhall be declared Bankrupt, ſhall not within* 42 Days after Notice in Writing left at the uſual Place of Abode *of ſuch Perſon*, or perſonal Notice, in caſe ſuch Perſon be in Priſon, and Notice in the London Gazette, *ſurrender himſelf to the Commiſſioners, and ſubſcribe ſuch Surrender, and ſubmit to be examined upon Oath, or ſolemn Affirmation, and conform to the Statutes concerning Bankrupts, and upon his Examination diſcover all his Effects, and how he has diſpoſed of his Effects (and all Books and Writings relating thereunto) of which he was poſſeſſed or intereſted, or whereby ſuch Perſon or his Family has, or may expect any Poſſibility of Advantage (except ſuch Parts as ſhall have been bona fide diſpoſed of in the Way of his Trade, and except ſuch Money as ſhall have been laid out in the ordinary Expence of his Family) and alſo, upon ſuch Examination, deliver up unto the Commiſſioners ſuch Part of his Effects, and all Books and Writings relating thereunto, as ſhall be in his Power (his neceſſary Wearing Apparel, and the neceſſary Wearing Apparel of the Wife and Children of ſuch Bankrupt excepted) then the Bankrupt, in caſe of Default in not ſurrendering and ſubmitting as aforeſaid, or in caſe he ſhall conceal, or imbezzle his Eſtate to the Value of 20 l. or any Books of Accounts or Writings relating thereto, with Intent to defraud his Creditors (and being convicted by Indictment or Information)* ſhall be deemed guilty of Felony, without Benefit of Clergy; *and ſuch Felon's Goods and Eſtate ſhall go among the Creditors ſeeking Relief under ſuch Commiſſion.*

6. *S* 2. *The* Commiſſioners ſhall appoint, within the ſaid 42 Days *for the Bankrupt to ſurrender and conform as aforeſaid*, not leſs than three Meetings, *the laſt of which ſhall be on the 42d Day limited for ſuch Bankrupt's Appearance*; and three Weeks Notice ſhall be given in the Gazette of the Time and Place of ſuch Meetings.

7. *S.* 3. *It ſhall be lawful for the* Lord Chancellor *to* enlarge the Time *for ſuch Perſon ſurrendering himſelf, and diſcovering his Effects,* not

not exceeding 50 Days *from the End of the ſaid* 42 *Days; ſo as ſuch Order for enlarging the Time be made ſix Days before the Time on which ſuch Perſon was to ſurrender himſelf.*

8. *S.* 36. After *ſuch Bankrupt ſhall have obtained his* Certificate, *and the ſame ſhall be* confirmed, *ſuch* Bankrupt ſhall *be obliged* to give his Attendance, upon Notice in Writing to attend the Aſſignees, in order to ſettle any Account of ſuch Bankrupt's Eſtate, or to attend any Court of Record, to be examined touching the ſame, *or for ſuch other Buſineſs, which ſuch Aſſignees ſhall judge neceſſary for getting in the Bankrupt's Eſtate, for which Attendance the Bankrupt ſhall be allowed* 2 *s.* 6 *d. per diem; and* in caſe ſuch Bankrupt ſhall neglect to attend, *or refuſe to aſſiſt in ſuch Diſcovery, without good Cauſe to be ſhewn to the Commiſſioners to be by them allowed (ſuch Aſſignees making Proof thereof upon Oath, or ſolemn Affirmation, before the Commiſſioners) the* Commiſſioners are *required to iſſue a Warrant, to ſuch Perſons as they ſhall think proper, for apprehending ſuch Bankrupt, and him* to commit to the County Gaol, *there to remain in cloſe Cuſtody, until he ſhall conform to the Satisfaction of the Commiſſioners, and be by the Commiſſioners, or the Order of the Lord Chancellor, or by due Courſe of Law diſcharged; and ſuch Gaoler is required to keep ſuch Perſon in cloſe Cuſtody, within the Walls of the Priſon, under the Penalties before mentioned, for ſuffering ſuch Priſoners to eſcape.*

(P. a) The Bankrupt's Perſon protected. In what Caſes.

1. IN *Debt on Obligation*, the Defendant *pleaded, that before the Action* brought, the *Plaintiff became a Bankrupt*, to which the Plaintiff demurred, and per Curiam, it is an ill Plea; and *until an Aſſignment be made, the Debtor is defenceleſs*; and [cited] therefore [the Caſe of] **Hanſon and Hale** [that] *Payment, before a Commiſſion ſued out*, is well enough, and *ſo* it is *before his Debt be aſſigned.* And Judgment for the Plaintiff. 3 Keb. 616. pl. 78. Hill. 27 and 28 Car. 2. B. R. Andrews v. Spicer.

2. A Man *rents an Houſe* for Years, by Leaſe, at C. and *becomes a Bankrupt*, and *ſurrenders all his Goods and Effects* to the Commiſſioners, according to the 4 and 5 Ann. Reg. *and with the reſt, this Leaſe:* And his Certificate was allowed; but *being taken into Cuſtody for Non-Payment of the Rent ſince*, he moved by Counſel to be diſcharged; but the Court would not grant it, and forced him to put in Bail; for they ſaid, *the Act of Parliament did not make void the Contract between him and his Landlord.* Paſch. 6. Ann. Reg.

3. Two *Perſons having Authority to ſeiſe the Effects of a Bankrupt, broke open a Cloſet, where the Bankrupt was*, to ſearch for them; *two Officers came ſoon after* them, *and took him in an Action, and threw him into the Compter*, where he was ſerved with ſeveral other Actions in Cuſtody. It was ordered that they, at their own Coſts, ſhould procure him to be diſcharged out of Cuſtody, or to ſtand committed, being an Abuſe of the Proceſs of the Court. Sel. Caſe in Chan. in Ld. King's Time. 64. Mich. 12 Geo. Anon.

(Q. a) False Claims of Debts. Punishment thereof.

1. 5 *Geo.* 2. *cap.* 30. *S.* 29. IF *any Person shall before the Commissioners, or by Affidavit or Affirmation exhibited to them, swear or affirm, that any sum of Money is due to him from any Bankrupt which is not really due, knowing the same to be not due, and being convicted by Indictment or Information, such Person shall suffer the Penalties inflicted by the Statutes against wilful Perjury, and shall be liable to* pay double the Sum *so sworn or affirmed to be due.*

(R. a) Surplus and Allowance.

1. 13 *Eliz. cap.* 7. *S.* 4. SUCH *of the* Commissioners *as shall put the Commission in Execution,* shall, upon Request *made* by the Bankrupt, *not only* make Declaration to the Bankrupt of the *employing and* bestowing of their Lands, Goods and Debts, *but also make Payment of the* Overplus, *if any be, to the Bankrupt.*

2. 5 *Geo.* 2. *cap.* 30. *S.* 7. *All Bankrupts who shall surrender and conform, as by this Act is directed, shall be* allowed 5 per Cent. out of the neat Produce of the Estate that shall be receiv'd, in case the neat Produce of the Estate, after such Allowance made, shall be sufficient to pay 10 s. in the Pound, and so as the said 5 per Cent. shall not amount to above 200 l. *and in case the neat Produce of the Estate shall be sufficient to pay* 12 s. 6 s. in the Pound, *then all Persons so conforming, shall be allowed* 7 l. 10 s. per Cent. *so as such Allowance shall* not amount to above 250 l. *and in case the neat Produce shall, over and above the Allowance, be sufficient to pay* 15 s. in the Pound, *then Persons so conforming, shall be allowed* 10 per Cent. *so as such* 10 *per Cent. shall* not amount to above 300 l. and *every such Bankrupt* shall be discharged from all Debts owing at the Time that he did become Bankrupt.

3. *S.* 8. *If the* neat Proceed *of such Bankrupt's Estate shall* not amount to 10 s. in the Pound, *such Bankrupt shall not be allowed the* 5 *per Cent. but shall be* allowed *so much as the Assignees and Commissioners shall think fit,* not exceeding 3 per Cent.

4. *S.* 12. *Nothing in this Act shall give any Advantage to any* Bankrupt *who shall,* upon Marriage of any of his Children, have given above the Value of 100 l. (*unless he shall prove by his Books, or otherwise upon his Oath or Affirmation before the Commissioners, that he had remaining other Estate sufficient to pay every Person, to whom he was indebted, their full Debts)* or who shall have lost in one Day the Value of 5 l. or *in the Whole the Value of* 100 l. within 12 Months next preceding *his becoming Bankrupt,* at Cards, Dice, *Tables, Tennis, Bowls, Billiards, Shovel-Board, or Cock-Fighting, Horse-Races, Dog-Matches, or Foot-Races, or other Game, or by bearing a Share in the Stakes, or Betting,* or *that within one Year before he became a Bankrupt, shall have lost* 100 *l.* by Contracts for Stock, *or Shares of any publick Funds, where such Contract was not to be perform'd within one Week from the making, or where the Stock was not actually transferred.*

(S. a) Certificate and Diſcharge.

1. 13 *Eliz. cap.* 7. *S.* 10. IF *the* Creditors, of any Bankrupts which depart the Realm, keep their Houſes, *or otherwiſe withdraw into Places unknown, or ſuffer themſelves to be arreſted, or outlawed, or yield their Bodies into Priſon Purpoſely to defraud the Creditors,* be not fully ſatisfied *for their Debts by the Means before ſpecified, they ſhall have their Remedy for levying the Reſidue againſt the Offenders, as they might have had before the making of this Act. And the ſaid Creditors* ſhall be only barred for ſuch Part of the ſaid Debts as ſhall be paid unto them, as aforeſaid.

2. 4 & 5 *Annæ* 17. *All Bankrupts ſurrendering and conforming themſelves, as in this Act, ſhall be* diſcharged from * all Debts owing at the Time of the Bankruptcy, *and if they be proſecuted for any Debt due before, they ſhall be diſcharged on* Common Bail, and plead that the Cauſe of Action accrued before they became Bankrupts, *and give the Special Matter in Evidence, and if Judgment be given againſt the Plaintiff, the Defendant ſhall recover his Coſts.*

5 *Geo.* 2. *cap.* 30. *S.* 17. the ſame Matter enacted.

* This extends not to Debts *due to a Bankrupt as Executor*, but it is for this particular Reaſon; becauſe they are appropriated to pay Teſtator's Debts, and if they were aſſigned it would be a Wrong, viz. a Devaſtavit; and it being objected, that it extends not to *Debts due to the Bankrupt jointly with another*, it was anſwered by Ld. Ch. J. Parker, in delivering the Opinion of the Court, that the Caſe cited for that Purpoſe from 1 Lev. 17. is not determined. Wms's Rep. 254. in Caſe of Miles v. Williams.

A *Plea* upon this Act *muſt conclude to the Country*, and not to the Judgment of the Court; Adjudged. Trin. 1714. B. R. Wms's Rep. 249. 260. Miles v. Williams.

3. If a Bankrupt has a *Certificate*, and an Action be brought againſt him afterwards for a Debt precedent to the Statute, he may plead his Certificate *upon the Roll*, and ſo prevent a Judgment from being entered up afterwards, but having neglected ſo to do, it was his own Default, and a *Court of Equity* is not to relieve either his Pleading, or his Want of a Plea, or no proper Plea put in in Time, nor could he be relieved on an *Audita Querela*, becauſe he had an Opportunity and might have pleaded his Certificate before the Judgment was entered, and upon producing ſome Precedents where Bankrupts had been *relieved againſt Judgments* obtained againſt them, they did not come up to the Caſe in Queſtion, and the Petition was diſmiſſed. 2 Vern. 696, 697. Trin. 1715. Goodwin's Caſe.

4. Commiſſioners of Bankruptcy having made an Aſſignment of the Bankrupt's Eſtate, and afterwards given the Bankrupt his Certificate and Diſcharge, *cannot make a ſubſequent Aſſignment.* Wms's Rep. 386. Mich. 1717. Jacobſon v. Williams.

5. Gore brought an *Action, for Rent, againſt Bagſhall, a Bankrupt,* and obtained *Judgment before Bankrupt's Certificate was allowed* by Ld. Chancellor, and the Certificate not being allowed till after the *Rules of Pleading were out*, the Bankrupt had no Opportunity to plead his Certificate, and take the Benefit of the Act 4 Ann. but *in the Scire Facias againſt the* Bail the Certificate was pleaded, and the Plea over-ruled, ſo that the Bankrupt has no Relief but in Equity, or by Audita Querela, which is an Equitable Remedy at Law. A Motion was made by Sir Joſeph Jekyl, for an Injunction; But Cowper C. denied the Motion, (though Sir Joſeph Jekyl ſaid, there were ſeveral Precedents of Injunctions of this Sort, but had none ready to produce) becauſe this was a mer-

merciful Law made in Favour of the Bankrupt and in Prejudice of the Creditors, and therefore not to be extended in Equity farther than at Law. MS. Rep. Mich. 3 Geo. in Canc. Bagshall v. Gore.

6. A. a *Creditor* of B. brought an Action at Law, and having *got Judgment, took him in Execution*, on a Ca. Sa. Afterwards the Act of 5 *Geo.* was made, where by *cap.* 24. a Bankrupt, if he surrenders, is examined, and 4 Fifths in Value and Number of his Creditors sign his Certificate and testify their Consent &c. is to be discharged. After which Statute a *Commission is taken out* against B. *by C. B's Father-in-law, and A. is persuaded to come in and be an Assignee* to prevent the sinking the Estate, and getting him discharged. The *Estate* of B. (besides what he had, before the Statute, made over to C.) *was only some few Shillings and some desperate Debts.* It was insisted that Fraud appearing, Equity would not interpose in Prejudice of an honest Creditor, and Favour of the Bankrupt, which Ld. C. Parker admitted. And as to A's coming in and proving the Debt, it was argued, that it might be thought necessary in order to prevent B's Discharge, and this his Lordship held reasonable And that as to not detaining the Body, where all the Bankrupt's Estate was to be seised, here was no Estate left to seise, all that being made away to C. And that in this Case A's coming in, cannot be construed an Election to be paid out of B's Estate, and so a Waiver of his former Execution of the Body; for here being no Estate, there could be no Election, and A. proposing to waive any Benefit under the Commission; his Lordship said it ought to be accepted; and refused to discharge B. Wms's Rep. 560. Trin. 1719. Ex Parte Salkeld.

7 Such *Creditors* of a Bankrupt *as come in under the Commission*, by which all the Bankrupt's Estate, both Real and Personal (by Means whereof he should pay his Debts) was seised, *shall not be allowed to imprison the Bankrupt for not paying those Debts*.. Per Ld. C. Parker, who said he would Order his Discharge out of Custody, as to any Action brought by those, who had come into the Commission of Bankruptcy, and had sought Relief thereby. And though it was objected that he ought not to be discharged, till he had perfected his Examination, yet the Court held the contrary; for it did not appear that he had been in Contempt or refused; But if he had, yet when the *Commission was irregularly sued out*, there ought not to be any Proceedings upon it by Way of Examining the Bankrupt or otherwise. Wms's Rep. 612 Hill 1719. Ex Parte James.

8. A *Creditor petitioned* the Ld. C. Parker *against the Allowance of the Bankrupt's Certificate, who* in Consideration of the Plaintiff's withdrawing his Petition *gave him a Bond for the whole Debt.* The Certificate was afterwards allowed, and the Creditor sued the Bond against the Bankrupt, who pleaded the Act of *5 Geo. 2. and that the Bond was obtained in Order to procure his Discharge*; But Ld. C. Parker refused to relieve the Bankrupt, and dismissed his Bill with Costs. Wms's Rep. 620. Pasch. 1720. Lewis v. Chase.

9. A Question was, concerning the *Form of Certificates* on the late Act. But per Ld. C. Parker, the Commissioners are to certify One Day, that the Bankrupt has in all Things conformed &c. And then the next Day, the Creditors certify on the same Parchment their Consent, at the Foot of which the Commissioners are to certify, that the Creditors had consented according to the Terms of the Act. Trin. 6 Geo. Burdock's Case.

10. A Bankrupt so found, was *sued for a Debt on Bond, before his Certificate allowed*, but he had surrendered his Effects and submitted to be examined, and his Certificate not being allowed, he pleaded Non est factum, and *Judgment* was given against him. He had afterwards a

Certi-

Certificate allowed and confirmed. The Obligee Three or Four Years afterwards brought a *Scire Facias* upon the Judgment, and the *Defendant pleaded the Stat. 5 Annæ*; and that the Cauſe of Action accrued before his Bankruptcy, and upon Iſſue joined, it was *found againſt the Bankrupt*, he (as was alledged) *not being able to get the Commiſſion, or a Copy thereof, to produce* at the Trial, and the Plaintiff after had Judgment. The Plaintiff got an Injunction, but the Maſter of the Rolls, upon Hearing, diſmiſſed it, as a *Matter wholly at Law*; But upon Appeal, Ld. C. Macclesfield reverſed the Decree, but ſeemed to admit that were the Caſe only Matter *of Miſpleading* Equity ſhould not relieve, but upon the ſeveral Circumſtances of the Caſe a perpetua Injunction was granted. 2 Wms's Rep. 70. Trin. 1722. Blackhall v. Combs.

11. A *Creditor came in* under the Commiſſion *and proved his Debt*, and afterwards *arreſted the Bankrupt*, who now prayed to be diſcharged. Ld. C. King ſaid, it has been the Conſtruction of Equity upon Statute of 1 Annæ cap. 12. which diſcharges the Bankrupt of his Debts on a Certificate by 4 5ths of his Creditors, and allowed by the Chancellor, that where a Trader becomes a Bankrupt and any one of his Creditors *comes in* before [under] the Commiſſion to prove his Debt, *tho' with Deſign only to oppoſe the Bankrupt's Certificate*, yet this *is an Election to take his Remedy for his Debt under the Commiſſion*, and if pending that, the Creditor ſues and arreſts the Bankrupt, it is taken to be an Oppreſſion; and ordered the Creditor, at his own Expence, to diſcharge the Bankrupt out of Cuſtody. 2 Wms's Rep. 394. Mich. 1726. Anon.

12. *But* if ſuch Creditor will *waive any Benefit* under the Statute, and ſtay a reaſonable Time, and there is an *Improbability of the Bankrupt's being able to gain his Certificate* ſigned by 4 5ths in Number and Value of the Creditors, or allowed by the Court; in ſuch Caſe if the Creditor applies to the Court, declaring his Conſent to waive any Right, or Share of the Bankrupt's Eſtate under the Commiſſion, and praying that he may ſue the Bankrupt; Ld. C. King thought it reaſonable for the Court to give Leave to ſuch Creditor to proceed at Law againſt the Bankrupt for his Debt. 2 Wms's Rep. 395. Mich. 1726. in an Anon. Caſe.

13. On a *Joint Commiſſion againſt Two Partners*, the ſeparate *Creditors* though they have taken out *ſeparate Commiſſioners*, ſhall yet be at Liberty to come in to *oppoſe the allowing of the Certificate*. 3 Wms's Rep. 23. Hill. 1729. Horſey's Caſe.

14. Where *Two Partners* are *Bankrupts*, *and a Joint Commiſſion* is taken out *againſt them*, if they *obtain an Allowance of their Certificate*, this will bar as well their ſeparate as their Joint Creditors. 3 Wms's Rep. 24. Hill. 1729. Horſey's.

So on the other Hand, if there be *two Partners, and one of them becomes a Bankrupt*, and *on a ſeparate Commiſſion* being ſued out againſt him, *his Certificate is allowed*, this does not only diſcharge the Bankrupt, of what he owed ſeparately, but alſo of what he owed jointly, and on the Partnerſhip Account, becauſe by the Act of Parliament the Bankrupt, upon making a full Diſcovery, and obtaining his Certificate, is to be diſcharged of all Debts. Now as the Debts he owes jointly with another, are equally his Debts as what he owes on his ſeparate Account, conſequently *he is to be diſcharged of both his joint and ſeparate Debts*; And ſo it has been determined by the Judges of B. R. By the Lord Chancellor Parker. 3 Wms's Rep. 24. in a Note cites 3 July 1721. Ex Parte Yale.

15. 5 *Geo.* 2 *cap.* 30. *S.* 10. *No Diſcovery ſhall intitle ſuch Bankrupt to the Benefits allowed by this Act, unleſs the* Commiſſioners, *or the Major Part of them, ſhall* under their Hands and Seals certify to the Lord Chancellor, that ſuch Bankrupt has made a full diſcovery *of his Eſtate*, and in all Things conformed himſelf *according to the Directions of this Act, and that there does not appear to them any Reaſon to doubt of the*

Truth of ſuch Diſcovery, and unleſs Four Parts in Five in Number and Value of the Creditors, who ſhall be Creditors for not leſs than 20 l. *reſpectively, or ſome other Perſon by them duly authorized, ſhall* ſign ſuch Certificate; *but the Commiſſioners ſhall not certify till they ſhall have Proof by Affidavit, or Affirmation in Writing, of ſuch Creditors, or of the Perſons by them authorized, ſigning the Certificate, and of the Power by which any Perſon ſhall be authorized to ſign for any Creditor, (which Affidavit or Affirmation, together with ſuch Authority to ſign, ſhall be laid before the Lord Chancellor, with the ſaid Certificate) and unleſs ſuch* Bankrupt make Oath, *or ſolemnly affirm in Writing*, that ſuch Certificate was obtained without Fraud; *and unleſs ſuch Certificate ſhall, after ſuch Affidavit or Affirmation, be* allowed by the Lord Chaucellor, *or by ſuch Two of the Juſtices of B. R. C. B. or Barons of the Exchequer, to whom the Conſideration of ſuch Certificate ſhall be referred by the Lord Chancellor; and any of the Creditors of ſuch Bankrupt are to be heard, if they think fit, againſt the making ſuch Certificate, and againſt the Confirmation thereof.*

16. *S.* 13. *If any Bankrupt, who ſhall have* obtained his Certificate, *ſhall be taken in Execution, or* detained in Priſon, on Account of any Debts owing before he became Bankrupt, *by Reaſon that Judgment was obtained before ſuch Certificate was allowed; it ſhall be lawful for any one of the Judges of the Court, wherein Judgment has be ſo obtained, on ſuch Bankrupt's producing his Certificate allowed, to Order any Sheriff or Gaoler, who ſhall have ſuch Bankrupt in his Cuſtody, to* diſcharge ſuch Bankrupt without Fee.

17. Where a *Bankrupt is in Execution before the Commiſſion*, and the *Creditor comes in and receives a Dividend* out of the Eſtate, the Court will put him to his *Election either to diſcharge the Bankrupt, or renounce the Dividend*, and this in Conformity to the Law, where if the Creditor will take the Debtor in Execution, he cannot afterwards take Execution by Fi. Fa. becauſe the Body is deemed a Satisfaction; But otherwiſe, if Creditor takes a Fi. Fa. firſt and levies ſhort &c. there he may take a Ca. Sa. afterwards and ſue both. And here A. ſued out a Commiſſion of Bankruptcy againſt B. 1726, and after in 1727, received a Dividend of 2 s. 6 d. in the Pound, and now lately took B. in Execution for the Reſt of his Debt, and now B. petitioned to be diſcharged, but was denied; Per Ld. Chancellor. MS. Rep. Mich. Vacat. 1733. Ex Parte Blewin.

18. Per Ld. Chancellor. Though a *Creditor of Bankrupt under* 20 *l.* is by the laſt Act *excluded from Aſſent or Diſſent to the Certificate, yet* as he is affected by the Conſequence of allowing the Certificate, *he has Right to Petition, and ſhew any Fraud againſt allowing the Certificate.* MS. Rep. Mich. 1734. Ex Parte Allen

19. *Bankrupt in Priſon on a meſne Proceſs at Suit of A. pray'd that A. might make Election, whether he would come in under Commiſſion, or take his Remedy at Law.* Per Ld. Chancellor, A. may make a *ſpecial Election*, to take his Remedy at Law, and to come in under the Commiſſion, ſo far as to prove his Debt and aſſent or diſſent to Certificate, becauſe that will affect his Remedy at Law, but he is to *waive any Dividend or further Benefit under the Commiſſion*, and accordingly A. made his Election in this Caſe. MS. Rep. Mich. 1734. Ex Parte Hoſey.

20 F. having *proved a Debt of* 2000 *l.* under Commiſſion of Bankruptcy *againſt one L.—and paid Contribution, and* yet *had* L. *in Execution for his Debt.*—An *Order was made* by the late Lord Chancellor, *that F. ſhould either diſcharge L. or loſe his Dividend.*--And Commiſſioners having certify'd that 4 *5ths in Number and Value of Creditors had conſented to L's Diſcharge* excluſive of F. he now petitioned againſt allowing of Certificate, and that he might be admitted to come in, ſo far under Commiſſion as to have Liberty to aſſent or diſſatient. Lord Chancellor

ſaid,

ſaid, that it was ſettled on great Debate, that a *Creditor might be at Liberty to elect to proceed at Law, and notwithſtanding have Liberty to aſſent or diſſent to Certificate.* The Caſe of putting Creditor to Election is but modern in Favour of Bankrupt. But if that Election is made in general Terms, and in Conſequence the Creditor is to be excluded from a Liberty of diſſenting to the Certificate, the reſt of the Creditors are not only to take all the reſt of the Effects, but have it in their Power by allowing the Certificate to bar the other's Debt &c. So that *permitting ſuch Creditor to aſſent or diſſent to the Certificate is* not to give him a Benefit but *to prevent his being hurt*, and the laſt Statute about Bankrupt's mentions 4 5ths of Creditors who ſhall have proved their Debts, and not who proved &c. and ſought Relief, and it would be hard to put it in the Power of a few ſmall Creditors, by conſenting to the Certificate, to preclude the other of his Debt, and therefore as the Court by equitable Conſtruction puts a Creditor to his Election of abiding by his Remedy at Law on coming in to have his Dividend under the Commiſſion, ſo by the ſame Rule of Equity, ſuch Creditor renouncing any Benefit under the Commiſſion ſhould not be hurt, therefore let F. be at Liberty to make a Special Election. MS. Rep. Trin. Vac. 1734. Ex Parte Fenwick.

(T. a) Diſcharge. How it affects a Joint Debtor who is not a Bankrupt.

1. 10 *Annæ, cap.* 15. *S.* 3. THE Diſcharge of a Bankrupt *by Virtue of the Act* 4 *Annæ, or by any other Act relating to Bankrupts, from the Debts by him owing at the Time he became a Bankrupt*, ſhall *not be intended to* diſcharge or *releaſe* any other Perſon, *who was* Partner in Trade *with the Bankrupt at the Time he became a Bankrupt*, or who ſtood jointly bound, *or had made any joint Contract with him* for the ſame Debt from which he was diſcharged; *but notwithſtanding ſuch Diſcharge*, ſuch Partner ſhall ſtand chargeable.

(U. a) Gaoler &c. Puniſhment.

1. THE *Commiſſioners* upon the Statute of Bankrupts, *commited the Bankrupt to* the Cuſtody of *the Sheriff* of B. for refuſing to be examined on Interrogatories. The Sheriffs *let the Bankrupt to go at large.* An Action of *Eſcape lies* againſt them. Mo. 834, 835. pl. 1123. Trin. 12 Jac. The Caſe of the Sheriffs of Briſtol. Roll Rep. 47. pl. 16. Barns v. Cary, S. C. adjudged for the Plaintiff.

——2 Bulſt. 236 S. C. adjudged accordingly.

2. 5 *Geo.* 2. *cap.* 30. *S.* 19. *The Gaoler ſhall upon requeſt of any Creditor, having proved his Debt, and producing a Certificate thereof under the Hands of the Commiſſioners, (which the Commiſſioners are to give Gratis)* produce ſuch Perſon ſo committed; *and in Caſe ſuch Gaoler ſhall refuſe to ſhew*

ſhew ſuch Perſon ſo committed, and being in his actual Cuſtody at the Time of ſuch Requeſt, to *ſuch* Creditor requeſting to ſee ſuch Perſon, *ſuch Gaoler ſhall* forfeit 100l. *for the Uſe of the Creditors, to be recovered by Action of Debt, in the Name of the Creditor requeſting ſuch Sight.*

(W. a) Proceedings &c. of Commiſſioners to be recorded.

1. 5 *Geo.* 2. *cap.* 30. *S.* 41. UPON Petition *of any Perſon, the* Lord Chancellor may Order ſuch Commiſſions, Depoſitions, Proceedings and Certificates, to be entred or Record; *and in Caſe of the Death of the Witneſſes proving ſuch Bankruptcy, or in Caſe the ſaid Commiſſions, or other Things ſhall be loſt, a* Copy of the Record *of ſuch Commiſſions or other Things ſigned and atteſted as herein is mentioned,* may be given in Evidence *to prove ſuch Commiſſions, and Bankruptcy or other Things; and all Certificates which have been allowed, or to be allowed and entred of Record, or a true Copy of every Certificate, ſigned and atteſted as herein is mentioned, ſhall and may be given in Evidence in any Courts of Record,* and, without further Proof, taken to be a Bar and Diſcharge againſt any Action *for any Debt contracted before the iſſuing of ſuch Commiſſion;* unleſs any Creditor *of the Perſon that has ſuch Certificate,* ſhall prove that ſuch Certificate was fraudulently obtained.

2. *And the Lord Chancellor ſhall appoint a Place near the Inns of Court, where the Matters aforeſaid ſhall be entred of Record, where all Perſons ſhall be at Liberty to ſearch, and the* Lord Chancellor ſhall by Writing appoint a proper Perſon, who ſhall *(by himſelf or Deputy to be approved by the Lord Chancellor by Writing)* enter of Record ſuch Commiſſion and other Things, *and have the Cuſtody of the Entries thereof; and alſo appoint ſuch Fee for his Labour therein as the Lord Chancellor ſhall think reaſonable, not exceeding what is uſually paid in like Caſes; and the Perſon ſo to be appointed, and his Deputy, ſhall continue to enter of Record all the Matters aforeſaid, and to have the Cuſtody of the ſame, ſo long as they ſhall behave themſelves well; and ſhall not be removed but by Order in Writing under the Hand of the Lord Chancellor, on good Cauſe therein ſpecified.*

(X. a) Compoſitions between Creditors and Bankrupt; and Pleadings thereof.

1. F. Being a Goldſmith in London, and being diſabled, *agreed with moſt of his Creditors to aſſign over all his Eſtate upon Oath to ſeveral Perſons in Truſt for the Payment of his Debts, as far as his Eſtate would pay, he having ſuch Allowance for himſelf and Family as was agreed upon;* and moſt of the Creditors ſigned the ſaid Agreement; But *ſome of the Perſons that ſigned, finding that F. had done ſome Act of Violation of the Agreement, took out a Commiſſion of* Bankruptcy againſt the ſaid F. and ſeiſed all the Eſtate they could come by, and pretended that ſome

ſome of the Creditors aforeſaid, that ſigned the Agreement, and that were not privy to the ſuing out the Commiſſion, had Notice in due Time, though they had neglected the ſame, and that it was ſeven Months from the Date of the Commiſſion before the Commiſſioners aſſigned. And *F. and other the Perſons concerned in the firſt Agreement, and excluded by the Commiſſion* of Bankruptcy, being not comprized, as aforeſaid, *preferred their Bill* againſt the Aſſignees of the Commiſſion of Bankruptcy, to have the Agreement performed, or at leaſt *to be admitted to an equal Dividend* with them. But this Court would give no Relief therein; and the rather, for that it was made appear that *F. had made a Sale of ſome of the Goods he aſſigned to the Creditors*; but diſmiſſed the Bill. Chan. Caſes 18, 19. Hill. 14 and 15. Car. 2. Fuller & al'. v. Lance & al'.

2. Scire Facias on a Judgment, the Defendant pleaded a *Compoſition for 2 s. in the Pound; Ita quod it be paid within five Years after the major Part of his Creditors in Number and Value ſhall ſubſcribe the ſame Compoſition, and after the Defendant ſhould be diſcharged from Impriſonment*; and upon a Demurrer to this Plea, Holt Ch. J. was of Opinion, that a Compoſition by Virtue of the Statute *muſt be final*, and ſuch as will bind the Defendant, and from which he cannot vary, that thoſe Words ita quod, in Things Executory (as in this Caſe) make a Condition precedent; but in Eſtates Executed, they make a Condition ſubſequent, and ſo is Littleton to be underſtood. That the Payment of 2 s. per Pound, being a Condition precedent to this Agreement, and wholly in the Power and Will of the Defendant till it is paid, *it is therefore no Compleat Agreement, and conſequently not within the Statute*; and this Caſe is the ſtronger againſt the Defendant, becauſe it does not appear by his Plea that he was in Priſon, ſo that this Condition precedent may be impoſſible to be performed, and conſequently the Agreement can never ariſe; it is true, it might have been *otherwiſe, if 2 s. in the Pound had been agreed to be paid within the five Years, in the Nature of a Defeaſance to the Agreement*; *for this Statute operates as a Defeaſance*. 3 Salk. 59. pl. 1. Paſch. 12 W. 3. in B. R. Feltham v. Cudworth.

7 Mod. 10. S. C. accordingly; and per omnes, all Compoſitions by Virtue of this Act, work by way of Defeaſance, which, if not performed, the original Debt ariſes; and Judgment for the Plaintiff.

3. An Objection was made to a Compoſition, for that *the Agreement appeared to be only to, for, and with theſe Creditors who were Parties, and had ſigned the Compoſition*; but this Objection was diſallowed, becauſe *the Statute makes this an Agreement for the reſt*. 3 Salk. 60. pl. 6. Trin. 11 W. 3. B. R. Ellis v. Ollave.

4. The Statute of *Two Thirds in Number and Value* was *pleaded* in Bar, and the Defendant, to bring himſelf within the Benefit of the Statute, ſhews, *that he abſconded at the Time mentioned by the Statute, but did not ſhew for what he abſconded*; and for this the Plaintiff had Judgment on Demurrer. 7 Mod. 83. Mich. 1 Annæ B. R. Greenway v. Freeman.

5. When one *pleads the Statute of Two Thirds*, if he would take Advantage of the Clauſe of being in Cuſtody, he muſt ſhew it to have been on the 17th November; if of the Clauſe of abſconding, he muſt ſhew he abſconded for Debt at the Time of the Statute made. And Holt ſaid, he took the Statute to be a private Law; for though it concerned a great many, yet it concerned a particular Sort of People; and here the Plaintiff had Judgment, becauſe the Defendant did *not ſhew* in his Plea, *that he had abſconded at the Time of the Act made, but only ſaid it was on the 17th of November*. 7 Mod. 96. Mich. 1 Annæ B. R. Nicholl's Caſe.

(Y. a) Pleadings and Evidence.

1. 1 *Jac.* 1. *cap.* 15. S. 16. IF *any* Action *ſhall be brought* againſt *any* Commiſſioner, *or other Perſon, having Authority under the Commiſſion for any Matter, by force of the ſaid Statute* [13 *Eliz.*] *or this Statute, the Defendants may* plead Not Guilty, or Juſtify, *that the Act whereof the Plaintiff complained, was done by Authority of the ſaid Act* 13 *Eliz. cap.* 7. *or this Act, without expreſſing any other Matter or Circumſtance contained in either of the ſaid Acts, whereunto* the Plaintiff ſhall be admitted to reply, that the Defendant did the Act ſuppoſed of his own Wrong, without any ſuch Cauſe *alledged by the ſaid Defendant, whereupon Iſſue ſhall be joined.*

2. In *Debt on the Statute of Bankrupts* Plaintiff *counts of the Debt due* unto him, *Et quod vigore Statuti prædicti actio accrevit*; It was *urged, That there being two Statutes of Bankrupts*, the Statute of 13 Eliz. cap. 7. and 1 Jac. cap. 15. and other Statutes before; and the Statute 1 Jac. cap. 15. gives the Action, and ſo *the Declaration is uncertain*; and for this Cauſe is bad and inſufficient. Flemming Ch. J. held the Declaration is clearly good, notwithſtanding the Exception taken; for it is plain that theſe Words in the Declaration, *(vigore Statuti prædicti actio accrevit) ſhall be referred unto the Statute, which gives the Action* unto the Creditor upon the Aſſignment by the Commiſſioners, and this is only the Statute of 1 Jac. cap. 15. Theſe are general Statutes, and ſo Notice is to be taken of them; and in this the whole Court agreed; and Judgment for the Plaintiff. 2 Bulſt. 26. Mich. 10 Jac. Powell v. Stuff and Timewell.

3. *Debt upon an Obligation aſſigned* by the Commiſſioners of Bankrupts, and does *not ſhew the Obligation*; wherefore it was demurred. And becauſe he *comes in by Act in Law, and has no Means to obtain the Obligation*, it was adjudged to be good enough, without ſhewing it in Court; As Tenant by the Statute Merchant, or Tenant in Dower, ſhall have Advantage of a Rent Charge, without ſhewing the Deed. Cro. C. 209. pl. 5. Hill. 6 Car. B. R. Gray v. Fielder.

4. In *Audita Querela*, the Plaintiff *counted that Sir H. B. to whom he was Indebted, became a Bankrupt, and that certain Creditors had his Debt aſſigned to them, and that one of them accepted part* of his Debt *in ſatisfaction of the Whole*; but becauſe he did *not ſhew what were the Debts of the Creditors, that ſo his Payment might appear proportionable to the Debts*, the Defendant demurred; Sed per Cur. it is well enough, eſpecially being an Action by one that is a Debtor, and *the very Aſſignment is a ſufficient Bar againſt the Parties*; and if there were Surpluſage, the Defendant hath Remedy in Chancery. Judgment for the Plaintiff. Keb. 491. pl. 40. Paſch. 15 Car. 2 B. R. Fitzwilliam v. Lewis.

5. *Scire Facias againſt the Executors of B. upon a Judgment againſt their Teſtator*, they *plead, that he was a Trader, and* indebted to ſeveral Perſons, and that upon their Petition to the Ld. Chancellor, *a Commiſſion of Bankruptcy iſſued againſt him*, and that by reaſon of the Death of King Charles II. a new Commiſſion iſſued in time of King James II. and aver'd the ſaid laſt Commiſſion to be ſtill depending; and upon Demurrer it was held that this Plea is ill; becauſe the *Defendants did not allege, that their Teſtator was a Bankrupt at the Time of the Petition exhibited, or* at the Time *when the Commiſſion iſſued againſt him.* The Court held

held this Exception incurable, becauſe by the Statute 13 Eliz. cap. 7. the Bankrupt is deſcribed in the firſt Place, and then the next Paragraph gives the Lord Chancellor Power to grant Commiſſions againſt Perſons therein deſcribed, being Bankrupts; and that all the Precedents are with Averments of the Bankruptcy. 2 Lutw. 1273. Hill. 3 & 4. Jac. 2. Gubbs v. Backwell.

6. It was ruled in this Caſe, that, in pleading a Man to be a Bankrupt, it is *ſufficient to ſay, that he became a Bankrupt ad omnes intentiones ſeparal' Statut', without ſetting forth any particular Act of Bankruptcy*, as departure out of the Kingdom, taking Sanctuary, or keeping his Houſe, and abſconding there. Comb. 108. Paſch. 1 W. & M. in B. R. Betts v. Lowe.

7. In an *Indebitatus Aſſumpſit* the Defendant *pleaded, that the Plaintiff became a Bankrupt, and Commiſſion was taken out, and ſo all his Goods* &c. *belonged to the Commiſſioners* &c. The Plaintiff demurred and had Judgment; for till an Aſſignment the Property of the Goods is not transferred out of the Bankrupt. 1 Salk. 108. Paſch. 1 W. & M. in B. R. Cary v. Criſp.

8. In a ſpecial *Aſſumpſit* brought by Aſſignee of Commiſſioners of Bankrupt, he need not *ſhew how the Perſon became Bankrupt*; adjudged. Carth. 29. Paſch. 1 W. & M. in B. R. Pepys v. Low. Show. 7. S. C. but nothing ſaid by the Court; But the Reporter adds Quære, If good.

9. Though *Commiſſioners* upon the Statute of Bankrupts have an Authority under the Great Seal eſtabliſhed by Act of Parliament, yet, if they *declare a Man Bankrupt that is not ſo*, he may traverſe the Bankruptcy, and try it in B. R. Arg. 4. Mod. 116. Trin. 4 W. & M. in B. R. in Caſe of Philips v. Bury.

10. In *Trover by Aſſignee* of Commiſſioners of Bankrupt againſt Defendant who pretends to have *ſeiſed the Goods for Rent*, Note, The Commiſſion muſt be prov'd, and the Aſſignee *muſt prove* an Act of Bankruptcy, as well as the Aſſignment by the Commiſſioners, and Prima Facie it ſhall be intended, that the Aſſignment was executed at the Time it bears Date, (which is but two Days before the Action brought) the Witneſſes not remembring the preciſe Day, but it appearing that the *Date was eraz'd*, Holt ſaid, he expected better Proof, and then another Witneſs ſwore the preciſe Day. Cumb. 453. Trin. 9 W. 3. B. R. Meggot v. Watſon. 12 Mod. 159. Meggot v. Mills and Waine, S. C. but S. P. does not appear. —Ld. Raym. Rep. 286. S. C. but S. P. does not appear.

11. If the *Petition* to the Ld. Chancellor, mention'd *in the Declaration, recites, that the Bankrupt was indebted in* 300*l.* *and the Petition produced at the Trial recites*, that he was indebted in 150*l.* yet, that is no material Variance. Ld. Raym. Rep. 741. 16 Mar. 12 W. 3. Ruled by Holt. Ch. J. at Thetford Aſſiſes. Kirne v. Smith.

12. There is no need to *produce at the Trial the Petition* to the Ld. Chancellor; becauſe it may have been by Parol, though the Practice has been otherwiſe; Ld. Raym. Rep. 741. Ruled by Holt Ch. J. at Thetford Aſſiſes, 16 Mar. 12 W. 3. upon Evidence. Kirne v. Smith.

13. In an Action by Aſſignees of Commiſſioners of Bankrupts, they need not *ſet out the Proceedings* of the Commiſſion and Commiſſioners *at large*. Arg. 2 Ld. Raym. Rep. 1548. cites Lutw. 274. [Hill. 12 W. 3.] **Lawſon v. Lamb,** and that in Lutw. 451. [**Slaughter v. Pierrepont.**] It was held, that it need not appear in a Plea of Aſſignment by Commiſſioners of Bankrupts, that the Bankrupt *was indebted in* 100*l.* As to the Caſe in Lutw. 274. that was in Caſe of a Declaration brought by the Aſſignees, wherein a ſhort way of declaring hath been allowed upon the Authority of a great Number of Precedents; But as to the other Caſe in Lutw. 451. of a Plea that was long before the Statute of 5 Geo. 1. Cap. 24. Par. 20. which is

is expreſs, that no Commiſſion ſhall iſſue, unleſs the Creditors, who petition for a Commiſſion, are Creditors in ſuch Sums as are mentioned for that Purpoſe in that Act, Per Curiam. 2 Ld. Raym. Rep. 1548. Mich. 2 Geo. 2.

14. In *Debt* the Defendant *pleaded* in Bar *that the Plaintiff was a Grocer and Indebted, and became a Bankrupt; and* that upon a Commiſſion taken out he *was declared a Bankrupt, and that the Debt* for which the Action was brought againſt the Defendant, *was aſſigned to his Creditors* &c. The Plaintiff took Iſſue that he did not become Bankrupt. Lutw. 701. Trin. 1 Ann. Hepworth v. Haigh.

15. An Action brought againſt a Bankrupt, the Defendant pleads the *Statute of Bankrupts*, (in which it is ſaid, *That the Perſon, who does as the Act directs, may plead the general Iſſue,*) and that he *manifeſtly became a Bankrupt* before the Day &c. Holt Ch. J. ſaid, this Plea will not do; for *when a Statute gives a Plea, it muſt be pleaded in the Words of the Statute.* 11 Mod. 207. pl. 9. Hill. 7 Ann. B. R. Hull v. Holiday.

16. In Action upon ſeveral Promiſes brought by Aſſignees of a Commiſſion of Bankrupt, the *Declaration was, that in Conſideration the Defendant was indebted to the Bankrupt for Goods ſold and delivered* &c. *he promiſed to pay the Aſſignees.* After Verdict on Non Aſſumpſit &c. it was mov'd in arreſt of Judgment, that the Promiſe ought to have been made to Bankrupt, ſed non allocat'. per Cur. for the Debt being aſſigned to the Plaintiff, that is a good Conſideration. There are two Ways of declaring, 1ſt. As here upon expreſs Promiſe to the Aſſignees. 2dly, *Aſſignees may bring ſuch Action as the Bankrupt*; As he may have an Indebitatus Aſſumpſit, ſo may they. Et Judic. pro Quer. Paſch. 12 Ann. B. R. Faſhion v. Dormet.

17. In an Action brought by Aſſignees under a Commiſſion of Bankruptcy, againſt the Executor of S. J. R. the Plaintiff *declared, that the Defendant promiſed to pay them,* but did not, by Means of which they brought they brought this Action; the Defendant *pleaded, that he never made ſuch Promiſe to the Bankrupt*, and upon that the Plaintiff demurred. But the Court ſaid, *that if the Defendant had by his Plea denied the very Words of the Declaration in this Point*, the *Plaintiffs would have been bound at the Trial to have proved a Promiſe actually made to themſelves.* They took this to be exactly like the Caſe of an Executor, and accordingly gave Judgment for the Plaintiff. 2 Barnard. Rep. in B. R. Mich. 5 Geo. 2. Skinner v. Rebow.

18. *Debt for Rent by G. againſt B. a Bankrupt, and Judgment before the Certificate was allowed*, ſo that he had no Opportunity to plead it, and take the Benefit of 4 Ann. But *in the Sci. Fac. againſt the Bail, the Certificate was pleaded*, and the Plea over-ruled, ſo that the Bankrupt had no Relief but in Equity, or by Audita Querela, which is an equitable Remedy at Law. But Cowper *Chancellor denied an Injunction*, becauſe this was a merciful Law made in favour of the Bankrupt, and in prejudice of Creditor, and therefore not to be extended in Equity further than at Law. Mich. 3 Geo. Canc. Bagſhall v. Gore.

(Z. a) Equity.

1. PROOF *of a Debt diſallowed* by Commiſſioners of Bankrupt, the Court will hear the Proof. Chan. Caſes 275. Paſch. 28. Car. 2. Anon.

2. Bill for Relief againſt *Bonds* &c. *given to the Bankrupt, but ſuggeſted to be paid*, and therefore prays to have them deliver'd up and cancell'd; a Creditor of the Bankrupt's, to whom the Bonds &c. are aſſign'd by the Commiſſioners, muſt be made *a Party*. Fin. Rep. 265. Mich. 28 Car. 2. Ford v. Lear and Key.

3. Bill by *Creditors againſt the Aſſignees* of a Bankrupt to have a Debt recovered by the Aſſignees diſtributed among the Creditors, without being paid into the Hands of the Aſſignees, as fearing, by Payment to the Aſſignees, their Parts may be loſt; decreed, to be *diſtributed among* the Creditors and Aſſignees, according to their ſeveral Proportions, by the Perſon againſt whom the Recovery was, who was one of the Plaintiffs in this Cauſe, and a principal Creditor. Fin. Rep. 264. Trin. 28 Car. 2. Hawkins & al'. v. King & al'.

4. Bill for *Account* and *Diſcovery* of Money receiv'd by Defendant for one that became Bankrupt; Defendant *pleaded*, he receiv'd it only as *Menial Servant* to the Bankrupt, and had accounted for it to him already, and that the Commiſſioners had already examin'd him on Interrogatories, the Plea was over-ruled. Vern. 95. pl. 81. Mich. 1682. Wagſtaff v. Bedford.

5. *Bill for Diſcovery of a Bankrupt's Eſtate*; the Defendant demurred, becauſe the *Bankrupt was not made a Party*, and the Demurrer was allowed. 2 Vern. 32. pl. 23. Hill. 1688. Sharpe v. Gamon.

3 Wms's Rep. 311. in a Note of the Reporter, he ſays that, It is a General Rule, that no one need be made a Party againſt whom, if brought to a Hearing, the Plaintiff can have no Decree; thus, in a Bill brought by the Creditors of a Bankrupt againſt the Aſſignees under the Commiſſion, the Bankrupt himſelf need not be made a Party; By the Maſter of the Rolls, Hill. 1732. De Golls v. Ward. Though with regard to making the Bankrupt a Party, it ſeems formerly to have been held otherwiſe, and cites 2 Vern. 32.

6. Bankrupt is *taken in Execution pending the Reference of his Certificate* to the Judges, though it appears that the Debt was diſcharged by the Statute, yet the Court would not diſcharge him, but put him to his *Audita Querela*. 2 Vern. R. 697. in Caſe of Goodwin; cites it as the Caſe of Baily v. Robinſon. Trin. 6. Annæ in B. R.

7. A Bankrupt having *ſlipt his Time of pleading his Certificate* to a Debt precedent to the Bankruptcy, is not to be relieved in Equity; and per Harcourt C. the Statute is binding in Equity, as well as at Law. 2 Vern. 696. Trin. 1715. Goodwin's Caſe.

8. 5 *Geo.* 2. *Cap.* 30. *S.* 38. No Suit *in Equity ſhall be commenced* by Aſſignees, without the Conſent of the major Part in Value *of the Creditors* preſent at a Meeting purſuant to Notice in the Gazette.

For more of Creditor and Bankrupt in General, See other Proper Titles.

Cui in Vita.

(A) Who ſhall have it, and in what Caſes.

1. *Weſtm.* 2. 13 *E.* 1. *cap.* 13. GIVES *a Cui in Vita to the Wife for covery of her Land loſt by the Husband's Default in his Life Time.*

2. *Recovery by Sufferance* is Alienation, and therefore the Feme ſhall have Cui in Vita, after the Death of her Husband, of a Recovery ſo ſuffered. Br. Cui in Vita Pl. 19. cites 4 E. 3.

3. If Judgment of *Forejudging* be given *againſt Baron and Feme*, this is not Void but Error, and the Feme ſhall not have Cui in Vita. Per Cui in Vita. Pl. 14. cites 9. E. 3. 2.

4. In Aſſiſe if a Man *leaſes to Baron and Feme for Life*, and the *Baron aliens in Fee*, the *Leſſor may enter* and recover by Aſſiſe if he be ouſted, notwithſtanding that, the Feme *may have Cui in Vita, after the Death of her Husband.* And ſo ſee that ſhe may have Cui in Vita notwithſtanding the Alienation and the Entry; for the Title of Entry is not given but by the Law, for the Alienation and the Title of the Feme is by the Demiſe before Notice. Br. Cui in Vita. pl. 9. cites 11 Aſſ. 11.

5. A Sur Cui in Vita is maintainable of a *Rent.* F. N. B. 194. (F) cites Mich. 12 E. 3.

6. *The Heir of the Feme ſhall have Cui in Vita* and *not Aſſiſe*, Br. Entre Cong. pl. 28. cites 21 E. 3. 6.

7. In Aſſiſe the *Baron and Feme* were *ſeiſed in Feme*, and the *Baron infeoffed E. in Fee*, but the *Feme held her in, claiming her firſt Eſtate*, and the *Baron by Licence* and Will *of E.* the Feoffee, *re-enter'd and took the Profits*, and after *E. died, his Daughter* and Heir being *in the Venter of his Feme* Mother to the Daughter, and after the *Baron died*, and the *Feme claimed by her Firſt Intereſt, and continued Poſt Mortem Viri by Ten Years*, and the *Plaintiff in Aſſiſe entered becauſe the Feme was his Nief*, and the *Daughter of E.* the Feoffee, *was born and entered*, and well, by award, and the Lord of the Nief brought Aſſiſe againſt the Daughter and Heir of E. the Feoffee, and was barred, quod nota; for the Feoffment of the Baron was a Diſcontinuance, ſo that the Entry of the Feme was not lawful; But ſhe put to her Cui in Vita. Br. Entre Cong. pl. 56. cites 21 Aſſ. 25.

8. It appears by Judgment in Aſſiſe, that where *Baron and Feme are Tenants for Life*, the Remainder to A. in Tail, and the *Baron aliens in Tail*, and A. has iſſue and dies, the Iſſue may *enter for the Alienation to his Diſinheritance* notwithſtanding that the Feme Covert be alive; for ſhe *ſhall have Cui in Vita after the Death of her Baron.* Br. Cui in Vita. pl. 10. cites 43 Aſſ. 17.

Br. Cui in Vita, pl. 23. cites S. C.

9. Sur *Cui in Vita* was brought *by the Heir againſt W. D. into which the ſame W. had not Entry, unleſs after the Demiſe, which the aforeſaid W. (whom ſhe in his Life could not contradict) made thereof to J. of D.* and the

the Writ awarded good, upon the Alienation made by the Tenant himſelf; for if he *makes Diſcontinuance, and after divers Degrees, repurchaſes the Land again*, the Writ is well brought as above, and the Writ awarded good, notwithſtanding that it appeared that *all was one and the ſame Perſon*. Br. Entre in le per. pl. 3. cites 44 E. 3, 4, 5.

10. *Baron and Feme and a Third are ſeiſed in Fee*, the *Baron alien'd and died*; Cui in Vita does not lie for the *Feme*; For ſhe *and the Third, may join in Writ of Right*. Br. Extinguiſhment, pl. 43. cites 35 Aſſ. 15. and Fitzh. Cui in Vita 20. F. N. B. 193. (K) S. P. but ſays it ſeems, that ſhe ſhall have a Cui in Vita of a Moiety, being the third Jointenant, but that ſuch Alienation ſeems to be a Severance of the Jointure, and refers to Paſch. 16 E. 3. Cui in Vita in the Abridgment.

11. *But* if the *Third dies*, ſhe may have Cui in Vita of all, and ſo Action ſuſpended is now revived; But *it ſeems it was never ſuſpended*; For it was not given to her till after the Death of the Third. Ibid.

12. If *a Man* is *ſeiſed in Jure Uxoris*, and *W. recovers againſt him by Default*, and the Baron dies, the Feme ſhall have Cui in Vita, and not Quod ei deforceat; Per Moyle J. quod non negatur. Br. Cui in Vita. pl. 12. cites 2 E. 4. 13. F. N. B. 193. (I) S. P. 2 Inſt. 343. S. P. for this is as it were a Demiſe made by the Husband; for otherwiſe ſhe ſhould be without Remedy; for ſhe cannot have a Quod ei deforceat.

13 If the Husband diſcontinues the Land of the Wife, and *ſhe brings a Writ of Dower*, ſhe is concluded to have a Cui in Vita; Per Walmſley J. Ow. 154. cites 10 E. 4. By Acceptance of Parcel of the Land in Dower, ſhe ſhall be barr'd in Cui in Vita of the Reſidue. F. N. B. 194. (B)

14. If *Baron and Feme are impleaded by him, who has good Title*, and the *Baron confeſſes the Action*, the Feme has no Remedy. But by the Statute of Weſtm. 2. cap. 3. upon the Render of the Baron the Feme may be received; but where the Baron and Feme are *received in Default of the Tenant for Life by Reverſion in Jure Uxoris*, there the *Baron cannot confeſs the Action*; for he is received to defend the Right of his Wife. Br. Cui in Vita. pl. 23. cites 7 E. 4. 17.

15. If Recovery is had *by Default in a Writ of Waſt*, the Feme after the Death of her Husband ſhall not have Cui in Vita. Quære Whether becauſe it is not merely by Default, or becauſe no Land is in Demand by the Writ of Waſt, or if ſhe ſhall have Quod ei deforceat upon ſuch Recovery? Br. Cui in Vita; pl. 22. cites 9 E. 4. 16.

16. The Writ of Cui in Vita *lies, where the Husband aliens* in Fee the Right of Inheritance of his Wife, or the *Freehold of his Wife* by Feoffment, or grant for Life, or in Tail; then after the Death of the Husband, the Wife ſhall have Cui in Vita contradicere non potuit; and the Writ lies where the Wife has an Eſtate for Life or in Tail, and the Husband aliens that Eſtate and Title of the Wife's, then the Wife after his Death ſhall have that Writ. F. N. B. 193. (A.)

17. And *if the Wife does not bring the Writ* during her Life, then if ſhe had an Eſtate in Fee Simple, *her Heir ſhall have* a Writ, which is called *Sur Cui in Vita after her Death*. And if the Wife have an Eſtate in Tail, and her Husband aliens, and makes a Feoffment of that Eſtate; then if the Wife dies, her Heir ſhall have a Writ of Formedon in the Deſcender to recover that Eſtate, and not a Writ of Sur Cui in Vita; for thoſe Writs of *Cui in Vita, and Sur Cui in Vita, are Writs founded upon the Common Law, of an Eſtate in Fee Simple*; for there was no

no other Eſtate at the Common Law, which would deſcend, but a Fee Simple. F. N. B. 193. (A).

18. If the *Husband and Wife exchange the Land of the Wife* for other Lands, if the *Wife agreed* unto the Exchange *after the Husband's Death*, ſhe ſhall not have a Cui in Vita. F. N. B. 194. (A).

19. The *Husband gave the Land of the Wife to J. who gave other Land to the Husband and Wife, and to her Son of the Husband, and to the Heirs of him* who ſurvived, and that was *pleaded by Exchange in Bar*, in a Cui Fita and holden in Bar. F. N. B. 194. (B) in the Notes in the Engliſh Edition, cites 8 E. 2. Cui in Vita 38. and 20 E. 3. Cui in Vita 10.

20. So if ſhe *accepts a Rent* where ſhe and her Husband makes a Feoffment. F. N. B. 194. (B) ibid. cites, 21 H. 6. 24.

21. The *Aunt and the Niece may join* in a Writ of Sur Cui in Vita, upon an Alienation made by the Husband, their Common Anceſtor; or upon a Recovery had againſt the Husband and Wife, who was the Common Anceſtor to them, if the Second Husband aliens the Lands of the Wife, and he and his Wife die, and the Iſſue of the Wife and the firſt Husband ſhall have a Sur Cui in Vita againſt the Alienee, although the Second Husband be living, if he were not intitled to be Tenant by the Curteſy; but if the Second Husband be intitled to be Tenant by the Curteſy, then the Iſſue of the Firſt Husband ſhall not have a Sur Cui in Vita during the Life of the Second Husband. F. N. B. 194. (D.)

S. C. cited Arg. Roll Rep. 442.

22. Two *Barons of Femes Jointenants alien* jointly and die, their Femes Survivors ſhall have ſeveral Cui in Vita's; becauſe the Coverture is the Cauſe of the Action, the which is ſeveral; for the Coverture of the one, is not the Coverture of the other. Keilw. 105. b. pl. 18. Caſus incerti temporis. Anon.

23. If Baron ſeiſed of a *Copyhold* in Right of his Wife ſurrender this to the Uſe of a Stranger, the Wife cannot enter after the Death of the Baron; For Copyhold is out of 32 *H.* 8. For this is intended of Freehold, but he ought to make his Plaint in Nature of a Cui in Vita. Dal. 116. pl. 8. Anno 16 Eliz. Anon.

24. *Husband aliened* the Lands of the Wife and *afterwards they are divorced* and the *Husband dies*; the Wife ſhall not enter by the 32 H. 8. but is put to her Cui in Vita ante Divortium. Le. 7. in pl. 10. Mich. 25 and 26 Eliz. B. R. Egerton Sol' Gen' cites it as Haddon's Caſe.

25. If *Lands, during the Coverture, are given to the Husband and Wife and their Heirs*, this is Jus Uxoris within the Statute Weſtm. 2 cap. 3. 2 Inſt. 343.

(B) Writ and Pleadings.

1. IN Cui in Vita *of Land Quam clamat eſſe jus &c. de Dono Will' & Georgii* &c. The Tenant *ſaid, that the Demandant had never any Thing of the Gift of Will'* &c. And held a good Plea to the Writ. Thel. Dig. 170. Lib. 11. cap. 52. S. 5. cites Trin. 4 E. 2. Brief 795.

2. In Cui in Vita of Land *Quam clamat &c. de Dono Will'. qui Hug. quondam virum ſuum & ipſam inde feoffavit* &c. The Tenant *ſaid, that the Baron never had any Thing but as Baron* of the Feme &c. And it was held no Plea. Thel. Dig. 170. Lib. 11. cap. 52. S. 6. cites Paſch. 5 E. 2. Br' 799.

Cui

3. Cui in Vita *ſuppoſing that the Tenant had not Entry unleſs by S. to whom her Baron leaſed*; The Tenant *ſaid, that the Baron leaſed to S. and to Agnes his Feme*, Judgment of the Writ. And held no Plea. Thel. Dig. 170. Lib. 11. cap. 52. S. 4. cites Mich. 19 E. 2. Brief 843.

4. In Cui in Vita the *Tenant pleaded Jointenancy by Fine with one A.* and the *Demandant ſaid, that the Tenant had releaſed all his Right to A. and ſo the Tenant is ſole Tenant*, and yet the Writ was abated. Thel. Dig. 226. Lib. 16. cap. 7. S. 7. cites 3 E. 3. It. North. Maint' de Br'. 13.

5. In Cui in Vita *of a Manor given in Tail*, if the Tenant *pleads Nontenure of Parcel*, it is ſufficient for the Demandant to *maintain, that the Tenant was Tenant of the Manor as intirely as the Manor was at the Time of the Gift in Tail.* Thel. Dig. 226. Lib. 16. cap. 7. S. 10. cites Trin. 4 E. 3. 144. 163. and ſays, ſee 4 E. 3. 122. 9 E. 3. 489. and 20 E. 3. Maint' de Br' 10 in Formedon.

6. In Cui in Vita *of a Manor*, the Tenant *pleaded Nontenure of Parcel*, and the *Demandant ſaid, that the Tenant is Tenant intirely of the Manor in Demeſne as in Demeſne, in Service as in Service* &c. and was not received, by which the ſaid fully Tenant of the Manor according as ſhe demands it, and the others e contra. Thel Dig. 226 Lib. 16. cap. 7. S. 14. cites Mich. 5 E. 3. 207.

7. In Cui in Vita *Iſſue may be taken upon the Demiſe ſuppoſed to be made by the Baron.* Thel. Dig. 171. Lib. 11. cap. 52. S. 13. cites Paſch. 8 E. 3. 392.

8. The Writ of Cui in Vita is good enough, *without ſaying in certain what Eſtate the Demandant has by her Title.* Thel. Dig. 106. Lib. 10. cap. 14. S. 15. cites Paſch. 8 E. 3. 392.

9. In Cui in Vita the Writ was in *quod non habet Ingreſ. niſi poſt diſſionem quam A. quond' Vir &c. inde fecit W. D. cui ipſa in Vita ſua* &c. which Writ was abated; for it ought to be *quam A. quondam vir'* &c. *cui ipſa in Vita ſua &c. inde fecit W. D.* &c. Thel. Dig. 104. Lib. 10. cap. 12. S. 2. cites Paſch 16. E. 3. Brief 652.

Note, if the Writ be in the Degrees, the Words Cui in Vita &c are put in the End; but if in the Poſt, in the Middle; and therefore, if the Writ be Poſt Dimiſſionem quam &c. Vir ipſius B. inde fecit cui ipſa &c. the Writ ſhall abate; for the Words relate to the next Antecedent. F. N. B. 193. (E) in the new Notes there (c) cites 16 E. 3. Brief 652.

10. In Cui in Vita, it is a good *Plea* to ſay, *that the Demandant had accepted Part of the ſame Land for her Dower.* Br. Execution, pl. 57. cites E. 3. 39.

11. Cui in Vita *againſt Tho. and Will. & A. his Feme, who had not Entry unleſs by the Baron of the Demandant.* Tho. diſclaimed, and the *Baron and Feme took the intire Tenancy, and ſaid, that they enter'd by Tho. and not by her Baron*, but they were compelled to anſwer to the Leaſe ſuppoſed by the Writ, by which *they ſaid as above Abſque hoc, that the Baron leaſed to them 3 modo & forma* &c. and Iſſue thereupon, and held, that it went to the Action. Thel. Dig. 176. Lib. 11. cap. 54. S. 38. cites Mich. 29 E. 3. 60.

12. In Cui in Vita the Caſe was, that the *Baron ſeiſed in Jure Uxoris, gave the Land to Baron and Feme in Special Tail*, the *Remainder to T. in Tail, ſaving the Reverſion to him and his Heirs*; the *Baron had Iſſue by his Feme*; the *Baron and Feme died*, and the *Iſſue brought Cui in Vita* againſt the Tenant, and *they pleaded this Matter in Bar* by this Gift, ſaving the Reverſion to the Baron and his Heirs, and ſhew'd Deed of it without Warranty, *and averr'd, that Aſſets is deſcended in Fee to the Heir*, who is Demandant, *by the ſame Father, and ſo pleaded the Reverſion for his Warranty and the Aſſets in Bar*, and the Demandant demurr'd, and becauſe the Demandant by this Suit is to defeat the ſame Reverſion and Warranty, therefore by Award the Demandant recover'd; For *a Man*

Br. Bar, pl. 102 cites S C ——— Br. Garranties, pl 29. cites S C.

ſhall not be bound by this Thing which he is to defeat by his Suit, quod nota. Br. Cui in Vita. Pl. 6. cites 38 E. 3. 32.

13. In Cui in Vita *a Man ſeiſed in Jure Uxoris diſcontinued*, and *after ſeveral Alienations, he re-purchaſed*; the *Feme died*, and the *Heir brought ſur Cui in Vita againſt him by Name of W. B.* quod reddat &c. & in quod non habeat ingreſſum niſi poſt dimiſſionem, quam idem W. B. fecit &c. cui ipſa, the Feme, contradicere non potuit, and Exception was taken to the Writ, inaſmuch as it ſhould be by a ſtrange Name, & non allocatur, but the Writ awarded good. Quod nota. Br. Cui in Vita. pl. 24. cites 44 E. 3, 4, 5.

14. *Cui in Vita againſt B. in quæ idem B. non habet ingreſſum niſi poſt dimiſſionem quam prædictus B. cui ipſa* &c. *inde fecit Jo. D.* &c. adjudged a good Writ, notwithſtanding that it appears by the Writ, that the Tenant is the ſame Perſon who made the Leaſe, without giving diverſe Names; For divers Meſne Feoffments may be made between the Demiſe and the Re-purchaſe. Thel. Dig. 177. Lib. 11. cap. 54. S. 41. cites Hill. 44 E. 3, 4. And ſays, it ſeems that the Writ was a *Sur Cui in Vita.*

15. Cui in Vita, *which ſhe claims to hold to her and the Heirs of her Body iſſuing*, and *did not ſhew of whoſe Gift*, and therefore the Tenant pleaded it to the Writ, and it was abated by Award, quod non contradicitur ibidem, that in Quod ei deforceat, he need not ſhew of whoſe Gift. Note the Diverſity. Br. Cui in Vita. Pl. 2. cites 48 E. 3. 8.

16. Cui in Vita *which ſhe claims* to hold to her and the Heirs of her Body *of the Gift of W. N.* The *Tenant ſaid, that ſhe never had any Thing of the Gift of W. N.* Priſt. And per Belknap, clearly this is no Anſwer; For if ſhe has of the Gift of one, or another if the Baron Aliens, ſhe ſhall have Action, and the *Writ ſhall ſay Quam clamat eſſe jus & hæreditatem ſuam, notwithſtanding that it be of a Purchaſe*, and therefore every Word in a Writ is not traverſable. Br. Cui in Vita. Pl. 3. cites 49 E. 3. 29.

17. In *Cui in Vita which ſhe claims to hold to her and the Heirs of her Body of the Gift of J. N.* the *Gift* is not traverſable, but the *Alienation.* Br. Traverſe per &c. pl. 43. cites 49 E. 3. 32.

18. *So* if it be *which ſhe claims to be her Right and Inheritance*, where *it is of a Purchaſe*, this is not traverſable. Br. Traverſe per &c. pl. 43. cites 49 E. 3. 32.

19. The Tenant ſhall have *Traverſe to the Title of the Demandant* in Cui in Vita. Thel. Dig. 150. Lib. 10. cap. 14. S. 4. cites 49 E. 3. 22. and Hill. 50 E. 3. 6.

20. In Cui in Vita of the Demiſe of the Baron *of Land, which ſhe held for Term of Life of the Demiſe of J. N.* and the *Tenant ſaid, that ſhe had nothing of the Demiſe of J. N.* and admitted a good Anſwer. Per Cur. upon Argument of it; For *where ſhe makes Title, this Title ought to be a true Title*, and there Fine upon Releaſe made to Baron and Feme, and to the Heirs of the Baron by J. N. was taken no Demiſe; for it is ſuppoſed by it, that the Baron and Feme were in Poſſeſſion at the Time of the Fine. Br. Cui in Vita, pl. 4. cites 50 E. 3. 6.

21. In Cui in Vita, where *four are impleaded, three confeſs or make Default, and the fourth demands the View*, the *Demandant ſhall have Judgment of three Parts immediately, contra where the fourth takes upon him the intire Tenancy.* Br. Judgment, pl. 22. cites 12 H. 4. 19.

22. *And if* the fourth is *Tenant of the Whole, and does not take upon him the intire Tenancy*, but demands the View, and he is ouſted of three Parts by Execution upon a Judgment againſt the other three, he ſhall have Aſſiſe. Br. Judgment, pl. 22. cites 12 H. 4. 19.

23. In Caſes Special, the Writ ſhall make Mention *of whoſe Gift*, Leaſe, or Demiſe, he holds, *contra of Fee Simple*; For of Eſtate for Term

Term of Life the Writ ſhall ſay, Quam *clamat tenere ad terminum Vitæ ex dimiſſione J. N.* And of Eſtate Tail, Quam clamat tenere *ſibi & Hæredibus de corpore ſuo exeuntibus de dono J. N.* and of Fee Simple, Quod clamat *eſſe ſuum jus*, or jus & Hæreditatem ſuam, *without ſaying of whoſe Gift or Feoffment*; per Priſot; and ſo was the beſt Opinion, which is not much deny'd. Br. Cui in Vita, pl. 7. cites 39 H. 6. 38.

24. If the *Baron aliens the Land of his Feme with Warranty*, and leaves *Aſſets deſcended in Fee*, and he and the Feme die, and *the Heir aliens the Aſſets*, and dies, his Heir ſhall be barr'd in Cui in Vita, by Reaſon that Aſſets was deſcended to his Father, becauſe it was of Fee Simple; *contra of the Heir in Tail*, who aliens ſuch Aſſets and dies, his Iſſue ſhall not be barr'd. Br. Cui in Vita, pl. 18. cites Vet. N. B. Formedon in deſcender.

25. The Writ of Cui in Vita *may be in the Per, Cui, and Poſt.* F. N. B. 193. (E).

26. In a Cui in Vita *the Grant*, or Gift, *alleged in the Writ, is not traverſable.* F. N. B. 194. (G).

27. If a *Man gives Lands to a Woman to marry her*, and they marry, and afterwards the *Husband aliens and dies*, the Wife ſhall have Cui in Vita. F. N. B. 194. (H).

(C) Recover'd. What.

1. ENTRY ſur Diſſeiſin per Cur. Where the *Baron and Feme purchaſes Land*, and the *Baron aliens and dies*, the Feme may have Cui in Vita and recover the Whole; For there are no Moieties between the Baron and the Feme during the Coverture, and therefore it is not good for any Moiety. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45. S. P. the Purchaſe being during the Coverture. F. N. B. 194. (B)

2 *But* if they *purchaſe before the Coverture*, and after inter-marry, and the Baron aliens all and dies, the Feme ſhall have Cui in Vita of the Moiety and recover it, and the Alienation is good of the other Moiety; Note the Diverſity; for it appears. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45. F. N. B. 194. (B) S. P. accordingly.

2. An *Husband ſeiſed in Right of his Wife, and having in his own Right, Lands contiguous to his Wife's Land, builds an Houſe which extends 20 Feet Northward, and 12 Feet Eaſtward upon his Wife's Land*, the reſt of the Houſe ſtanding upon the Husband's Ground; The Wife dies without any Iſſue had by her Husband; The *Heir of the Wife brings a* [Sur] *Cui in Vita againſt the Husband, and demands the ſame Land by the Name of an Houſe*, and had Judgment Pro tanto, as aforeſaid; Affirmed in Error. Jenk. 268. pl. 83. Cro. E. 234. pl. 7. Paſch. 33 Eliz. C. B Hayes v. Allen, S. C. adjudged, and Judgment affirm'd in Error. ——Le. 152. pl. 210.

S. C. and the Writ awarded good. —— And. 265. pl. 272. S C. adjudged accordingly. —— Poph. 13. S. C. and the Judgment affirmed ——[The ſeveral Reports are of the Building being by Diſcontinuee of the Husband upon Part of the Diſcontinuee's own Land, and Part on the Wife's Land.]

For more as to Cui in Vita, See the Statute of Weſtm. 2. 13 E. 1. cap. 40. at tit. Age. (I) pl. 9. &c. and other proper Titles.

Curteſy.

Curteſy.

(A) Tenant by the Curteſy. Of what Seiſin. Actual or not.

1. QUARE *Impedit by the King againſt diverſe*, the *Defendant made Title that the Advowſon deſcended to three Coparceners, who made Partition to preſent by Turn, and that the Eldeſt had her Turn, and after the Second her Turn, and he married the Youngeſt and had Iſſue* by her, *and ſhe died, the Church voided*, ſo it belong'd to him to Preſent, and *did not alledge that his Feme ever preſented*, ſo as ſhe had Poſſeſſion in Fact, and yet admitted that he may be Tenant by the Curteſy by the Seiſin of the others. Br. Tenant per le Curteſie, pl. 2. cites 21 E. 3. 31.

Co. Litt. 29. a. S. P. though the Church was not void at her Death, and ſo ſhe had but a Seiſin in Law, yet he ſhall be Tenant by the Curteſy, becauſe he could by no Induſtry attain to any other Seiſin, Et Impotentia excuſat Legem. ——— A Man ſhall be Tenant by the Curteſy of an Advowſon, of which the Wife had the Inheritance, though it never avoided in her Time. Dod. of Advowſon. 21. ——— F. N. B. 149. (D) S. P. ——— 1 Rep. 97 b Arg. S. P and ſays, the Rule of Law is ſo, and cites 7 E. 3. 66 a b and 3 H. 7 5. a. ——— The Baron ſhall be Tenant by the Curteſy *of an Advowſon, though the Feme never preſented* Br. Tenant, per le Curteſy, pl. 9. cites 7 E. 3. 66. and Fitzh. Tit. Barre 293. ——— And notwithſtanding the Advowſon becomes void during the Coverture, and the Wife dies after the ſix Months paſt, and before any Preſentment made by the Husband &c. ſo as the Ordinary preſents for Lapſe to this Avoidance, yet the Husband ſhall preſent to the next Avoidance, as Tenant by the Curteſy &c. Perk. cap. 6. S. 468.

2. *Aſſiſe* by N. againſt A. it was found by Verdict at large, that *S.* was *ſeiſed of the Land* and *had Iſſue R. before Eſpouſals, and A. within the Eſpouſals by her Baron* and died ſeiſed, *R. and A. enter'd and made Purparty of this Land and others*, ſo that *this Land was allotted to R. who took to Baron the Plaintiff* in the Aſſiſe and had Iſſue, and *R. died*, and the *Baron held him in as Tenant by the Curteſy*, and A. ouſted him, and he brought Aſſiſe and Judgment given for the Plaintiff; For this Entry and Purparty, and Dying ſeiſed, made the Baſtard to be Heir; quod nota. Br. Entre Cong. pl. 31. cites 21 E. 3. 34.

Br. Tenant per le Curteſy, pl. 4. cites S. C *but contra of Eſtate Tail and Fee Simple.*

3. Land is given *to W. and A. his Feme in ſpecial Tail*, the *Remainder to J. N. in Tail, the Remainder to the right Heirs of J. N.* The *Baron died without Iſſue*, and *A. the Feme ſurvived*, and is Tenant in Tail after poſſibility of Iſſue extinct, *and took another Baron and had Iſſue*, and after *J. N. died without Iſſue, to whom A.* the Feme *is Heir*, and after *A. died.* The *ſecond Baron ſhall be Tenant by the Curteſy*; for when the Remainder in Fee came to the Feme Tenant in Tail after poſſibility of Iſſue &c. the *Frank-tenement was extinct in the Fee, and ſo A. was ſeiſed in Fee.* Br. Eſtates pl. 25. cites 9 E. 4. 17, 18.

Co Lit 29. a. S P. ——— 1 Rep. 97. b in Shelly's Caſe, Arg. S. P. and ſays, it is a Rule in Law, and cites 7 E. 3 66. a. b. and 3 H. 7. 5. a.

4 It was touch'd, that if *a Feme has Rent* and takes Baron, and *ſhe dies before a Day of Payment or other Seiſin*, yet the Baron ſhall be Tenant by the Curteſy. Br. Tenant per le Curteſy, pl. 5. cites 3 H. 7. 5.

5. A Man ſhall *not* be Tenant by the Curteſy, *unleſs upon Seiſin in Fact*. Br. Tenant per le Curteſie, pl. 7. cites F. N. B.

Feme ſhall be endowed of a Seiſin and Poſſeſſion in Law, without Seiſin in Deed; As where the Father of the Baron died ſeiſed, and Baron after died before Entry; Quod Nota; for otherwiſe it is of Tenant by the Curteſy, and the Reaſon ſeems to be, *in as much as the Baron may enter in Jure Uxoris, but* the *Feme cannot compel her Baron to enter into His own Land*. Br. Dower, pl. 75 cites 21 E. 4. 60.

A Man ſhall not be Tenant by the Curteſy *of a bare Right, Title, Uſe, or of a Reverſion or Remainder expectant* upon any Eſtate of Freehold, unleſs the particular Eſtate determined or ended during the Coverture. Co. Litt 29. a.

But there *muſt be a Seiſin in Deed if it may be attained unto*; As if a Man dies ſeiſed of Lands in Fee ſimple, or Fee Tail general, and theſe Lands deſcend to his Daughter, and ſhe takes a Husband, and has Iſſue, and dies before any Entry, the Husband ſhall not be Tenant by the Curteſy, and yet in this Caſe ſhe had a Seiſin in Law, but if ſhe or her Husband had, during her Life entered, he ſhould have been Tenant by the Curteſy. Co. Litt. 29. a.

6. If *Father and Daugher be*, and the *Daughter takes Baron and has Iſſue* by him, and after *the Iſſue dies*, and *the Father* of the Feme *dies*, the *Baron and Feme enter*, and after the *Feme dies* the Baron ſhall be Tenant by the Curteſy, Quære; for the Iſſue died before the Land was deſcended to his Mother. Br. Tenant per le Curteſy, pl. 12. cites lib. Parkins tit. Tenant per le Curteſy.

7. If *Father and Daughter be*, the *Father dies*, the *Daughter enters and takes Baron and has Iſſue*, and *after a Son is born, who enters upon the Baron and Feme*, and after *the Iſſue of the Daughter dies*, and the *Son, who was Brother to the Daughter, dies without Iſſue*, the *Baron* ſhall not be Tenant by the Curteſy, if he *does not enter again in the Life of the Feme*. But Quære if he ſhall be Tenant by the Curteſy, if he had enter'd in the Life of the Feme? Br. Tenant per le Curteſy, pl. 13.

8. If a Man ſeiſed of Lands in Fee has iſſue a Daughter, who takes Husband and has Iſſue, and the Father dies, and the Husband enters; he ſhall be Tenant by the Curteſy, albeit the *Iſſue was had before the Wife was ſeiſed*. And ſo it is albeit the *Iſſue* had *died in the Life Time of her Father before any Deſcent* of the Land, yet ſhall he be Tenant by the Curteſy. Co. Lit. 29. a.

9. If *after Iſſue Land deſcends to the Wife*, (be the Iſſue dead or alive at the Time of the Deſcent) he ſhall be Tenant by the Curteſy. For the Time of the Birth of the Iſſue is not material, if he be born alive and in the Life of the Wife. 8 Rep. 35. b. Trin. 29 Eliz. C. B. Paine's Caſe.

13 Rep. 23. S. P. obiter. *So* if after the Death of the Iſſue the *Wife purchaſes* Lands in Fee, and dies without any other Iſſue, the Baron ſhall be Tenant by the Curteſy; for the having Iſſue, and the being ſeiſed during the Coverture, is ſufficient, tho' it be at ſeveral Times.

10. *Cuſtom* of a Manor, that *if a Man marries a Cuſtomary Tenant* of the ſaid Manor, and has Iſſue, and ſhall over-live his Wife, he ſhall be Tenant by the Curteſy. During the Coverture, a Cuſtomary Tenement deſcends, he has Iſſue, yet he ſhall not be Tenant by the Curteſy, becauſe *the Wife was not Cuſtomary Tenant at the Time of Marriage*. 2 Le 109. pl. 140. Trin. 29 Eliz. B. R. Sir J. Savage's Caſe.

S. C. cited Arg. 2 Le. 208 in pl. 257. Trin. 29 Eliz. C. B. —— This Caſe denied per Cur.

1 Salk 242, 244. in Caſe of Clement v. Scudamore, Hill. 2 Ann. B. R. —— And by Holt and Powell, 2 Ld. Raym. Rep. 1028. in S. C. —— And ſo in S. C. Wms's Rep. 69.

11. A. died, leaving a Wife, a Son, and a Daughter; the *Widow* entered upon the Eſtate, and was *ſeiſed as Tenant in Dower of One Part, and as Tenant in Common with her Son of another Part*, and of a Third Part as Guardian in Socage to her Son. The *Son* went beyond Sea, and *died under Age*, whereby the *Daughter* became intitled; who during her Infancy married the Plaintiff, and together with him *applied to the Mother to be let into Poſſeſſion of the Son's Part*, which the *Mother refuſed, imagining the Son was ſtill alive, and thereupon to hold the Land for him*. Upon this they brought a Bill

* But in the ſame Caſe his Lordſhip ſaid, that indeed, where *one enters, claiming the whole for himſelf, in Excluſion*

of his Companion, this may not ſerve as the Entry of his Companion, being made directly againſt him; but that is not this Caſe; for

in Chancery for an Account, which was accordingly directed; after this the *Daughter died*, and upon further Application to the Court by the Husband one Queſtion was, whether the Seiſin of the Mother (after the Son's Death) being Tenant in Common with the Daughter, was the *Seiſin of the Daughter ſufficient to make the Husband Tenant by the Curteſy* of her Part. And the Ld. Chancllor held it was ſufficient, for the Entry and Poſſeſſion of one Tenant in Common &c. is the Entry and Poſſeſſion of the other; And accordingly he decreed for the Plaintiff. 25 Feb. 1739. Sterling v. Penlington.

it appears, that the Mother's keeping Poſſeſſion of the whole againſt the Daughter and her Husband, was intirely owing to a Miſtake in imagining her Son was ſtill living, and not with an Intent to exclude the Daughter from her Right, and therefore no Inference can be drawn from it.

(B) In what Caſes. In Reſpect of the Iſſue.

1. A *Feme inheritable took Baron and had Iſſue*, the *Baron died*, and *ſhe took another Baron and had Iſſue, which died*, and the *Feme died*, the Second Baron ſhall be Tenant by the Curteſy; Br. Tenant per le Curteſy. pl. 8. cites 21 H. 3. and Fitzh. Dower 128.

Fin. 8vo. 129. S. P.— Co. Lit. 29. a. S. P.— And. 35. pl. 87. Hill. 28 H. 3. S. P. in C. B. ——Co. Lit. 29. b. ad finem. S. P.

2. A Man may be Tenant by Curteſy, *though the Child never be heard to cry*, if it move and be alive; becauſe it may be born dumb; Per Fitzherbert. D. 25. pl. 159. a. b. Hill 28 H. 8. Anon.

S. P. and it ought to be Born in the Life of the Wife. Co. Lit. 29. b. 30. a.

3. If the *Baron has Iſſue* by the Feme, and the Feme dies, the Baron ſhall be Tenant by the Curteſy, be the Iſſue dead or alive. Br. Tenant by the Curteſy. pl. 11. cites Old Tenures tit. Tenant per le Curteſy.

4. The *Wife died big with Child and was ripp'd alive out of her Belly*, the Husband ſhan't be Tenant by the Curteſy; for it ought to commence by the Iſſue and be conſummate by the Death of the Wife, and the Eſtate of Tenant by the Curteſy ought to *take away the immediate Deſcent*. 8 Rep. 35. a. cited per Cur. as Reppes's Caſe.

5. If the Iſſue be *born Deaf or Dumb*, or both, or be born an *Ideot*, yet it is a lawful Iſſue to make the Husband Tenant by the Curteſy and to inherit the Land. Co. Lit. 29, a.

(C) Tenant by the Curteſy. In what Caſes. In Reſpect of the Limitation of the Eſtate.

1. IF *a Daughter be Heir and endows her Mother, and takes a Baron and has Iſſue, and dies*, and *the Mother dies*, the Baron of the Daughter after his Feme, if ſhe dies in the Life of the Mother, ſhall not be Tenant by the Curteſy; for the *Poſſeſſion of his Feme was defeated and turned into Reverſion*; Br. Tenant per le Curteſy. pl. 10. cites 8 Aſſ. 6.

2. *A*

2. *A Man ſeiſed of Land took Feme*, and *he and his Feme levied a Fine* and *took an Eſtate to them, and to the Heirs of their Two Bodies begotten*, and *had Iſſue a Daughter E. and died. E. took Baron*, and *ſhe and her Baron levied a Fine of the ſame Land*, and *retook to them and to the Heirs of their two Bodies*, the Remainder over in Fee, *and had iſſue within Age* (the Land held by Chivalry;) *the Baron died*; *E. took another Baron and had Iſſue*, and *E. died*; the *firſt Iſſue within Age* and the Lord entered into the Land by the Ward of the firſt Iſſue of E. by her firſt Baron, and the *ſecond Baron of E. entered pretending to be Tenant by the Curteſy, becauſe*, by his Pretence, *his Feme was remitted to the firſt Tail by the Fine levied by the Father and Mother of his Feme, which is general to his Feme, and ſo every Iſſue inheritable, and ſo he Tenant by the Curteſy.* But the beſt Opinion was, becauſe his Feme and the firſt Baron levied the Fine, and retook but an Eſtate to them in ſpecial Tail, therefore the ſecond Baron cannot be Tenant by the Curteſy, becauſe as his Feme ſhall be eſtopped by the Fine, ſo ſhall her Baron be who claimed by her &c. in Ejectione Cuſtod'. Br. Tenant per le Curteſie; pl. 1. cites 46 E. 3. 5.

Br. Eſtoppel pl. 41. cites S. C ——— S. C. cited by Anderſon Ch. J. Le. 82. pl. 102. Mich. 29 & 30 Eliz. C B. in Caſe of Zouch v. Bamfield.

3. *Husband makes Diſcontinuance* of his Wife's Land, and takes back Eſtate to him and his Wife by which his Wife is remitted; they have Iſſue; The Wife dies; Husband ſhall not be Tenant by the Curteſy; For he has *extinguiſhed* his future Right by the Livery. Arg. 4 Le. 221. cites 9 H. 7. 1.

Godb. 25. S. P. Arg. cites 19 H. 7. 1.——4 Le. 135. Arg. cites 9 H. 7. 1.——Mo. 31, 32 in pl. 103. Trin. 3 Eliz. Arg. S. P.——If he makes a *Feoffment on Condition, and re-enters for Condition broken*, and the Wife dies, he ſhall not be Tenant by the Curteſy, for his Title to be Tenant by the Curteſy is extinct by the Feoffment, Co. Litt. 30. b.——S. P. by way of Quære Per Holt Ch. J. Carth. 67.

4. The Baron of *Feme Tenant in Tail* ſhall be Tenant by the Curteſy, though his Feme and her Iſſue die without Iſſue. Br. Dower. Pl. 86. cites Old Nat. Brev. 144.

Co. Litt. 30. b. S. P.

5. A. had Iſſue a Daughter, and *devis'd his Lands to his Executors for Payment of his Debts, and till his Debts paid*, and made his Executors, and died; and after the Debts were paid. Reſolv'd, in the Beginning of Q. Elizabeth, that the Daughter having married, and had Iſſue, and the Debts being afterwards paid, that the Baron ſhall be Tenant by the Curteſy; cited in Matthew Manning's Caſe, 8 Rep. 96. as Guavarra's Caſe.

6. *In all Caſes where* a Man takes a Wife ſeiſed of ſuch Eſtate of Tenement, ſo that the *Iſſue* which he has by his Wife *may by Poſſibility inherit* the ſame of ſuch Eſtate as the Wife had, as Heir to the Wife, in ſuch Caſe, after the Death of the Feme, he ſhall have the ſame Lands by the Curteſy of England, otherwiſe not, and Iſſue born *dead*, can't by Poſſibility inherit. 8 Rep. 34. b. Trin. 29 Eliz. C. B. Paine's Caſe.

7. A *Monſter* is not an Iſſue, but Human Shape is ſufficient, though there be ſome Deformity. 8 Rep. 35. a. cites Bracton.

Co. Litt. 29 b. S. P.

8. A. has a Son and two Daughters, and devis'd Black Acre, White Acre, and Green Acre, whereof he is ſeis'd in Fee to his Wife for Life; Remainder of Black Acre to his Son and his Heirs; Remainder of *White Acre to his eldeſt Daughter and her Heirs*; Remainder of Green Acre to his youngeſt Daugher and her Heirs, and *if any of his three Children die without Iſſue of his or her Bodies*, then the other ſurviving ſhall have Totam illam Partem, equally to be divided. A. dies; The Wife dies; The eldeſt Daughter dies, leaving Iſſue. The Son dies without Iſſue; The youngeſt Daughter enters into Black Acre. But adjudg'd that the Words *Totam illam Partem* extend only to the Land, and not to the Eſtate therein, and gives only an Eſtate for Life, and ſo the

2 Le 193. pl. 243. Hill. 29 Eliz. B. R. Pretiman v. Cooke. S. C. in totidem Verbis. 3 Le. 180. pl. 232 Putnam v. Cook. S. C. in totidem Verbis.——Cro. E. 52.

pl. 2. Pettywood v. Cook. S. C. and held, that only an Estate for Life was limited by the Words.

the Husband shall not be Tenant by the Curtesy, and there are not two Survivors, so nothing to be divided, and therefore the Law says, that Black Acre is descended viz. the Fee of it to the Daughters of the two Sisters. 2 Le. 129. pl. 171. Mich. 29 Eliz. B. R. Hawkins's Case.

Le. 167 pl. 233. Samms v. Payne S. C. held accordingly; For the Estate of E. is spent and determined by the dying without Issue, and sue, and does not cease, or is cut off by any Limitation; and Judgment given for the Tenant by the Curtesy ——— And. 184. pl. 220. S. C. and S. P. adjudg'd accordingly —

9. J. P. the *Mother*, was *seised in Fee*, and *had Issue E. and H.* now Plaintiff, and by Indenture, upon Consideration of natural Affection to her two Daughters, *covenanted to stand seised to the Use of E. in Tail, upon Condition* following, viz. *that the said E. the Heirs of her Body*, or their Assignes, *should pay to H.* (now Plaintiff) 30*l. within one Year after the Death of* J. *the Mother, or within one Year after that H. should accomplish the Age of* 18 *Years, and for Default of Issue of E. the Remainder to H.* (now Plaintiff) *in Tail; E. takes a Husband, and has Issue* of her Body, *which dies without Issue, and E. did not pay the* 30*l. within the Year* after the Death of J. the Mother; and *then H.* (now Plaintiff) *came to the Age of* 18 *Years*, and after *E. died within the Year; after that H. came to the Age of* 18 Years, without Issue, and afterwards *the Year passed, and no Money was paid*, whereby the Plaintiff entred, and if the Husband shall be Tenant by the Curtesy, was the Question; and upon the Motion, the Court was clear in Opinion, that he shall be Tenant by the Curtesy; for the *Condition was gone; because E. died within the Time* which she had *limitted* to her *for Performance* thereof. And Anderson said, that if an *Estate* be *determined by Limitation*, this will not avoid a Tenancy by the Curtesy, but *otherwise* it is, if the Estate be determined *by a Condition*; for this shall relate to the Defeasance of the Estate. Goldsb. 81, 82. pl. 22. Hill. 30. Eliz. Plain v. Sams.

8 Rep. 34. a. &c. S. C. but states nothing as to the Condition of Payment, but upon the Limitation only, and held, that though the Estate Tail is determined, yet the Estate of the Tenant by the Curtesy continues; For this is not derived merely out of the Estate of the Feme, but is created by the Law, by Privilege and Benefit of the Law, tacitly annex'd to the Gift. Ibid. 36. a. ad finem.

Cro. E. 313. pl. 5. S. C. adjornatur. ——— Ow. 148. 33 Eliz. Lilly v. Taylor, seems to be S. C. & S. P. held accordingly by Popham and Clench. ——— See Gibb. 24. this Case as to the Limitations remarked upon and truly stated by Raymond Ch. J. in delivering the Opinion of the Court. Pasch. 1 Geo. 2. B. R.

10. Devise to A. his Daughter for Life, *and if she marry after my Death and have Issue &c.* then I will, that *her Heir after my Daughter's Death shall have the Land, and to the Heirs of their Bodies begotten*, Remainder to a Stranger. This is only an Estate for Life, and the Inheritance in her Heir by Purchase, resting in Abeyance all her Life and settling the Instant of her Death, so the Baron of A. shall not be Tenant by Curtesy. Mo. 593. pl. 803. Hill. 35 Eliz. Clerk v. Day.

11. If *Lands* be *given to a Woman and to the Heirs Male of her Body*, she *takes a Husband and has Issue a Daughter and dies*; he shall not be Tenant by the Curtesy, because the Daughter by no Possibility could inherit the Mother's Estate in the Land; therefore where Littleton saith, *Issue* by his Wife Male or Female, *it is to be understood, which by Possibility may inherit*, as Heir to her Mother of such Estate. Co. Lit. 29. b.

12. If a *Woman Tenant in Tail general makes a Feoffment in Fee, and takes back an Estate in Fee; and takes a Husband and has Issue*, and the Wife dies, the Issue may in a Formedon recover the Land against his Father, because he is to recover by Force of the Estate Tail, as Heir to his Mother, and is not inheritable to his Father. Co. Litt. 29. 6.

13. *A. has Iſſue a Daughter*, and *deviſed his Lands to Executors for Payment of his Debts, and till his Debts are paid*, and makes his Executors, and dies. The *Daughter marries, and dies*; the *Debts are paid* by Executors; the Husband ſhall be Tenant by the Curteſy. 8 Rep. 96. Trin. 7 Jac. in Manningham's Caſe.

14. A deviſed *the Fee of his Land to B. his Wife, Remainder to C. for Life*, Remainder to D. for Life; B. has Eſtate for Life, and Remainder expectant, and her Baron ſhan't be Tenant by Curteſy; cited by Crew Ch. J. to have been adjudged. Lat. 44. Trin. 2 Car.

15. *Rent* granted *to B. a Feme, after the Death of C. in Fee*; B. dies, C. dies; per Glyn Ch. J. the Baron ſhall be Tenant by the Curteſy. 2 Sid. 118. Mich. 1658. Dethick v. Bradburn.

16. Upon a Special Verdict the Caſe was; *P.* was *ſeiſed* of two Meſſuages *in Fee after the Death of his Brother*, and *had Iſſue two Sons*, R. his eldeſt Son, and N. his younger Son, *and four Daughters*, E. M. O. and A. and made his Will in Writing, and *deviſed* his two Meſſuages *to N. his younger Son, and he to have 30 l. per Annum for his Maintenance for ten Years after the Death of his Grandfather, and the Reſidue of the Profits to be applied for raiſing Portions for his Daughters; and if N. die, then he gives the Eſtate, that N. had, to his four Daughters, Share and Share alike*; and then further ſays, *and if* it ſhall pleaſe God *all my Sons and Daughters die without Iſſue, then* he deviſes it *to his Siſter and her Heirs* &c. The Deviſor dies; the *Grandfather dies*; and after, *N. enters, and dies without Iſſue*; the *four Daughters enter*, and are ſeiſed, and the *one takes Husband, and has Iſſue, and dies*, and the Husband claims to be Tenant by the Curteſy; adjudged per tot. Cur. that here was no Tenancy by the Curteſy. Skinn. 266. pl. 3. Hill. 2 and 3 Jac. 2. B. R. Price v. Warren.

17. Wherever the *Eſtate is to determine by expreſs Limitation, or Condition, on the Death of the Wife*, there the Husband ſhan't be Tenant by the Curteſy; as where an Eſtate for Life is limited to a Woman; Remainder to her firſt Son, and every other Son in Tail Male, *Remainder to the Heirs of her Body*, Remainder to her right Heirs; here it is plain ſhe is ſeiſed of the Inheritance; yet if ſhe has a Son, the Husband ſhan't be Tenant by the Curteſy, becauſe the contingent Eſtate, which is to ariſe on her Death, intervenes between her Eſtate for Life and the Inheritance. 9 Mod. 150. Trin. 11 Geo. in Canc. Boothby v. Vernon.

(D) The Nature of the Eſtate.

1. IF a *Nief purchaſes Land, and takes Baron*, and the *Lord enters before* that the Baron has *Iſſue*, there it ſeems that the *Baron by Iſſue had, ſhall not be Tenant by the Curteſy*. Br. Tenant per le Curteſy; pl. 14. cites Doct. & Stud. Libro ſecundo. Co. Litt 30. b. S. P.

2. *But if* the Baron and Feme *have Iſſue before the Lord enters*, then he ſhall be Tenant by the Curteſy; For by the Iſſue had, Avowry ſhall be made upon the Baron alone, and not before, and there *if the Feme dies, the Poſſeſſion is veſted in the Baron by the Law, and not in the Heir*, if no other Perſon enters, and he who is to uſe Precipe quod reddat, ſhall have it againſt the Baron, and not againſt the Heir, which is clear Law. Ibid.

3. If *Lands holden* of the King, by Knight's Service *in Capite*, deſcend to a Woman, and *after Office found ſhe intrudes, and takes Huſband*

band, and has Iſſue. In this Caſe, the Husband ſhall be Tenant by the Curteſy. Co. Litt. 30. b.

4. If a Man *marries the Nieſe of the King by Licence*, and has Iſſue by her, and after *Lands deſcend to the Nieſe*, and the *Husband enters*, *the Nieſe dies*, he ſhall be Tenant by the Curteſy of this Land, and the King upon any Office found, ſhall not evict it from him, becauſe, by the Marriage, the Nieſe was infranchiſed during the Coverture. Co. Litt. 30. b.

Co. Litt. 30. a. in principio, S. P. and in Marg. cites 9 E. 3. 38. 16 E. 3. Aid. 129. Stat. de Conſuetudinibus Kanciæ.

5. In *Gavelkind*, Baron ſhall be Tenant by Curteſy, without Iſſue; Arg. and ſeems admitted. 2 Sid. 153. Paſch. 1659. B. R.

(E) Tenant by the Curteſy. Of what.

Perk. S. 469. S P —— Doct & Stud. 2 Dial. cap. 15. S. P.

1. THE Wife is ſeiſed of a *Reverſion with certain Rent* and has Iſſue; the Wife dies, the Baron ſhall be Tenant by the Curteſy of the ſaid Rent, and the Heir ſhall have the Reverſion, and ſo the Rent ſhall be ſever'd from the Reverſion by the Means of the Law; But in this Caſe the *Baron cannot diſtrein* for the ſaid Rent, and yet it was Rent Service in the Feme; But becauſe he comes to this Rent by his own Act he cannot diſtrein; For it was his own act to take the Feme to Wife. Kelw. 104. b. pl. 13. Caſus inc. Temp. Anon.

Arg. 1 Rep. 97. b. (f) 98. a. in Shelley's Caſe, cites 7 E. 3. 66. a. b. 3 H. 7. 5. a. S. P. —F. N. B. 149. (D) 2d. Part, S P. admitted.

2. Though the Rule in Law is, that one ſhall not be Tenant by the Curteſy without actual Seiſin; yet in ſome Caſes a Man ſhall, as where the *Wife was never ſeiſed*, as if *Rent* deſcended to the Wife during Marriage, and before the Day of Payment the Wife dies, yet the Baron ſhall be Tenant by the Curteſy, becauſe no Default can be in the Baron; for he cannot have the Rent before the Day comes. Kelw. 104. b. pl. 13. Caſus incerti Temporis. Anon.

3. Where an *Office of Inheritance* deſcends to the Wife, and he has Iſſue by her, the Husband ſhall be Tenant by the Curteſy, and in the like Caſe a Feme may be endowed; Arg. Pl. C. 379. b. in Sir H. Nevill's Caſe.

S. P. Arg. Cro. E. 391. in pl. 14. —— 4 Rep. 22. b. pl. 2. 24 Eliz. S. P.

4. It was held upon Evidence that the Husband ſhall not be Tenant by the Curteſy *of a Copyhold*, unleſs there be an expreſs Cuſtom to warrant it; Cro. E. 361. pl. 22. Mich. 36 & 37 Eliz. C. B. Paulter v. Cornhill.

agreed by Wray and Anderſon Ch. J. on Evidence to a Jury in Rivet's Caſe. ——— S. P. by Coke Ch J. and cited 4 Rep. 22. Brown's Caſe. ——— 2 Bulſt. 337. Hill. 12 Jac. ——— S. P. admitted per Cur. Hutt. 17. Paſch. 16 Jac. C. B.

5. If an *Eſtate of Freehold in Seigniories*, *Rents*, *Commons*, or ſuch like be *ſuſpended* a Man ſhall not be Tenant by the Curteſy; *but if* the Suſpenſion be *but for Years*, he ſhall be Tenant by the Curteſy. Co. Litt. 29. b.

6 If a *Tenant makes a Leaſe for Life of the Tenancy to the Seignioreſs*, *who takes a Husband* and has Iſſue, and the Wife dies, he ſhall not be Tenant by the Curteſy. Co. Lit. 29. b.

7. *But if the Leaſe had been* made *but for Years*, he ſhall be Tenant by the Curteſy. Ibid.

8. If

8. If a *Woman Tenant in Tail general takes a Husband, and has Iſſue*, which *Iſſue dies*, and the *Wife dies without any other Iſſue*, yet the Husband ſhall be Tenant by the Curteſy, albeit the Eſtate in Tail be determined; becauſe he was intitled to be Tenant per Legem Angliæ, before the Eſtate in Tail was ſpent, and for that the Land remains. Co. Lit. 30. a.

39. *But* if a *Woman makes a Gift in Tail, and reſerves a Rent to her and to her Heirs*, and the *Donor takes Husband* and has Iſſue, and the *Donee dies without Iſſue*, and the *Wife dies*; the Husband ſhall not be Tenant by the Curteſy of the Rent, for that the Rent newly reſerved is by the Act of God determined and *no State thereof remains*. Co. Litt. 30. a.

10. *But* if a *Man be ſeiſed in Fee of Rent and makes a Gift in Tail general to a Woman*, ſhe takes Husband and has Iſſue, the Iſſue dies, the Wife dies without Iſſue, he ſhall be Tenant by the Curteſy of the Rent, becauſe *the Rent remains*. Co. Lit. 30. a.

11. A Man ſhall be Tenant by the Curteſy of a *Common ſans Nombre*. Co. Lit. 30. b.

12. So he ſhall be of a *Houſe, that is Caput Baroniæ or Comitatus*. Co. Litt. 30. b.

13. And ſo he ſhall be of a *Caſtle*, which ſerves for the Publick Defence of the Realm. Co. Litt. 30. b.

14. *Cuſtom* that if any Wife ſeiſed of Copyhold Land has Baron and they have Iſſue between them &c. and the Wife dies, that the Baron ſhall have the *Copyhold* for Life, as Tenant by the Curteſy. The Husband takes to Wife one, to whom Copyhold *deſcends*, he enters into the Land before any Admittance claiming it in Right of his Wife; They have Iſſue; But *before Admittance Wife dies*; It ſeems the better Opinion of the Court was, that ſuch *Entry* was ſufficient to intitle him to be Tenant by the Curteſy, but without a Cuſtom a Man cannot be Tenant by the Curteſy of a Copyhold Eſtate. And 192. pl. 227. in Caſe of Ewer v. Eaſtwick.

Mo. 271. pl. 425 Hill. 31 Eliz. C. B. Ever v. Aſton, S. C. adjornatur, the Court being in great Doubt upon another Point. —— Mo. 597. in pl. 813. Paſch. 35 Eliz. in a Nota at the End of the Caſe ſays, it ſeems a Man ſhall be Tenant by the Curteſy before the Admittance of the Wife —Per Doderidge, S. P. 2 Bulſt. 337. Hill. 12 Jac. and per Coke Ch. J. ibid. —— It was ſo held upon Evidence, Cro. E 361. pl. 22. Mich. 36 & 37 Eliz. in C. B. Paulter v. Cornhill.

15. The Defendant *conveyed Lands to the Uſe of his Daughters*; the Plaintiff married one and had Children by her, who are dead; the Plaintiff prefers his Bill to be Tenant by the Curteſy, but held not ſo, becauſe the Daughters had *Joint Eſtates*, and ſo goes to the Survivor. Toth. 83. cites 20 Jac. Cowley v. Anderſon.

16. If one take a Wife that is ſeized of *Gavelkind Lands*, and *ſhe dies without Iſſue* by her Husband; her Husband ſhall be Tenant by the Curteſy of *half of the Lands, ſo long as he ſhall live unmarried*; but if he ſhall marry again he ſhall forfeit the Eſtate in the Land, Mich. 22 Car. 2. B. R. This is by the Cuſtom of Kent; *but* by the ſame Cuſtom, *if he had Iſſue* by his Wife, then he ſhall be Tenant by the Curteſy of all the Lands his Wife was ſeiſed of, and although he do marry again, he ſhall not forfeit his Eſtate. Mich. 22 Car. Quære, whether in the former Caſe he ſhall forfeit his Tenancy by the Curteſy, if he do *live incontinently*, as the Wife ſhall her Dower by a like Cuſtom. L. P. R. 627.

17. One cannot have a *Right Title Uſe, Reverſion*, or *Remainder expectant on a Freehold* as Tenant by Curteſy, or Dower. R. S. L. 201. cites C. L. 29.

18. A

Ld. Somers ſaid, that there was ſuch an Order, but the Point was not debated.

18. A *Term to attend the Inheritance* which was *in Truſtees* was decreed not to be made Uſe of againſt the Baron, Tenant by the Curteſy, by the Heirs at Law. 2 Vern. 324. pl. 313. Mich. 1695. Snell v. Clay.

Ch. Prec. 98. —— See Ibid. 66. —— S. C. of Snell v. Clay, cited by the Maſter of the Rolls, Hill. 1732. and ſaid, that Ld. Sommers himſelf, when this Caſe was urged in the Caſe of Brown v. Gibbs, as an Authority for a Dowreſs, it being taken for granted, that there was no Difference in Reaſon between that of Dower and Curteſy, his Lordſhip ſeemed to admit it by avoiding the Authority of that of Snell v. Clay, in ſaying (as above) that the Point of a Tenant by the Curteſy was not debated in that Cauſe. 2 Wms's Rep. 638. in Caſe of Sutton v Sutton.

2 Vern. 585. and 681 S. C. cited ——— S. C. cited by the Maſter of the Rolls. 2 Wms's Rep 644. Hill. 1732. in Caſe of Sutton v. Sutton.

8. *Money was deviſed to be laid out in Land* and ſettled to the Uſe of the Wife and her Children; ſhe afterwards married the Plaintiff, by whom ſhe had a Daughter, but Mother and Daughter are both dead; Decreed the Plaintiff to have the Intereſt of the Money during his Life (it not being inveſted in Land) as Tenant by the Curteſy; 2 Vern. 536. pl. 480. Hill. 1705. Sweetapple v. Bindon.

——— S. C. cited Arg. Wms's Rep. 110. in Caſe of Watts v. Ball.

It ſeems to be admitted, that Tenant by the Curteſy cannot be of a Truſt.

19. Tenant by Curteſy decreed *of a Truſt*. 2 Vern. 681. in pl. 605. cites the Caſe of Worthington v. Fletcher.

2 Vern 488 in pl. 441. Hill. 1704. ——— Since 27 H. 8. cap. the Baron ſhall be Tenant by the Curteſy of an * *Uſe*, though not before. 2 And. 75. Mich. 39 & 40 Eliz. in Caſe of Cromwell v. Andrews. —— Ibid. 147. Hill. 41 Eliz. in Corbett's Caſe.

* Per Coke Ch J. Cro. J. 201.

A. ſeiſed in Fee had Iſſue *two Daughters, L. and M. and deviſed his Lands to Truſtees in Fee to pay his Debts, and convey the Surplus to his Daughters equally.*

20. Though the *Inheritance* was *in Truſtees* for Payment of Debts; yet decreed that the Baron ſhould be Tenant by the Curteſy. 2 Vern. 681. pl. 605. Hill. 1711. in the Caſe of Williams v. Wray, cites it as Ball's Caſe.

M. married and died, leaving a Son and the Husband living. On a Bill for Partition by L. the Husband ſwore, that he married M on a Preſumption that ſhe was ſeiſed of a legal Eſtate in the Moiety, that at the Marriage ſhe was in the actual Receipt of the Profits of ſuch Moiety, and it was admitted that the Truſt was not diſcovered till after M's Death, nor till it was agreed that a Partition ſhould be made. Lord Chancellor held, that he ſhould be a Tenant by the Curteſy, and the rather, becauſe it appeared that he *upon his Marriage did conceive* and preſume *his Wife to be ſeiſed of a legal Eſtate* in the Moiety, *and had reaſon to think ſo, ſhe being in Poſſeſſion thereof*; and decreed, that an Eſtate for Life in a Moiety in Severalty ſhould be conveyed by the Truſtees to the Husband, with Remainder in Fee to his Son. Wms's Rep. 108. Hill. 1708. Watts v. Ball —— S. C cited by the Maſter of the Rolls. 2 Wms's Rep 645. Hill 1732. in Caſe of Sutton v. Sutton.

21. Husband may be Tenant by the Curteſy *of a Truſt* though the Wife cannot have Dower thereof; ſaid by the Lord Chancellor to be a ſettled Rule. 3 Wms's Rep. 234. Hill. 1733. in Caſe of Chaplin v. Chaplin.

L. J. Atk. 603. MS Rep. Hill. Vac. 11 Geo 2. Caſhborn v. Iniliſh and Scarf.

23. The Reſolution of the Court by Lord Chancellor. The principal Queſtion in this Caſe, on which I am now to give my Opinion, is, whether the Defendant Ingliſh can be Tenant by the Curteſy *of an Equity of Redemption.* The Mortgagee came into Poſſeſſion in 1731.

Thomas Caſhborn, Father of the Plaintiff, and of the Wife of the Defendant Ingliſh, by Virtue of a Marriage Settlement, being ſeiſed of ſome Lands in Tail, and of other Lands in Fee Simple, had Iſſue three Daughters.

Part of the Land, of which he was ſeiſed in Fee, he ſettled on himſelf for Life, with Remainder to Anne his Eldeſt Daughter in Fee, and the other Part of ſuch Lands he deviſed by his Will to the ſaid Anne his Daughter, and her Heirs, ſubject to the Payment unto her two Siſters of 200 l. a piece.

Anne,

Anne, after the Death of her Father, borrow'd 900 l. of the Defendant Scarf, and by Leaſe and Releaſe of 24th and 25th June 1728, mortgages part of the Fee Simple Lands to the ſaid Scarf and his Heirs, under a Proviſo to be void on payment of 900 l. and Intereſt.

6th Auguſt 1729, the ſaid Anne Intermarried with the Defendant Engliſh, and in 1731 died, leaving Iſſue by him a Son, who died without Iſſue, and on his Death his two Aunts, the Plaintiffs, became his Heirs at Law, and entitled to that Inheritance, and, as ſuch, brought their Bill, Trin. 1733 in this Court, againſt Mortgagee Defendant Scarf, and the Defendant Engliſh, among other Things for a Redemption of the mortgaged Premiſes, and to have an Account of the Rents and Profits of the Real Eſtate, which belong'd to the Plaintiffs Wife, that deſcended to his Son, from the Time of the Death of ſuch Son, as Heir at Law to both of them.

The Defendant Engliſh inſiſted to be intitled to the mortgaged Premiſes for his Life, as Tenant by the Curteſy, and the Cauſe, being at Iſſue, was heard on the 8th of May 1735 before his Honour the Maſter of the Rolls, when it was decreed, that the Defendant Engliſh was not intitled to be Tenant by the Curteſy of the mortgaged Eſtates, and ſo was decreed to Account for the Rents and Profits thereof from the Death of his Son.

From this Decree the Defendant Engliſh thought fit to appeal, and the general Queſtion now is, whether the Husband can be Tenant by the Curteſy *of the Equity of Redemption, upon a Mortgage in Fee?* This Queſtion depends on two Conſiderations.

1ſt. What kind of Intereſt an Equity of Redemption is conſidered to be in the Eye of this Court?

2dly, What is requiſite to intitle the Husband to be Tenant by the Curteſy?

1ſt. What kind of Intereſt in the Eye of this Court, an Equity of Redemption is? An *Equity of Redemption has always been conſider'd in this Court as an Eſtate in the Land*, it is *ſuch an Intereſt* in the Land *as will deſcend from Anceſtor to Heir, and may be Granted, Intailed, Deviſed or Mortgaged, and* that equitable Intereſt may be *barr'd by a common Recovery*;

Which proves, that an Equity of Redemption is not conſider'd barely as a meer Right, but ſuch an Eſtate, whereof, in the Conſideration of this Court, there may be a Seiſin, or a Deviſe of it could not be good. The Perſon who is intitled to the Equity of Redemption, is, in this Court, conſider'd as Owner of the Land, and the Mortgagee to retain the Land as a Pledge or Depoſit.

And for this Reaſon it is, that a Morgage in Fee is conſider'd as a Perſonal Eſtate, notwithſtanding the Legal Eſtate veſts in the Heir in Point of Law.

The *Husband of a Mortgagee in Fee ſhall never be Tenant by the Curteſy of the mortgaged Eſtate, unleſs there be a Foreclоſure, or that ſuch Mortgage has ſubſiſted for ſo great a length of Time as the Court thinks ſufficient to induce them not to grant a Redemption.*

A Mortgage in Fee will not paſs under a Deviſe of all my Lands, Tenements, and Hereditaments, decreed in the Caſe of **Litton v. Faulkland**, 2 Vern 625. There ſaid, if it was a Releaſe of an Equity of Redemption or Foreclоſure, it is now Part of the Real Eſtate in the Land.

1 Vern. 401. **Barnet and Kinaſton**. A Mortgage in Fee in Right of the Wife on the Husband's dying and not diſpoſing thereof, was decreed to be a Choſe in Action, and ſurvived to the Wife; From whence it follows, that the Perſon that is intitled to the Equity of Redemption, is Owner of the Land; For if a Mortgage in Fee, in Right of the Wife,

is, on the Death of the Husband, decreed to be but a Choſe in Action, if the Ownerſhip of the Land is not in the Mortgagor, it is in no body; and if this Matter of Morrgages is not an Intereſt in Equity only, but properly a Real Eſtate, then the Real Property will be ſunk and veſted no where, if not in the Mortgagee

If a Man by his Will deviſes Lands, and afterwards mortgages in Fee thoſe Lands; At Law it is conſider'd as a Revocation of the total Deviſe, but in Equity only a Revocation pro tanto, amounting to the ſame Thing as letting in a Charge upon the Land, and when the Mortgage is paid, the Deviſe takes Place.

The Ownerſhip of the Land doth always veſt in the Mortgagor or Mortgagee.

It is objected by the Plaintiffs, that an Equity of Redemption is only a Right of Action, and not to be conſider'd as ſuch an Eſtate whereof there can be a Tenancy by the Curteſy, but this is by no Means well founded; For this is no otherwiſe a Right of Action than every Truſt, and as there can be no Benefit had of an Equity of Redemption, but by ſuing a Subpæna out of the Court, ſo is the Caſe of every mere Truſt in Land, which is conſider'd as a Real Eſtate in this Court, but cannot be come at without a Subpæna. To ſay that is a meer Right of Action, is by Conſequence to ſay, that the Eſtate in the Land is in no Body, and this determines the Queſtion; For if a Mortgage is but a Choſe in Action, this affirms that the Equity of Redemption is the real Ownerſhip of the Eſtate, and this will determine the Point betwen them.

It is objected, that the Mortgagee is not barely a Truſtee for the Mortgagor; It is true, not barely a Truſtee, but it is ſufficient for the preſent Purpoſe, if he is in Part a Truſtee for the Mortgagor, and it is moſt certain, that as to the Real Eſtate in the Land, the Mortgagee is only a Truſtee for the Mortgagor till Foreclоſure. Mortgagee is only Owner as a Charge or Incumbrance, and intitled to hold as a Pledge, and but as to the Inheritance deſcended, and Real Eſtate in the Land, the Mortgagee is a Truſtee for the Mortgagor till the Equity of Redemption is foreclоſed.

2dly. The next Conſideration is what is requiſite to intitle the Huſband to be Tenant by the Curteſy. At Law four Things are neceſſary to make a Tenantcy by the Curteſy, (to wit) Marriage, having Iſſue that may Inherit, Death of the Wife, and Seiſin of the Wife. Co. Litt. 30. a. Here it is admitted, that the three firſt did concur, but the Objection that is rely'd on is, that there was no actual Seiſin of the Wife during the Coverture, which is contended to be as Neceſſary in reſpect to an Equitable Eſtate, as of a Legal Eſtate, and it is admitted that the Wife had no actual Seiſin of the Legal Eſtate, either in Fact or in Law. Here is no Diſpute whether actual Seiſin in Conſideration of Law, but all that is beſide the preſent Queſtion; For the Proceedings are upon a Suppoſition, as no ſuch Thing as a Tenant by the Curteſy; But the true Queſtion is upon this Point, Whether there was not ſuch a Seiſin or Poſſeſſion in the Wife of the Equitable Eſtate in the Land, as in Conſideration of Equity is equivalent to an actual Seiſin of a Legal Eſtate at Common Law.

In Conſideration of this Court, I am of Opinion there was ſuch a Seiſin of the Wife in the preſent Caſe of the Equity of Redemption.

I have ſhewn, that a Perſon, intitled to the Equity of Redemption, is Owner of the Land of the Legal Eſtate; and if ſo there muſt be a Seiſin of the Legal Eſtate; And what other Seiſin could there be than what Ingliſh and his Wife had in the preſent Caſe?

For here is a Mortgage in 1728 by Ann Caſhborn, who in 1729 married with the Defendant Ingliſh, and in 1731 died, leaving Iſſue a Son, and the Wife was all along in Poſſeſſion till her Death, and Mortgagee did

did not come into Poſſeſſion till after her Death, and there is not any Foreclosure, and though the Poſſeſſion of the Wife was but as Tenant at Will to the Mortgagee, yet it was, in Equity, a Poſſeſſion of the real Owner of the Land, ſubject only to a pecuniary Charge on it, and from thence I think it clearly follows, that there cannot be a higher Seiſin of an Equitable Eſtate.

Next, whether there can be a Tenant by the Curteſy? I am of Opinion there may be a Tenant by the Curteſy of the equitable Eſtate of the Wife; Equity follows the Law becauſe made a Rule of Property.

Williams and Wray, 2 Vern. 680, **Ball's Caſe** cited, where it was determined, that the Husband be Tenant by the Curteſy of a Truſt Eſtate of the Wife, and ſo clearly there admitted, and yet the Caſe was of a Truſt for the Payment of Debts.

Sweetapple and Bindon, 2 Vern. 536, Mrs. Bindon gave Money to be laid out in Land to be ſettled on her Daughter and her Iſſue, and afterwards the Mother dies, and the Daughter marries with Sweetapple, by whom ſhe had Iſſue, and dies before the Money was laid out in Lands, and upon the Death of the Wife Sweetapple brought his Bill, praying that the Money might be laid out in Lands, and that he might be decreed to hold the ſame for his Life as Tenant by the Curteſy, which my Lord Cowper decreed accordingly; Which is a much ſtronger Caſe than the preſent; for in that Caſe there was neither Seiſin nor Lands, but it was determined according to the common received Rule of this Court in conſidering Money directed to be laid out in Land, the ſame as Land.

There has been two Objections made by the Plaintiffs.

1ſt. That the Husband had it in his Power to have had Seiſin in his Wife's Life-time; for he might have paid off the Mortgage, and therefore it was his own Laches that he did not.

2d, That a Wife ſhall not be endowed with an Equity of Redemp- and ſo here.

As to the Laches in the Defendant Engliſh it was compared to the Husband's not making an Entry at Law. The Compariſon will not hold; for it is not ſo eaſy to pay off the Principal and Intereſt due on a Mortgage, as it is to make an Entry at Law, nor is it to be done ſo ſpeedily, for a Mortgage in moſt Caſes is allowed Six Months Notice to be paid off.

And in the Caſe of Sweetapple, which I have juſt mentioned, the Husband might have brought his Bill, in his Wife's Life-time, to compell the laying out the Money in the Purchaſe of Land, but though he omitted ſo to do till after the Wife's Death, yet that was not objected to him as Laches.

But it was further ſaid, that it would encourage the Defendant Engliſh to let the Intereſt run on the mortgaged Premiſſes, which would perhaps ſwallow up the whole Eſtate; for that at the ſaid Defendant's there might be as much due on the Mortgage for Principal and Intereſt, as the Eſtate would then be worth; But I cannot find the Force of this Ground; For if he is Owner of the Eſtate, ſhe was Owner of the Fee.

If by this is meant the Intereſt that became due in the Life of the Wife, the Husband has nothing do with it, becauſe the Intereſt that he claims does not ariſe till the Death of the Wife, and he therefore is not to pay Intereſt that was due before his Title accrued.

But by this is only meant the Intereſt from the Death of the Wife; During the Tenancy by the Curteſy, the Heir will have the ſame Remedy as in the Common Caſe of a Tenancy for Life of an incumber'd Eſtate; for in all ſuch Caſes the Tenant for Life keeps down the Intereſt.

And

And as to the next Objection of the Wife's not being endowed of an Equity of Redemption on a Mortgage in Fee, and that therefore a Husband ought not to be Tenant by the Curteſy of an Equity of Redemption, this proves too much; for it has been determined that a Wife ſhall not be endowed of a Truſt Eſtate, yet that Husband ſhall be Tenant by the Curteſy of a Truſt Eſtate. The Argument from Dower to the Caſe of a Tenant by the Curteſy fails in this Caſe. Perhaps it may be hard to find out a ſufficient Reaſon, how it came to be ſo determined in the one Caſe, and not in the other, but it is ſafe to follow former Precedents, and what are ſettled and eſtabliſhed, and if ſuch Precedents ſhould be departed, I hold it fit rather, that the Wife ſhould be allowed her Dower of a Truſt Eſtate, and not that a Tenancy by Curteſy of a Truſt Eſtate ſhould be taken away.

It may be refuſing to allow the Wife Dower of a Truſt Eſtate was becauſe ſhe could not have it at Law, and that it was founded on the Maxim of Equitas ſequitur Legem; but whatever the Reaſon of ſuch Refuſal was, the Husband is allowed to have a *Tenancy by the Curteſy* of a Truſt Eſtate, nay even *of Money directed to be laid out in Land though not actually laid out*, as in the Caſe of Sweetapple before cited.

Upon a Mortgage for Years, Wife ſhall have Aid of Equity of Redemption, which ſhe could not have of a Truſt Eſtate. If Tenant by the Curteſy of Money to be laid out in Land, by Analogy it ought to be ſo of an Equity of Redemption, eſpecially where the Wife continues in Poſſeſſion of the Mortgaged Lands all her Life-time.

As to **Penvill and Luſcomb's Caſe** heard at the Rolls, Feb. 4, 1728; that was a Pauper Cauſe, and a Queſtion was made in it, whether there would be a Poſſeſſio Fratris of an Equity of Redemption; his Honour made no Determination in it; but it appears by the Minutes in the Regiſter's Book, which I have ſeen, that his Honour ſaid, he would take Time to conſider of it, and I do not find that it ever came on afterwards.

There was a Caſe put on the Part of the Plaintiffs by way of Illuſtration; which was this, ſuppoſe that a *Feme ſole conveys Lands to J. S. in Fee, upon Condition, that if at ſuch a Day ſhe paid ſuch a Sum of Money to him, or his Heirs, that then ſhe might re-enter*; ſhe afterwards marries and has Iſſue, but before the Day on which the Condition was to be performed ſhe dies, and after her Death her Heir pays the Money; whether the Husband would be Tenant by the Curteſy? *If* this is *meant as a Mortgage* to make a Security, then *it is the ſame as the preſent Caſe, but if* it is *meant of a meer Purchaſe ſubject to a Re-Entry at Common Law on Payment*, undoubtedly the Husband would not be Tenant by the Curteſy; for that were to make him Tenant by the Curteſy of a Condition; for *taking it as a Purchaſe, the Wife had*, in that Caſe, *no Eſtate or Seiſin in Re, nor Right ad Rem, till the Performance of the Condition.* As to a Condition or Power of Revocation, theſe ſtand upon different Reaſons.

For theſe Reaſons, upon the beſt Conſideration, (although I form my Judgment with great Deference, when I differ in Opinion from other great Perſons that have gone before me) I am of Opinion, that the Defendant Ingliſh is intitled to be Tenant by the Curteſy of the mortgaged Premiſſes in Queſtion, and the Conſequence of that is, that that Part of the Decree of his Honour the Maſter of the Rolls, whereby it is adjudged that the ſaid Defendant is not Tenant by the Curteſy, muſt be reverſed. MS. Rep. Hill. Vac. 11 Geo. 2. Caſhborn v. Ingliſh and Scarſ.

(F) Favour'd. In what Cases; and of What the Tenant may take Advantage.

1. A *Fine levied by Feme Covert alone, without her Husband, of her own Lands*, wherein she has Fee Simple, is an Estoppel against her and her Heirs, if her Husband avoid it not by Entry, or otherwise, as he may during his Wife's Life, and after her Death, during his own Life, as if he be Tenant by the Curtesy. West. Symb. S. 8. cites 17 Ed. 3. 52 and 78. 17 Ass. 17. 7 H. 4. 23.

2. Tenant by Curtesy shall have Benefit of *Warranty*; for though he is in the Post, yet he continues the Estate; per Wray Ch. J. 2 Le. 218. in pl. 275. Pasch. 16 Eliz. B. R.

3. Tenant by the Curtesy *of a Coparcener of an Advowson* shall have the same Advantage as his Wife should have had; agreed by Anderson. Cro. E. 18. pl. 6. Pasch. 25 Eliz. C. B. in the Case of Harris v. Nichols. And. 63. pl. 137 S. C. but S. P. does not appear. —— Co Litt. 186. b. S. P.

(G) Bound by, or liable to what Charges &c.

1. FEME *Tenant in Tail acknowledged a Statute*, and took Baron, and had Issue, and died. The *Lands may be extended* in the Hands of Tenant by the Curtesy, and also in the Hands of Tenant by the Curtesy, and also in the Hands of the Issue in Tail, if Tenant by the Curtesy *surrenders* during the Life of Tenant by the Curtesy. D. 51. pl. 17. Marg. cited by Noy in his Reading to have been so adjudged. Mich. 6 Eliz.

2. Tenant by the Curtesy shall be *Attendant to the Lord Paramount*. 8 Rep. 36. Trin. 29 Eliz 3 C. B. in Paine's Case.

3. Tenant by the Curtesy is not to be prejudiced by *Term for Years to attend the Inheritance*, and decreed accordingly, that the Term should not be made use of against him by the Heirs at Law. 2 Vern. 324. pl. 313. Mich. 1095. Snell v. Clay.

(H) Prevented or disabled by what Act, or Default. In what Cases.

1. A *Man* took a Feme Inheritrix, and *had Issue* by her, *and did Felony, and was attained*, and by some the Baron shall be Tenant by the Curtesy; for it is vested by the Law, and he is in the Post by the Law, and not by the Feme, or by the Issue, and some e contra; for all is forfeited; Quære? For by several elsewhere he is Tenant by the Curtesy, and that after Issue had, the Lord may avow upon him only for Homage without the Feme. Br. Tenant per le Curtesie; pl 3. cites 21. E. 3. 49. Br. Forfeiture de Terres, pl. 78. cites S. C. —— Co. Litt. 40. a. S. P. where the Wife was attainted of Felony,

[so it seems it should be here] so as the Issue cannot inherit to her, yet he shall be Tenant by the

the Curteſy in reſpect of the Iſſue which he had before the Felony, and which by Poſſibility might then have inherited, but if the Wife had been attainted of Felony before the Iſſue, albeit ſhe had Iſſue afterwards, he ſhall not be Tenant by the Curteſy. ——— The Year Book of 21 E 3. 49. b. 50. a pl. 8. is of Felony done by the Wife. ——— Pollexf. 51. in Caſe of Parſons v. Pearce, Arg. S P

* Co. Litt. 30. a. S. P.

2. *A Man diſcontinued the Land of his Feme, and retook an Eſtate to him and his Feme*, by which the *Feme is remitted*, and *after he has Iſſue by this Feme*, and the Feme dies; per Kingſmill, the Baron ſhall be Tenant by the Curteſy, becauſe the Feme was remitted; But Fairfax, Tremail, and Huſſey contra; For the Baron was not remitted, and by the Feoffment he gave his Right which he had, or might have. And 30 E. 3. the Queſtion came between the Iſſue of the Feme and the Father, and there it is adjudged, that he ſhall not be Tenant by the Curteſy. Br. Tenant per le Curteſy; pl. 6. cites 9 H. 7. 1.

Co. Litt. 30. b. S P. and cites S. C.

3. If a *Feme takes Baron*, and has Iſſue, and *Land deſcends to the Feme*, and the *Baron* enters, ſo that he *is intitled to be Tenant by the Curteſy*, and after the *Feme is found an Ideot*, and his Eſtate in the Land is alſo found, the King ſhall have the Land; and if the Feme dies, the Baron never ſhall have the Land by the Curteſy; and when the Office is found, the Title of the King ſhall have Relation to the firſt Poſſeſſion of the Feme alſo, and ſo both the *Titles commence at one and the ſame Time*, but the King ſhall have the Pre-eminence; and becauſe the King's Title is to the Franktenement of the Land ſeeing he ſhall have the Cuſtody of it during the Wife's Life, this wholly takes away the Baron's Title; Per Weſton. Pl. C. 263. b. Mich. 4 & 5 Eliz. in Caſe of Dame Hales v. Pettite.

If after the Pardon he has *other Iſſue*, he ſhall be Tenant by the Curteſy; Arg. Noy 159. cites 12 H. 7.

4. A Woman Inheritrix takes Husband, who after is *attaint of Felony*; the King *pardons* him; they have Iſſue; the Husband ſhall be Tenant by the Curteſy, which proves the King has not the Freehold by that Attainder; per Coke Counſel, Arg. 2 Le. 126. Mich. 28 and 29 Eliz. in Caſe of Venables v. Harris.

——— If a Feme takes Baron who have Iſſue, and after he *is attainted of Felony*, and then the *King pardons him*, per Keble he ſhall not be Tenant by the Curteſy by the Iſſue had before; Contra if he had Iſſue after. Br. Tenant per le Curteſy, pl. 15. cites 13 H. 7. 17.

Cro. E. 129. pl. 1. Paſch. 31 Eliz. B. R. S. C. adjudged, that the Fine ſhould be reverſed in toto.

5. Baron and Feme ſeis'd of Land in Right of the Wife (whereof the Baron was intitled to be Tenant by the Curteſy) levied a *Fine*, which, upon Error brought, was *revers'd*, *becauſe ſhe was within Age*, and the Reverſal was for both, and the Baron adjudg'd to re-have, ſo as the Fine was utterly avoided. Cro. J. 482. cites Charnock v. Worſely.

——— Le. 114. pl. 157. S. C. and the Fine reverſed accordingly. ——— S. C. cited Ow. 21. as reſolved accordingly. ——— S. P. by Holt Ch J. who ſaid, it is to be conſidered, whether his Title to be Tenant by the Curteſy is not extinguiſhed if the Fine be reverſed after her Death; but indeed, if the Fine be reverſed in her Life-time he may have a new Title. 5 Mod. 67. Mich. 7 W. 3. B. R.

6. *By Stat.* 3. *Jac.* 1. *cap.* 5. *A* Popiſh Recuſant Convict, *who is marry'd otherwiſe than in open Church, and by a lawful Miniſter, according to the Orders of the Church of England, ſhan't be Tenant by the Curteſy.*

7. A Man *married his Father's Siſter's Daughter.* This is no Cauſe of Divorce; but it was adjudged, that though that Marriage [might be ſaid to] be within the Levitical Degrees, yet it is a *Marriage de facto*, and only avoidable by Divorce, which, after the Death of the Huſband, cannot be done, becauſe thereby the Iſſue will be barſtardized; and if the Wife had been Inheritrix &c. the Husband ſhould have been Tenant

Tenant by the Curteſy; and vouched 7 H. 4. Noy. 29. Hill. 15 Jac. C. B. Rennington v. Cole.

9. Four Things do belong to an Eſtate of Tenantcy by the Curteſy, viz. Marriage; Seiſin of the Wife; Iſſue and Death of the Wife. But it is not requiſite that theſe ſhould concur together all at one Time; and therefore if a Man takes a *Woman ſeiſed* of Lands in Fee, and *is diſſeiſed, and then have Iſſue*, and the *Wife dies*, he ſhall enter, and hold by the Curteſy. So if he has *Iſſue* which *dies before the Deſcent*, as is aforeſaid. Co. Litt. 30. a.

10. *A Man* is *intitled to be Tenant by the Curteſy*, and *makes a Feoffment in Fee upon Condition*, and *enters for the Condition broken*, and then his *Wife dies*, he ſhall not be Tenant by the Curteſy, becauſe albeit the Eſtate given by the Feoffment be conditional, yet *his Title* to be Tenant by the Curteſy *was incluſively abſolutely extinct by the Feoffment*, for the Condition was not annexed to it. Co. Litt. 30. b.

Perk. S. 474. S. P. that after the Wife's Death he may enter for the Condition broken, and when he hath re-entered, he ſhall hold the ſame Land as Tenant by the Curteſy; Tamen Quære.

11. The Reaſon of the Difference why a Wife, in Caſe of an Elopement with an Adulterer, forfeits her Dower, and yet the *Husband leaving his Wife, and living with another Woman, does not forfeit his Tenancy by the Curteſy*, is, becauſe the Statute Weſtminſter 2. cap. 34. does by expreſs Words, under theſe Circumſtances, create a Forfeiture of Dower; but there is no Act inflicting, in the other Caſe, the Forfeiture of a Tenancy by the Curteſy. 3 Wms's Rep. 276, 277. Paſch. 1734. in Caſe of Sidney v. Sidney.

(I) Pleadings in Actions by or againſt Tenant by the Curteſy.

1. IN *Præcipe* quod reddat the *Tenant pleaded, that A. his Feme, was ſeiſed* &c. *and marry'd him, and had Iſſue T. and died*, ſo he is Tenant by the Curteſy, the Reverſion to T. and pray'd Aid of him, and a good Plea, without expreſſing the Surname of his Feme. Br. Pleadings, pl. 16. cites 40 E. 3. 37.

2. The *Baron of the eldeſt Parcener*, who is Tenant by the Curteſy, ſhall have *Quare Impedit* in his Turn. Thel. Dig. 24. Lib. 2. cap. 1. S. 44. cites Hill. 5 H. 5. 10.

3. In *Waſt againſt Tenant by the Curteſy*, he *ſaid, that his Feme never had any Thing after the Coverture* &c. and held, that the Pleading was not good; becauſe it was only Argumentative, by which he *pleaded, that one Alice infeoff'd him, Abſque hoc, that he had ever any Thing by the Curteſy*. Thel. Dig. 173. Lib. 11. cap. 53. S. 9. cites Mich. 20 H. 6. 2.

4. Tenant by the Curteſy, though not expreſsly named in the Writs mentioned in Stat. 13 E. 1. 4. yet he is within the Miſchief and Purview of that Statute, for he is *Tenant for Term of Life*. 2 Inſt. 353.

For more of Tenancy by the Curteſy in General, See other Proper Titles.

Cuſtom.

Cuſtom.

See Tit. Preſcription (D)

(A) [In what Caſes a Cuſtom ſhall be] void for *Uncertainty*.

This in Roll is in Fol. 565.

1. A Cuſtom ought to be certain.

2. Such Cuſtom ſhall be void for want of Certainty, which in Caſe of ſuch Grant would be void for want of Certainty. D. 1. Taniſtry 35. (Quære this, for there may be a Cuſtom which may not begin by Grant.)

S. C. cited Arg. 3 Le. 82.——S. C. cited by Hobart Ch. J. who ſaid, that a certain Age ought to be ſet down, that the Court may judge it an Age of Diſcretion; for Cuſtom muſt not deprive the Law of Nature.

3. A Cuſtom, that when an Infant is of ſuch an Age that he can count 12 d. or meaſure an Ell of Cloth, that he may make a Feoffment, is void for the uncertainty. 13 E. 3. Fitz. Dum fuit infra ætatem. [pl. 3.] Da. * 1. Taniſtry 33.

* [This ſeems to be a Miſtake of the Printer, and that it ſhould either be omitted, or be made a (v) to join to Da. and ſo would be Dav.]

Fitzh. Barre. pl. 277. cites S. C. & S. P. * See pl. 3. and the Notes there.

4. A Cuſtom that ſuch of the Tenants of the Manor who comes firſt to ſuch a Place, &c. ſhall have all the Wind-falls there, is not good for the uncertainty. 14 E. 3. Fitz. Bar. 227. Da. * 1 Taniſtry 33.

—— Dav. Rep. Taniſtry, 33. a. cites S. C. that ſuch Cuſtom is void for Uncertainty; but Ibid. 35. a. b. cites S. C. [only it is miſprinted, 177. inſtead of 277.] that the Cuſtom is good, becauſe the Time of the firſt coming may well be tried.

5. The Cuſtom of Taniſtry of Ireland, that the Land ſhall deſcend Seniori & Digniſſimo viro Sanguinis & Cognominis of him that died ſeiſed, is not good for the uncertainty of the Perſon and Eſtate. Da. 1. [Dav.] Taniſtry 35.

6. But a Cuſtom, that it ſhall deſcend to the moſt worthy of the Blood is good. Da. 1. Taniſtry 35. b.

Gibb 55. Taylor v. Scott, S. C.

7. A Cuſtom alleg'd and found by Verdict *to pay* 10 *d. to the Vicar at the uſual Time of Churching Women*, was held to be void; 1ſt. Becauſe it was *not alleged*, *what was the uſual Time* the Women were to be Churched, and therefore uncertain; 2dly, Becauſe it was unreaſonable, becauſe it obliged the Husband to pay if the Woman was not Churched at all, or if ſhe went out of the Pariſh, or died before the Time of Churching; Judgment was arreſted. 2 Ld. Raym. Rep. 1558. Paſch. 2 Geo. 2. Naylor v. Scott.

(A. 2) What it is; and How eſtabliſhed.

1. A Cuſtom, in the Intendment of Law, *is ſuch a Uſage as hath obtained the Force of a Law, and is* in Truth a *binding* Law *to ſuch particular Places, Perſons, and Things which it concerns*, and ſuch Cuſtom cannot be eſtabliſhed by Grant of the King, according to 49 E. 3. 3. a. or by Act of Parliament. But it is *Jus non ſcriptum*, and made by the People only of ſuch Place where the Cuſtom is. Dav. Rep. 31. b. 32. a. Hill. 5 Jac. B. R. in the Caſe of Tanistry.

(B) In the *Negative.*

See Tit. Preſcription (Q) per tot.

1. A Cuſtom may be in the Negative, mix'd with an Affirmative. 8 H. 6. 4.

2. So it ſeems, that a Cuſtom meerly in the Negative is good. 8 H. 6. 5.

Cuſtom does not lie in the Negative, but may be in the Negative with an Affirmative *Precedent*, As to preſcribe to buy and ſell without paying Toll; but it is no good Cuſtom to ſay, that he has not paid Toll; and the Law ſeems to be the ſame of being quit of Toll. Per Paſton. Br. Cuſtoms, pl. 23. cites 7 H. 6. 31, 32. and 8 H. 6. 3. ——— But he may preſcribe in the Affirmative; As to ſay, that he and his Anceſtors have been quit of Toll Time out of Mind. Br. Preſcription, pl. 76. cites 18 E. 4. 3. by Littleton.

(B. 2) Commencement. And how it differs from Preſcription.

1. CUSTOM *may be alleged, where there is no Perſon who can preſcribe.* Br. Preſcription, pl. 100. cites 2 M. 1.

2. *As Inhabitants* cannot preſcribe, but they may allege Cuſtom, that the Inhabitants may common in D. and *the one goes with the Place*, and *the other with the Perſon*, which Perſon ought to be *able to preſcribe*; for otherwiſe it is not good. Ibid.

3. Where a Man preſcribes *to go quit of Tithes for his Lands in D.* where all others of D. pay Tithes, this is void; for *Cuſtom cannot be particular*, but ought to be throughout a Country or Vill. Br. Preſcription, pl. 93. cites Doct. & Stud. Lib. 2. cap. 55

4. Preſcription goes *to one* Man, and a Cuſtom to many. Brownl. 133. Hil. 6 Jac. in Caſe of Rolles v. Maſon.

And ſo of Places there is a Difference between Freehold and Copyhold Land, that in the laſt Caſe a Preſcription in a particular Place,

Place, As for every Copyholder of ſuch a particular Wood to cut Trees there growing is good; but a Cuſtom which concerns Freehold Land ought to be throughout the County, and cannot be in a particular Place; Per Walmſley, which Beaumond agreed. Cro. E. 353. pl. 10. Mich. 36 & 37 Eliz. C. B.

5. Preſcriptions are either *Perſonal*, and in this Inhabitants may preſcribe, As for a Way, or Matter of Eaſe; or *Real*, and this is inherent in the Eſtate, as where he preſcribes by a Que Eſtate; or *Local*, where a Man preſcribes to have a Thing appendant, or appurtenant, to his Manor, that whitherſoever the Land goes, the Preſcription is concomitant to it. Arg. 2 Brownl. 210. Hill. 7 Jac. B. R. in Caſe of Marſham v. Hunter.

6. Naturally a Preſcription, or Thing preſcriptible, is ſo to be laid, where by Law it may, and not by Way of Cuſtom, and where it cannot be by Law, and is therefore *pleaded by Way of Cuſtom*, the Nature of it is not chang'd, but remains ſtill a Preſcription in its Kind, though it be allow'd to be pleaded by Way of Cuſtom *for Neceſſity's Sake*; and it appears in Gateward's Caſe, 6 Rep. 59. b. that a Thing lying properly in Preſcription, as *Common* did in that Caſe, being an Intereſt which muſt inhere in ſomebody, can't be pleaded by Way of Cuſtom, nor ſtand by Cuſtom, where it can't ſtand by Preſcription, as there they would have made it for *Inhabitants* that are not permanent to preſcribe. But yet for Common for *Copyholders* in the Lord's Soil, it is allow'd to be pleaded by Cuſtom for Neceſſity's Sake; whereas, *in the Soil of another*, it muſt be laid by Preſcription in the Lord, and yet the Nature of both is a Preſcription; per Hobart Ch. J. Hob. 86. pl. 114. Trin. 12 Jac. in Caſe of Day v. Savage.

7. A Matter of *Diſcharge* may be laid by Way of Cuſtom, for that it is no Intereſt, but an Exemption, not Poſitive, but Privative, of the general Poſſeſſion; per Hobart Ch. J. Hob. 86. Trin. 12 Jac. in Caſe of Day v. Savage, cites Gateward's Caſe.

Roll R. 46. per eundem S. P. for thoſe Cuſtoms cannot be created by Patent S. C.——ibid. 48. Arg. S. P.

8. As to Preſcription and Cuſtom, this Difference ought to be obſerved. A Preſcription ought to *ſtand upon Reaſon*; But a *Cuſtom can't have Commencement but by Parliament*, and *not by Grant*, as Borough Engliſh and Gavelkind, no Reaſon being to maintain theſe but only by Act of Parliament; per Coke Ch. J. 2 Bulſt. 206. Paſch. 12 Jac.

Sir Francis North, Arg. Vent. 390. ſpeaking of the Claim of the Freemen of London to be diſcharged of Wharfage, which was adjudged not a Cuſtom, but a Preſcription, calls it a *local Preſcription to privilege Perſons in a certain Place and Condition*, which he ſays is, in its Nature, *betwixt a Preſcription and a Cuſtom*, and not a Cuſtom, becauſe it concerns the Diſcharge of Perſons, and it is merely local; nor a Preſcription, becauſe it is not annexed to any Eſtate, nor to any Perſon, but in relation to a certain Place and Condition; and yet it is rather termed a Preſcription; for it is ſaid, that Inhabitants may preſcribe for an Eaſement, or a Diſcharge, but a ſtrict Preſcription to make Title to a real Intereſt is ſo nice, that it cannot be *pleaded* by way of Cuſtom, nor confounded with it. Inhabitants, or Freemen, or Citizens, cannot preſcribe in that kind.

9. A Cuſtom *goes to Land*, and a Preſcription *to Perſons*. Arg. Poph. 201. Mich. 2 Car. B. R. in Caſe of Jenkin v. Vivian.

10. A Cuſtom can't extend to a *particular Place*; Arg. Poph. 201. cites D. 23 Eliz. and this was agreed per tot. Cur. Mich. 2 Car. B. R.

(C) Cuſtom

(C) Cuſtom *againſt Cuſtom.*

See Tit. Preſcription (X)

1. IF in an Action upon the Caſe a Man preſcribes, that he, and all thoſe whoſe Eſtate he hath in the Manor of D. hath uſed Time out of Memory &c. to have a Fold-Courſe, ſcilicet, Common of Paſture for Sheep, not exceeding 300, in certain Land, as appurtenant to his Manor, and that the Defendant hath incloſed Part of the Land, in which he ought to have the Common of Paſture for the ſaid Sheep &c. and the Defendant pleads, that there is a Cuſtom Time out of Mind, &c. that the Owner of the Land, in which the Common of Paſture for the ſaid Sheep is to be taken, had uſed Time out of Mind &c. to incloſe any of the ſaid Land in which the Common of Paſture is to be had; This is not good within a Traverſe of the Preſcription, for this is a Cuſtom againſt a Cuſtom, which cannot ſtand together, ſcilicet, that one ſhould have the Fold-Courſe Time out of Mind, and the other might incloſe it, and exclude the Fold-Courſe. Trin. 11 Car. B. R. and Mich. 11 Car. between *Day* and *Spooner*, per Curiam, over-ruled without Argument, in a Writ of Error upon a * Judgment, to the ſame Intent in Banco. Intratur Mich. 6 Car. Rot. 183. Hill. 11 Car. it was adjudged per Curiam accordingly. Cro C 432. pl. 2. Spooner v. Day, S. C. adjudged. —— Jo 375 pl. 1. S C adjudged.

* Fol. 566.

2. In an Action upon the Caſe for ſtopping ancient Lights, if the Plaintiff declares, That he was ſeiſed of an ancient Houſe in the City of York, and that he, and all thoſe whoſe Eſtate &c. have had Time &c ſeven ancient Windows, and that the Defendant had erected a new Houſe upon his own Land, next adjoining thereto, by which he ſtopped the ſaid Windows, and the Defendant pleads in Bar, that there is a Cuſtom within the ſaid City Time out of Mind &c. that if any one hath Windows againſt the Land of his Neighbour, that he may ſtop the ſaid Windows and Lights upon his own Land, at his Will and Pleaſure, by Force of which Cuſtom he ſtopped the ſaid Windows; This is no good Plea, for a Cuſtom againſt a Cuſtom is not good, for both are of equal Antiquity, and the one cannot have a Preſcription to have the Lights, and the other to ſtop them, Time out of Mind. Tr. 29 El. B. R. between *Bland and Moſely*, adjudged upon a Demurrer; Cited Co. 9. Aldred's Caſe. 58. S. C. cited Arg. Bulſt. 115, 116. —— See Cuſtoms (D) pl. 1 S. C. —— See Tit. Stopping Lights, per tot.

3. If one preſcribes to have a Way over the Land of B. to his Freehold, B. cannot preſcribe to ſtop it. Co. 9. Aldred's Caſe. 58. b. S. C. cited Freem. Rep. 210. pl. 217. Trin. 1676. in Caſe of Hickman v. Thorney, which ſee at Preſcription (X) pl. 4. and the Notes there.

4. In Replevin the Defendant *alleged a Cuſtom* of the Manor, *that Quælibet Fœmina viro cooperta joining with her Baron in a Surrender of Copyhold; and being privately examined* by the Steward, makes it a good Surrender. Plaintiff *replied*, that there is *a Cuſtom in the Manor, that Quælibet &c. who is of full Age, may ſurrender, but that the Feme in this Caſe was within Age*, but *did not traverſe the Cuſtom quod Quælibet* &c. and therefore the Court held it ill; for the Plaintiff confeſſing a particular Cuſtom, ought to traverſe the general Cuſtom alleg'd by the Defendant. Litt. Rep. 274. Trin. 5 Car. C. B. Anon.

(D)

(D) *Who* ſhall be *bound* by a Cuſtom. The *King*.

Ravm. 77. 1. Paſch. 15 Car. 2. B. R.

A Cuſtom that exalts itſelf upon the King's Prerogative, is void againſt the King. Da. 1. [Dav.] Canſtry 33.

Twiſden J. denied the Opinion of Lambert, that if the *King purchaſes Gavelkind Lands*, they ſhall go to all his Sons; and ſays, that Lambert had it out of Plowden, 247. a. from Southcote's Opinion, and he from 35 H. 6. cap. 28. a. ——— Sid. 138. cites S. P. per Twiſden accordingly, but that Twiſden ſaid the Cuſtom is only *ſuſpended by reaſon of the Prerogative*; for ſo ſoon as it comes into other Hands it ſhall deſcend again as Gavelkind. —— If the King purchaſes Lands of the Cuſtom of Gavelkind, and dies, having Iſſue divers Sons, the eldeſt Son ſhall only inherit theſe Lands; and the reaſon of theſe Caſes is, for that the Quality of the Perſons doth in theſe, and many other like Caſes, alter the Deſcent, ſo as all the Lands and Poſſeſſions, whereof the King is ſeiſed in Jure Coronæ, ſhall, ſecundum jus Coronæ, attend upon and follow the Crown, and therefore to whomſoever the Crown deſcends, thoſe Lands and Poſſeſſions deſcend alſo; for the Crown and the Land, whereof the King is ſeiſed in Jure Coronæ, are concomitantia. Co. Litt. 15. b.

2. It is no good Cuſtom, that when any Diſtreſs ſhall be taken for the King's Debt within the Precinct of ſuch a Manor, that it ſhall be brought to the Pound of the Lord, there to continue for three Days, within which Time, if the Owner of the Diſtreſs pays it, he ſhall have back the Thing diſtrained, **becauſe this is not any manner of Profit to the Lord, but of Service; and Uſage ſhall not bind the King without his Special Grant.** 21 E. 3. 4. b. adjudged.

Br Cuſtoms, pl. 5 cites 35 H. 6. 25. —— Fitzh. Cuſtom, pl. 2. cites S. C. ——— Jenk. 83. pl. 62. S. P. cites 35 H. 6. 35. [but is miſprinted, and ſhould be fol 25, 26, &c.]

3. The Cuſtom of London to retain Goods put in Mortgage till Satisfaction **be made of the Money upon them lent,** extends to the King's Jewels. 35. H. 6. 26. Da. 1. [Dav.] Canſtry 33. b.

It was argu'd by ſeveral, that a Cuſtom *which ariſes upon the Perſon or Goods* ſhall not bind the King; *Contra* of Cuſtom *which ariſes upon the Land*, As *Gavelkind*, or Borough Engliſh, this ſhall bind him. Br. Prerogative, pl. 5 cites 35 H. 6. 25. —— *And* it was ſaid there, that the King *ſhall not pay Toll, Pontage, nor Paſſage.* Ibid. —— *Nor Lapſe of Advowſon*, nor *Alienation of Villein before Seiſure* ſhall not grieve him. Ibid. —— *So 20 Deſcents* ſhall not toll his Entry. Ibid. —— *And his Goods* ſhall *not* be forfeited, as *Waif*, *Stray*, *nor* as *Wreck*, for Default of proving the Property within the Year; Nor by *Sale in Market Overt*, nor where Cuſtom of the Land is to pay *Fine at the Alienation*, the King ſhall not pay Fine for it if he purchaſes it. Br. Prerogative, pl. 5. cites 35 H. 6. 25. —— Jenk. 83 pl. 62 S.P. and cites S. C.

4. If a Man hath Toll or Wreck, or Strays, by Preſcription, this extends not to the King's Goods. Da. 1. [Dav.] Canſtry 33. b.

5. It is a good Cuſtom of the County of Cheſter, that if the King's Tenant in Capite by Knight's Service dies, his Heir being within Age, that the King ſhall not have the Lands held of other Lords by Knight's Service; **and this is there ſaid to be Secundum Conſuetudinem, ab antiquo ſemper per quandam Prærogativam hactenus in Comitatu præd'. obtentam & uſitatam.** 23 E. 1. **Rotulo Clauſarum Membrana, 9 The Cuſtom allowed.** The like in Membrana, 10 & 24 E. 1 Membrana, 3.

2 Roll Rep. 350 Parſons v. Lea. S C. adjornatur. —Ibid.

6. There is a Cuſtom in Cheſhire, that if a Debtor comes before the Chamberlain of Cheſter, and there takes his Oath that he is not able to pay the Debt, but that he will as faſt as he can, that he ſhall have a Protection; And it is ordained by the Statute of [34] H. 8. [cap.

[cap. 13.] that ſuch Protection ſhall not be allowed without the King's Warrant; and if an Action of Debt be brought here in B. R. and the Plaintiff hath Judgment, and ſues an Elegit, directed to the Chamberlain of Cheſter, to extend certain Lands within the County-Palatine of Cheſter, * he ought to execute it notwithſtanding the ſaid Cuſtom, for the Cuſtom cannot extend out of the County-Palatine to bind the King's Courts, for the Chamberlain is but a Miniſter in this to execute the Proceſs of the Court. P. 1 Car. between *Barny* and Plaintiff, againſt *Sir Urian Leigh*, adjudged, and a new Elegit awarded after the ſaid Matter returned.

* 36 Lea's Caſe, S. C. but no Judgment.— Palm. 414. Pilton v. Fol. 567. Lea, S. C and Crew, Doderidge, and Whitlock held, that the Cuſtom cannot bind B. R.

7. Cuſtoms *that go with the Land* bind the King, as Gavelkind, Borough Engliſh &c.* Jenk. 83. pl. 62. cites 35 H. 6. 25.— See pl. 4. in the Notes.

8. *But no Cuſtom ſhall bind the* King *for his Perſon or Goods*; As Ponrage, Murage, Waif, Eſtrays, Toll, Lapſe, Alienation of a Villein before Seiſure. Jenk. 83. pl. 62.

9. By the Cuſtom of Kent, *if a Man be hanged for Felony* the *King ſhall not have Annum Diem, & Vaſtum*, nor the Lord any Eſcheat of theſe Lands in Kent, the Cuſtom there hinders it. 3 Bulſt 213. Mich. 14 Jac. B. R. in a Nota on the Caſe of Roſewell v. Welſh.

(K) What Perſons may do Things by Cuſtom, which they cannot do at Common Law.

There is not any Letter between (D) and (K) in Roll.

[*Infants.*]

1. By Cuſtom an Infant may make a Feoffment at the Age of 15. 9 Co. 9. Combe 76. b. * 5 H. 7. 41. Doctor and Student. 21.

* Fitzh. Cuſtom, pl. 9. cites S. C. but then this Cuſtom ſhall be taken ſtrictly; for it has been adjudged, that a Releaſe made by him at ſuch Age is void; Per Beike and Vaviſor.

2. By the Cuſtom of a Town an Infant may bind himſelf Apprentice 9 H. 6, 7, 8. per Danby.

By ſuch Cuſtom he may bind himſelf *by Deed*, but not by the Common Law, per Danby; and therefore in Action brought of the Departure the Court ought to be upon the Cuſtom, as it ſeems. Br. Cuſtoms, pl. 63. cites S. C.

3. It was admitted a good Cuſtom, that Infant within Age may *deviſe his Land*. Quod Nota bene. Br. Cuſtoms, pl. 29. cites 37 H. 6. cap. 5.

Br. Departure, pl. 9. cites S. C.

(L) What Perſons ſhall be ſaid to be *bound by a general Cuſtom.*

[Infants, Ideots &c.]

1. IF a Cuſtom be, that a Deviſe made of Lands, and a Proclamation made thereof, and Nonclaim within a Year, ſhall bind all Men, yet an Infant ſhall not be comprehended within this Cuſtom, for he is exempt by reaſonable Conſtruction of Law, becauſe he hath not Diſcretion to make his Claim. 37 Aſſ. 5.

See tit. Copyhold. 2. If a Cuſtom be, that when a Copyhold deſcends to any Man, a a Proclamation ſhall be made at Three ſeveral Courts, that he ſhall come to be admitted, and if he does not come at any of the ſeveral Courts, and pray to be admitted, it ſhall be forfeited to the Lord, yet an Infant is not comprehended within this Cuſtom, becauſe by Intendment of Law he cannot make Claim. Co. 8. Lechford 100. adjudged.

See tit. Copyhold. 3. So for the Cauſe aforeſaid, Men of unſound Memory in Priſon, and out of the Realm, are not within ſuch Cuſtom. Co. 8. Sir Richard Lechford 100. b.

Cro. E. 186, 187. pl. 11. S. C. ſays, that Men Non ſanæ Memoriæ, may acknowledge a Recognizance, 4. So if the Cuſtom of London be, that the Mayor may take Recognizances of any Perſon, being of full Age, or of Women unmarried; this Cuſtom ſhall not bind Ideots, Men of unſound Memory, or in Priſon, for they are excepted by the reaſonable Conſtruction of Law. Trin. 32 Eliz. B. R. between *Chamberlain and Thorp*, dubitatur.

and have no Remedy to avoid them, and therefore Infants and Feme Coverts, which may, are particularly excepted in the Cuſtom. ——— Le. 130. pl. 178. S. C.

(M) *To what Things* it ſhall be ſaid to *extend.*

1. IF a Cuſtom be, that every Tenant of ſuch an Honour hath uſed Time out of Mind &c. to pay a Fine upon every Alienation; this Cuſtom ſhall not extend to the Demeſn-Lands in the Hands of the Lord, but only to Tenements in the Hands of the Tenant. 14 H. 4. 8, 9.

Br. Cuſtoms. pl. 22. cites S. C. Iſſue was join'd on the Cuſtom, whether the Parſon ſhould have 2. If a Cuſtom be, that the Lord ought to have the beſt Beaſt of him that dies his Tenant, and the Parſon of the Pariſh the ſecond-beſt Beaſt, as a Mortuary; if the Tenants hold two ſeveral Tenements of the Lord, ſubject to the Cuſtom, within the Pariſh, it ſeems the Lord ſhall have the two beſt Beaſts within the Intent of the Cuſtom, and the Parſon the Third. Dubitatur, 7 H. 6. 26. b.

he ſecond beſt Beaſt. Br. Hariots and Mortuaries pl. 3. cites S. C. accordingly.

Cro. E. 434, 435. pl. 46. S. C. ad- 3. If the Inhabitants upon a Common have uſed Time out of Mind &c. to dig Clay in the ſaid Common of their Lord, for the Reparation of their Houſes ſtanding upon the ſaid Common, and a Stranger

Stranger digs Clay **in the Common, the** Inhabitants cannot take this Clay * **from him, for this is not within their Cuſtom. Mich. 37. 38 Eliz. B. R. between** *Stile and Butt*, **adjudged.**

Fol. 568.

judg'd. For peradventure the Stranger dug it lawfully by the Lord's Licence.——Mo. 411. pl. 561. S. C. adjudg'd.——See tit. Common and Commoner, (B) pl 13.

[3.] **If the Cuſtom** of a Manor **be,** That when any Tenant ſells his Tenements, three Proclamations ſhall be made in the next Court-Day of the Manor, and **that** if any of the Blood of the Vendor will give ſo much Money for the Tenement as the Vendee will, that he ſhall have it; **and a** Tenant, in Conſideration of 100 l. in Money, and that the Vendee, being his Phyſician, hath cured him of a great Malady, ſells the Tenement to him, **and the** next of the Blood comes to the next Court, and proffers 100 l. for the Tenement, **yet he ſhall not have it, for this was given partly for the other Conſideration, which is not valuable, and ſo it is not within the Cuſtom, for by the Cuſtom it is to be intended where the Vendee comes in only for Money. H. 37. El. B. R. by two Juſtices; but by this Means every one may evade the Cuſtom.**

4. So **if he had** ſold the Tenement in Conſideration of a Leaſe for Years of other Land, and 1 d. **the next of Blood ſhould not have the Tenement upon the Proffer of the 1 d. H. 37 El. B. R. held.**

5. **If the Cuſtom of the Manor be,** That if any Copyholder in Fee ſurrenders out of Court, and he, to whoſe Uſe it is ſurrender'd, does not come in at the Court to take his Copyhold, after three Proclamations made, that then the Lord may ſeize **the Copyhold as forfeited, and a** Copyholder in Fee ſurrenders to the Uſe of another for Life, the Remainder over in Fee, **and the** Tenant for Life does not come into Court to take his Copyhold after three Proclamations made **according to Cuſtom, upon which** the Lord ſeizes **the Copyhold as forfeited,** and **after** Ceſtuy que Uſe for Life dies; **he in the** Remainder ſhall not be bound by the not coming in of the Leſſee, **for the Cuſtom being in Deſtruction of an Eſtate, ſhall be taken ſtrictly, and ſo it ſhall be intended only of Tenant in Fee in Poſſeſſion, and not in Remainder, as this Caſe is, and ſo this is out of the Cuſtom. P. 44 El. B. R. between** *Baſpole and Long*, **adjudged.**

Cro. E 879. pl. 10. S. C. adjudg'd.—Yelv. 1. S. C. adjudg'd.——Noy. 42. S. C. adjudg'd.——S. C. cited per Cur. Raym 404. Mich. 32 Car. 2. B. R.——S. C. cited Arg. Cart. 86, 87.——See tit. Copyhold.

6. *Cuſtom of London, that if any Goods are pawn'd there, the Pawnee may detain them till the Money be paid*; this Cuſtom does not intitle him to detain the Goods of a *Stranger*. 2 And. 152. per Cur. cites 35 H. 6. 26.

Jenk. 83. pl. 72. S. P.

7. A Cuſtom is *in London, that none ought to intermeddle with the Art of a Weaver there, but only thoſe who are free of* the Guild. If a Stranger receives Silk in London, and carries it to H. and weaves it there, and then brings it back again to London, and receives his Pay for it; Reſolved, that this is not any intermeddling with their Trade in London againſt the Cuſtom, though the Contract was made in London; adjudged for the Defendant. Cro. E. 803. Hill. 43 Eliz. London Weavers v. Brown.

8. Cuſtom that the *eldeſt Daughter ſhall ſolely inherit*; this ſhan't *extend* to let the eldeſt Siſter inherit by Force of this Cuſtom. So if the Cuſtom be that the eldeſt Daughter and eldeſt Siſter ſhall inherit, the eldeſt Aunt ſhan't inherit by that Cuſtom; and ſo if the Cuſtom be, that the youngeſt Son ſhall inherit, the youngeſt Brother ſhan't inherit by the Cuſtom. Godb. 166. pl. 232. Paſch. 8 Jac. C. B. Rapley v. Chaplain. And Foſter J. ſaid it was ſo adjudg'd in one Denton's Caſe.

9. A Cuſtom *is always infra Manerium*, and a Matter extra Manerium can never be by the Cuſtom, as a Cuſtom to have Common out of the Manor is void. Arg. 2 Show. 131. pl. 109. Mich. 32. Car. 2. B. R. in the Caſe of Zinzon v. Talmath.

Pollex. 561. S. C —— 2 Show. 131. S. C. and P. Godb. 166. Denton's Caſe. —— Litt. R. 235. in Caſe of Turrer v. Hodges. —— Bridgm. 50. Arg. —— 10. Cuſtoms are *Stricti Juris*. 2 Jo. 142. Paſch. 33 Car. 2. B. R. Zinzan v. Talmage.

Ld. Raym. Rep. 469. S. C. and S. P. per Holt Ch. J. accordingly. * S. C. cited 2 Jo. 204. per Cur. Patch. 34 Car. 2. B. R. 11. *General* Cuſtoms may be extended *to new Things* which are *within the Reaſon* of thoſe Cuſtoms; and 5 Co. 82 * Snelling's Caſe is an Authority in Point, where, by the Cuſtom of London, *Executors* may pay Debts, viz. Simple Contracts in equal Degree with Bonds; and adjudged, that *Adminiſtrators* were within the Cuſtom, though created by 31 Ed. 3. within Time of Memory, becauſe within the ſame Reaſon. 12 Mod. 271. per Holt Ch. J. in delivering the Opinion of the Court, Hill. 11 W. 3. in Caſe of the City of London v. Vanacre.

12. A Cuſtom of a Manor can't be *apply'd* to a particular Houſe within a Manor. Lutw. 128. Trin. 13 W. 3. Nicholſon v. Smith.

13. All Cuſtoms which are *againſt the Common Law* of England, ought to be *taken ſtrictly*, nay very ſtrictly, even ſtricter than any Act of Parliament that alters the Common Law; per Trevor Ch. J. in delivering the Opinion of the Court. 11 Mod. 160. Hill. 6 Ann. C. B. in Caſe of Archer v. Bokenham.

14. It is a general Rule, that Cuſtoms are *not to be enlarged beyond the Uſage*, becauſe it is the Uſage and Practice that makes the Law in ſuch Caſes, and not the Reaſon of the Thing; for it can't be ſaid that a Cuſtom is founded on Reaſon, though an unreaſonable Cuſtom is void; for no Reaſon, even the higheſt whatſoever, would make a Cuſtom or Law; ſo it is no particular Reaſon that makes any Cuſtom Law, but the Uſage and Practice itſelf, without Regard had to any Reaſon of ſuch Uſage; and therefore you can't enlarge ſuch Cuſtom by any Parity of Reaſon, ſince Reaſon has no Part in the making of ſuch Cuſtom; per Trevor Ch. J. 11 Mod. 160, 161. Hill. 6 Ann. C. B. in Caſe of Archer v. Bokenham.

(N) What Act ſhall be ſaid a good Purſuance of the Cuſtom.

Gavelkind [&c.]

Br. Cuſtoms. pl. 15. cites S. C. —— Fitzh. Cuſtom, pl. 11. cites S. C. — See tit. Gavelkind. (C) pl. 1. and the Notes there. 1. WHERE the Cuſtom of Gavelkind Land is, That an Infant of the Age of 15 may make a Feoffment, this ought to be taken ſtrictly; for if he is diſſeiſed, and releaſes to the Diſſeiſor, this is not within the Cuſtom, for it is not a Feoffment. 11 H. 4. 33.

Br. Cuſtoms. pl. 15. cites S. C. and per Hank. a Releaſe to Diſſeiſee is no Feoffment. —— Fitzh. Cuſtom, pl. 11 cites S. C. 2. So if he releaſes to the Diſcontinuee, this is not within the Cuſtom. 11 H. 4. 33.

3. So

3. So if he grants a Reverſion dependant upon an Eſtate for Life, it is not good. 11 H. 4. 33. b. S. P. per Belk. Br. Cuſtoms, pl. 15. cites S. C. ——Fitzh. Cuſtom, pl. 11. cites S. C.

4. But if he leaſes for Years, and releaſes to him, it is a Feoffment within the Cuſtom, becauſe the Freehold paſſes by the Releaſe. 11 H. 4. 33. Per Hank. quod Thirn conceſſit. Br. Cuſtoms, pl. 15. cites S. C. ——Fitzh. Cuſtom, pl. 11. cites S. C. ——If he makes a Leaſe, the ſame is not warranted by the Cuſtom. 2 Le. 83. at the End of pl. 110. Mich. 29 Eliz. B. R.

5. [But] If an Infant after 15 makes a Feoffment with Warranty, the Warranty is not warranted by the Cuſtom. 11 H. 4. 33. Br. Cuſtoms, pl. 15. cites S. C. Fitzh. Cuſtom, pl. 11. cites S. C.

6. If there be a Cuſtom within a Town to have 2d. for every Hide of every Sheep, Cow, or Ox, that is killed, or ſold, within the ſaid Town, and for Nonpayment thereof, to ſeize the Hides &c. the Party that is to have the 2d. cannot by this Cuſtom juſtify the taking the Hides, and converting them into Leather, which he took for the Nonpayment of the 2d. though he did it for Neceſſity, ſcilicet, becauſe they would * be putrefied, for this is only a Damage to the Owner, and he might have Debt for the 2d. M. 42. 43 El. B. R. between *Duncon and Reeve*, adjudged. Cro. E. 783. pl. 21 S. C. adjudged accordingly. ——See tit. Treſpaſs, (G. a) pl. 13, * Fol. 569. and the Notes ther

7. A Cuſtom was found in a Manor, *that where an Eſtate was granted to A. for Life, Remainder to B. for Life, Remainder to C. for Life, that A. had Power to deſtroy the Remainders by ſurrendring the Eſtate in Court* &c. And it was found that *A. granted it away by Fine.* And it was held per Cur. that the Remainders were not deſtroyed, nor granted by the Fine; for this being a Cuſtom againſt common Right, that one Man ſhould deſtroy the Right of another, it *ought to be purſued ſtrictly*, and the Cuſtom being found to do it by Surrender, a Fine will not have that Operation within the Cuſtom. Freem. Rep. 263. pl. 284. Mich. 1679. Talmarſh v. Zinzay.

(O) Deſtroyed. How; and in what Caſes.

1. A Seiſed in Fee of Land in *Borough Engliſh*, [after the Stat. 27 H. 8.] makes a Feoffment to the Uſe of himſelf and the Heirs Males of his Body, according to the Courſe of the Common Law; theſe Words, according to the Courſe of the Common Law, are void; for *Cuſtoms which go with the Land, as this* is *and Gavelkind*, and ſuch like Cuſtoms *which fix and order the Deſcents of Inheritances, can be altered only by Parliament.* by Catlin, Dyer, Sanders, Widdam, Browne, Bendlowes. Jenk. 220. pl. 70. cites D. 179. [b. pl. 45. Paſch. 2 Eliz. Anon.]

2. A *Cuſtom once reaſonable* and tolerable, if after it *become grievous*, and not anſwerable to the Reaſon whereupon it was grounded, yet *is to be taken away by Act of Parliament*; for an Inheritance once fixed, cannot be taken away but by Parliament. 2 Inſt. 664.

3. The Queſtion was *whether the Statute* 14 *Car.* 2. *cap.* 2. *being an Affirmative Law for the Election of Scavengers, had taken away a Cuſtom in Southwark?* And it was held by North, Atkins, and Windham, that it had deſtroyed the Cuſtom; the Authorities cited were Affirmative Acts 2 Mod 39. Mayor &c. of London v. Gatford. S. C. but adjornatur, to be argued again.

Acts ſhould not deſtroy Cuſtoms, were Dy. 19. 50. 3 Cro. 125. 2 Le. 74. 1 Inſt. 115. 23 H. 8. 5. 11 Rep. 59. 64. Mo. 113. Hob. 173. And they ſeemed to take a *Difference*, that *where a Statute is introductory of a new Law*, there it ſhall take away all contrary Cuſtoms, though there be only Affirmative Words; but if there were a Law before, that ſhall not be deſtroyed by Affirmative Words. And though an Opinion has prevailed, that, notwithſtanding the Statute of Magna Charta, where there is a Cuſtom for holding Leets at other times than are mentioned in the Statute, it ſhall be well enough, and ſo the Law is taken; but North ſaid, if that Statute were to be conſtrued now, it would hardly be ſo taken. Freem. Rep. 203. pl. 206. Mich. 1675. Anon.

(P) Pleadings.

Br. Detinue de Biens pl. 30. cites S. C.

1. DETINUE *by the Heir of Heir Loomes*, or Principals of his Anceſtor, viz. the beſt of every Sort of Goods, and counted upon the Cuſtom of the County, and it was held a good Cuſtom, and the Defendant durſt not demur, and it was admitted that the Heir might have Action, though he never had Property before, or Poſſeſſion; For the Law and Cuſtom adjudges Property and Poſſeſſion. Br. Cuſtoms. pl. 27. cites 39 E. 3. 6.

2. In an Action brought *by Co-heirs in Gavelkind*, or by the *Younger Brother in Borough-English*, or by a *Feme in Nottingham of Dower of a Moiety &c.* the Plaintiff ought to *declare upon the Cuſtom and preſcribe in it*, and ſhew it in his Count, and otherwiſe ill, quod Nota; Per Cur. Br. Count. pl. 91. cites 5 E. 4. 8.

3. If a Cuſtom be *that the Feme ſhall have the Third Part of the Goods of her Husband, if he has Iſſue, and if he has not Iſſue, then the Moiety*, there if *ſhe brings Rationabili Parte Bonorum de Medietate*, ſhe *ought to count of the Cuſtom, and that the Baron had no Iſſue*. Br. Cuſtoms pl. 70. cites 7 E. 4. 20, 21.

4. *Treſpaſs of breaking his Cloſe*, ſubverting his Land, and ſpoiling his Graſs, the *Defendant ſaid, that the Land is one Acre, called F. and that the Cuſtom of this Land is, and Time out of Mind was, that every one who has Land in the ſaid F.* viz. *Head-land, in plowing his Land may turn his Plow upon the ſaid Head-land, and that the Defendant had half an Acre abutting upon the ſaid Land, and in Plowing the ſaid Acre he turned the Plow upon the ſaid Land, and in turning the Point of his Coulter, raſed a little Parcel of his Land, and one of the Oxen took his Mouthful of Graſs, which is the ſame Treſpaſs.* Per Townſend the Cuſtom is not alleged to be throughout the Country, but only in one Cloſe, which cannot be a Cuſtom, but Brian e contra, aud that this Uſe is throughout the Realm, where one has Land adjoining to another's Land in the Field, bnt in ſuch an Action of Treſpaſs, Paſch. 22 E. 4. 8. the Defendant ſaid that the Cuſtom of the County of Middleſex is, where this Land lies, that where a Man goes to plow in the ſame County, it his lawful for him to *turn his Plow upon the Land next adjoining if it be not ſowed with Grain*, and per Cur. he *ſhall ſay it has been uſed there Time out of Mind* &c. and not *that it is lawful* &c. by which he ſaid accordingly, and that this Land was the Land adjoining, by which he turned his Plow upon it, *and that becauſe he could not well govern his Horſes they turned up a Foot of Land, which is the ſame Subverſion of Soil* &c. and as *to the Graſs ſaid*, that *one of his Horſes in turning took a Mouthful of Graſs againſt his Will, which is the ſame Deſpaſturing* &c. Per Catesby, where a Man drives a Drove of Cattle and they do ſo againſt his Will, this is a good

good Juſtification; contra, if he ſuffers them to continue there, and the Plea awarded good, and the Cuſtom admitted good. Br. Cuſtoms pl. 51. cites 21 E. 4. 28.

5. Information in the Exchequer againſt a Merchant for *lading Wine in a Strange Ship*, the *Defendant pleaded Licence of the King made to J. S.* to do it, *which J. S had granted his Authority to thereof the Defendant*, and that there is a *Cuſtom among Merchants throughout England, that one may aſſign ſuch Licence to another, and that the Aſſignee ſhall enjoy it* &c. which was demurred in Law, and it was agreed for Law, that a Man cannot *preſcribe Cuſtom throughout England*; For if it be *throughout England it is a Common Law and not a Cuſtom, contra if* the Cuſtom had been *pleaded to be in ſuch a City, or County* as Gavelkind, Borough Engliſh, Glouceſter Fee &c. Note the Diverſity. Br. Cuſtoms pl. 59. cites 34 H 8

6. In Treſpaſs the Cuſtom of a Manor was, *Quod quilibet Tenens per Copiam poterit dimittere* [*deviſare*] *terras ſuas, for* Life, or Years *in Fee, or alter, and that a married Woman might deviſe her Copyhold Lands to any other, or to her Huſband, by the Aſſent of the Huſband*; a Feme Covert deviſed her Land to her Baron (the Defendant) accordingly. The Court held that the Cuſtom was not unreaſonable, but it is alledged, Quod *Poterit* deviſare, which Word (poterit) is a Word of Juſtification, and that ſhould be *uſi ſunt* deviſare; It was adjudged againſt the Plaintiff. Mo. 123. pl. 268. Paſch. 24 Eliz. Anon.

Godb. 14. pl. 22. Paſch. 25 Eliz. C. B. Skipwith's Caſe. S. C. ſtates it likewiſe, that ſhe ſurrender it in the preſence of the Reeve and ſix other Perſons, and that a Surrender was made accordingly. Anderſon Ch. J. ſaid, that inſtead of the Word (Poterit) it ſhould be, that Feme Coverts poſſunt, and that by the Cuſtom have uſed to deviſe to the Huſband, and therefore the Preſcription is not good Adjornatur ——— Ibid. 143 pl 178. Trin. 33 Eliz. Skipwith v. Sheffield. S. C. Anderſon ſaid, it ſhall be intended that the Wife being ſub Poteſtate Viri, did it by Coercion of her Huſband. It was then urged, that the Cuſtom might be good, becauſe the Wife was to be examined by the Steward of the Court, as the Manner is upon a Fine to be examined by a Judge; but to this the Court ſaid nothing. —— 3 Le. 81. pl. 122. Paſch. 26 Eliz. S. C. according to Godb. 14. et adjornatur. ——— 2 Brownl. 218. Arg. cites it to be adjudg'd 24 Eliz. in one Skegg's Caſe, [which ſeems to be S C.] that inaſmuch as this was annexed to her Eſtate, which began by Cuſtom, the Cuſtom was good ——— S. C. cited, that the Cuſtom was good, but the alleging it by the Word (Poterit) was ill. Supp. to Co Comp Cop 84. ——— A Cuſtom found within a Manor, that every Tenant of the ſaid Manor potuit & potuiſſet ſurſum reddere &c. was adjudged naught. Raym. 4. Arg. cites Paſch. 37 Eliz. Biſhop's Caſe.

7. A Cuſtom was ſet forth, that *Licet & licuit for the Lord of the Manor to aſſeſs a Pain for the Breach of a Bye-Law.* Arg. Raym 4. cites it as adjudged void, Paſch. 37 Eliz. Sir William Hatton's Caſe.

8. In pleading Uſage and Cuſtom, it muſt pleaded, that it *was put in Ure.* Cro. E. 392. pl. 15. Paſch. 37 Eliz. C. B. Arg. cites it as held in C. B. in Hatton's Caſe.

9. *Parcener by Cuſtom* in his Declaration muſt *make Mention* of the Cuſtom, as to ſay the Land is of the Cuſtom of *Gavelkind*; but he ſhall not preſcribe in it. And ſo it is of *Burgh-Engliſh*; and theſe Two vary in that Point from other Cuſtoms; for the Law when they are generally alledged takes Knowledge of theſe Two. Lit. S. 265. and Co. Lit. in his Comment thereon 175. b.

10. It appears by the Regiſter, and many of our Books, that there muſt be a Cuſtom alleged in ſome County &c. to enable the Wife or Children to the Writ De *Rationabili Parte* Bonorum, and ſo it has been reſolved in Parliament. Co. Lit. 176. b. verſus finem.

11. In *Treſpaſs* the Defendant *juſtified by a Cuſtom in the Manor of T.* the Plaintiff *replied de Injuria ſua propria abſque tali Cauſa* &c. Though the Plaintiff ſhould not have traverſed the Cauſe generally, but the Cuſtom, yet that was adjudged holpen by the Statute of Jeofails, as Matter of Form; becauſe abſque tali Cauſa contained the Cuſtom and more. Hob. 76. pl. 97. Banks v. Parker.

12. In

Cro. C. 347. pl. 9. Hill. 9 Car. B R. The King v. Bagſhaw. S. P.

12. In Covenant the Plaintiff declared upon the *Cuſtoms of London, that every Freeman may take Apprentices, and that Infants may bind themſelves* &c. After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this Cuſtom was pleaded *in Fieri*, when it *ought to be in Facto*; becauſe Cuſtoms and Preſcriptions conſiſt in reiterated Acts, and therefore there muſt be an Uſage to ſupport them; But Judgment was given for the Plaintiff. Raym. 4. Hill. 12 Car. 2. B. R. Windhurſt v. Gibbs.

Keb. 836. pl. 19. Cornelius v. Tupor. S. C. the Plaintiff demurr'd, becauſe the Cloſe appears out of the Manor of C. and Quilibet Inhabitants haberet is no ſufficient Averment, which the Court agreed, and it ought to have been, that every Inhabitant within the ſaid Manor of C. hath had and uſed a Way over N. (the Cloſe in which the Treſpaſs was ſuppoſed.) Judgment for the Plaintiff, Niſi.

13. In *Treſpaſs*, Quare Clauſum fregit in C. the Defendant *pleaded* that the Manor of C. is an ancient Manor, and that within the ſaid Manor is *a Cuſtom, that every Tenant haberet a Way over the Place* where &c. Upon which the Plaintiff demurred, and Judgment was given for the Plaintiff that the Plea is ill. Sid. 237. Hill. 16 & 17 Car. B. R. Cornelius v. Taylor.

3 Keb. 250, 251. pl. 74. S. C. and Judgment for the Plaintiff, Niſi; and cites Hill. 24 Car. 2. were not alledging a Plaint was adjudged a Treſpaſs in the Officer, in the Caſe of Piers v. Deavon.

14. In *Treſpaſs* for taking Three Tuns of Hay, the Defendant *juſtifies, for that he was Meadow-Reeve, choſen at a Leet ſecundum Conſuetudinem Manerii, and that Time out of Mind the Meadow-Reeve had uſed to collect the Biſhops Rent's, and had uſed to have for his Pains out of the Meadow in Quo* &c. *as much Hay as he could draw upon an ordinary Cart*; and ſo juſtifies for his Load of Hay, and doth *not aver that it was upon an ordinary Cart*; and the Court ſeem to incline that the Plea was not good, becauſe he had not applied his Caſe to the Cuſtom; Sed adjornatur. Freem. Rep. 101. pl. 114. Paſch. 1673. Lincoln (Biſhop) v. Atwood.

15. In a *Treſpaſs againſt an Officer of an Inferior Court* if a *Cuſtom be alleged in a Court after a Plaint levied, to take out Proceſs*, and he *alleges the that Proceſs was taken out (but alleges no Plaint levied)* he is a Treſpaſſer. Freem. Rep. 356. pl. 449. Mich. 1673 Bennet v. Therne.

16. Treſpaſs for breaking his Cloſe, called the Market-Place, and erecting a Stall there, the Defendant juſtified by Virtue of a Cuſtom of the Manor for all Tenants to ſet up Stalls there to ſell their Goods, and that he being a Tenant &c. and a Butcher, ſet up a Stall there to ſell Fleſh; Plaintiff demurred becauſe Defendant did not ſay expreſsly, that the Market-Place is within the Manor; but the Court held that there is a ſufficient Avernmen tthat the Locus in quo is within the Manor; It was alſo objected, that the Cuſtom is to ſet up Stalls for ſelling their Goods, and the Plea is that he ſet up a Stall to ſell Fleſh, without ſaying (his) Fleſh, and ſo it may be the Fleſh of a Stranger, and for that Reaſon, Judgment was for the Plaintiff; but it being a hard Caſe, the Court moved the Parties to agree to amend the Plea and go to Trial on the Merits, and ſo they did. 3 Lev. 190. Mich. 36 Car. 2. C. B. Chatin v. Bettſworth.

17. A Cuſtom ought *not to be* laid *in the Negative*; admitted 2 Ld. Raym. Rep. 869 Paſch. 2 Ann. Ogle v. Norcliffe.

18. In an Action brought upon a Cuſtom, it *ought be ſhewn what the Cuſtom is*, othewiſe it is not maintainable 2 Ld. Raym. Rep. 1134, 1135. Paſch. 4 Ann. B. R. in the of Caſe Wincheſter (Mayor) v. Wilks.

(Q) Trial of Cuſtom.

1. WHERE a Cuſtom is pleaded *in the Vill, Court, or Country, where the Cuſtom is uſed*, there it ſhall be try'd by the Juſtices, and by the Court, and not by the Country. Br. Trials, pl. 104. cites 11 E. 4. 2.

2. *Contra, where it is pleaded in another Court*, as the *Cuſtom of N. is pleaded in C. B.* &c. there it ſhall be try'd per Pais. Ibid.

3. *Contra*, where it is *pleaded in N.* where the Cuſtom is known. Ibid.

For more of Cuſtom in General, See **Common, Copyhold, Cuſtoms, Preſcription, Toll.** And other Proper Titles.

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* Cuſtoms.

* The Common Law is the general Cuſtom of the Realm, and *Particular Cuſtoms, which bind not univerſally, make thoſe which are called Cuſtoms.* Br. Cuſtoms, pl. 23. cites 7 H. 6. 31, 32. and 8 H. 6. 3. —† It ſeems that the Word (Deviſe) here ſhould be (Demiſe) and the one is frequently miſprinted for the other. —— Jenk. 83. pl. 62. at the End, S. P. and cites S. C.

Fol. 558.

(A) What Cuſtoms are *good*.

What Cuſtoms are good *in Reſpect of the Eſtates that ſhall be bound* by them.

1. D. 19 El. 357. [b. pl.] 46. **adjudged, That the Cuſtom of a Town** that a Tenant in Fee of Socage-Land ſhall not † devi ſe or grant Leaſes for more than ſix Years, **and if he does, that the Leaſes ſhall be void, is a Cuſtom againſt common Reaſon, and the Liberty of [one that has] a Fee-Simple. (Semble, Book intends a Deviſe by the Statute.)**

(B) Cavelkind.

1. P. 4. E. 1. b. Rot. 2. **Margeria, quæ fuit Uxor Johannis Godfrey, petit verſus Willielmum de Dagenham** Medietatem &c. **Defendens dicit, quod Conſuetudo de Gavelkind (unde prædictum Tene** Raym. 76, 77. Arg. cites S. C. — Sid. 136. Arg. cites S. C.

Tenementum tenetur) **talis eſt, quod** Vidua amittet Dotem, ſi fornicata vel maritata fuerit, & quod dicta Margeria peperit Filium de quodam Willielmo A. poſt Mortem Viri ſui, ob quod debet amittere Dotem. **Margeria concedit talem eſſe Conſuetudinem, & dicit**, quod nunquam fuit convicta, **ſecundum quod convinci debet ſecundum Legem de Gavelkind, Dicit enim** quod ipſe inquiſiviſſe debuit per Inſidias quando ipſa fuit in parturiendo, & tunc debuiſſet ipſam cum Puero ſuo cœpiſſe cum Clamore & Huteſio; **unde deſicut ipſa nunquam convicta fuit ſecundum Legem de Gavelkind, petit judicium ſi debet repelli a Dote.** Defendens dicit, quod fornicata eſt, **ideo veniat jurata &c. Et** jurata dicit, quod **talis eſt Conſuetudo ut ſupra, & quod ipſa eſt fornicata, &** non eſt neceſſe quod ipſe capiatur cum Puero in parturiendo cum Huteſio & Clamore. **Ideo Margeria in Miſericordia, & Defendens ſine Die.**

S. P. per Cur. Freem. Rep. 105. Paſch. 1673. in Caſe of Randall v. Richil.

2. The Plaintiff brought a Writ of Dower, to be endowed of the Moiety of the Manor of C. and ſeveral other Lands of the Nature of *Gavelkind* in Kent. The Defendant pleads the *Statute of* 31 *H.* 8. *cap.* 3. whereby theſe Lands, amongſt others, were diſgavelled; the Queſtion was, whether this Collateral Cuſtom of endowing with a Moiety be taken away by the Statute, or no? And it was reſolved per Cur. that *the Statute extends only to alter the Deſcent, and as for the other Collateral Cuſtoms, leaves them as they were before.* Jud' pro Quer. as to that Point. Freem. Rep. 47, 48. pl. 57. Trin. 1672. C. B. Brooke v. Thomlinſon.

3. There are ſeveral Beneficial Cuſtoms of *Gavelkind*, as firſt, that they are *not forfeitable for Murder, or Felony*; 2dly, The Husband ſhall be Tenant by the Curteſy, without Iſſue; 3dly, Deviſeable before the 23 H. 8. 4thly, The Wife ſhall be endowed of a Moiety Quamdiu caſta vixerit; 5thly, *Not forfeitable upon a Ceſſavit*; 6thly, An Infant at 15 may alien. Arg. Freem. Rep. 48. pl. 57. Trin. 1672. C. B. Brooke v. Thomlinſon.

For more of Gavelkind, See **Deſcent, Gavelkind, Heir** (F. 5.)

(C) What Cuſtoms are *good*, What not.

Mo. 588. Arg. cites the ſame Rule, and that *Malus uſus eſt abolendus.*

1. COnſuetudo ex certa Cauſa rationabili uſitata privat communem Legem. **Lit.** 37. **Davies** 1. 32.

2. Treſpaſs for *digging Land* the *Defendant ſaid that it is Four Acres adjoining to the Sea, and that all the Men of Kent have uſed Time out of Mind, when they fiſh in the Sea, to dig in the Land adjoining, and pitch Stakes to hang their Nets to dry*; Nele ſaid he ought to ſhew what Men. And per Choke and Littleton this is no Cuſtom; for it is contrary to common Right and Reaſon. And per Danby, Fiſhers may juſtify the going upon the Land to Fiſh; for it is for the Common Wealth, and for the Suſtenance of ſeveral &c. and is the Common-Law, Quod fuit conceſſum. Per Fairfax, the *digging is Deſtruction of the Inheritance*, and therefore is no Cuſtom. Br. Cuſtoms, pl. 46. cites 8 E. 4. 18.

3. Treſpaſs of cutting of Graſs, the Defendant ſaid that there is ſuch a Cuſtom in the County of Kent, that *when any Enemies come to the Sea*

Sea Coaſt, that it is lawful for all of Kent to come upon the Land adjoining to the ſame Coaſt, in Defence and Safe-Guard of the Country, and there to make their Trenches and Bulwarks for the Defence of the ſame Country, and ſaid, that at the Time of the ſame Treſpaſs Enemies came &c. by which they dug to make Trenches and Bulwarks &c. And per Jenny it is the Common-Law to do ſo in Defence of the Realm. But Cateſby contra inde &c. quære. Br. Cuſtoms. pl. 45. cites 8 E. 4. 23.

4. In the Law-Book are many Caſes of *Cuſtoms allowed for particular Reaſons in particular Places*, which if there were general would be contrary to Law and Common-Equity, and this in Lands, Goods, and Liberties, and as well in Cauſes Spiritual, as Temporal; and therefore the Cuſtom of *Borough Engliſh*, *Gavelkind*, and for an *Infant to ſell Land*, if they were general, would be againſt Common Right; but yet they are allowable upon particular Reaſons, which are not now diſputable, in certain particular Places. Arg. Mo. 583. As Tenant of the Church of Hereford, that holds in Socage, ſhall be in Ward to the Dean and Chapter, which is contrary to Common-Law and Equity, cites 8 H. 3. Fitzh. Preſcription, 53.

5. So the Cuſtom of *Tenant-Right*, in the North Parts, that one who takes Eſtate by Deed and Livery of Seiſin for his Life ſhall have Inheritance Cuſtomary deſcendable to his Heir, and the Lord compellible to make to every Heir and Purchaſor ſuch Eſtate for ever; which is contrary to Common Equity; but allowable for the Policy of ſtrengthening the Borders againſt Scotland with ſuch Perſons, as ſhall not be removeable, and ſhall increaſe in Unity of Alliance and Conſanguinity, whereby they will join with much greater Courage in the Service againſt the Scots. Arg. Mo. 588. in pl. 796. Trin. 41 Eliz. S. P. Arg. Sid. 267. pl. 18.

6. So the Cuſtom *that the Executors of a Copyholder for Life ſhall have the Land for a Year after.* Arg. Mo. 588.

7. And the Cuſtom *of Cheltenham* in the County of Glouceſtor, *that if a Tenant in baſe Tenure of Inheritance takes Feme, and has Iſſue* by her, *and dies*; *And the Feme takes Second Baron and ſhe has Iſſue by him*; *He ſhall gain the Land to him, and if* he has *no Iſſue* he ſhall have the Land *for his Life and Twelve Years after.* Arg. Mo. 588.

8. So the Cuſtom *of Linne* is, *that if any Vill takes Toll of a Freeman of Linne, he ſhall take as much in Withernam*, when any of ſuch Place comes with Goods to Linne; and this allowed a good Cuſtom, or grantable by Charter, and thoſe of Newcaſtle, who have taken Toll of one of Linne, have made Recompence upon Withernam there taken, which is contrary to Common Equity, that the Goods of One Man ſhall be taken for the Fault of another. Arg. Mo. 588.

9. So the Cuſtom *of the Cinque Ports*, and of the Tower of London, *to take Withernam of Londoners*, if any Londoner has arreſted a Freeman of the Cinque Ports, or of the Liberty of the Tower is againſt Common Equity, but the Cuſtom is good, by Reaſon that thoſe Places are to be full of People for Safety. Arg. Mo. 588. Mo 603. pl. 834. Hill. 41 Eliz. C. B. in Caſe of Paramour v. Verrall, a Caſe was vouch'd Anno 18 Eliz. between a Freeman of Diepe in France, and a Freeman of Sandwich, which was upon the ſame Cuſtom of Sandwich put in Ure, the Conſideration of which was committed by the Queen, upon the Letters of the King of France, to Wray and Dyer, and to two Civilians, who certified the Cuſtom good; But Anderſon, Walmſley, Owen, and Beaumont, held the Preſcription not good; but Walmſley doubted much, becauſe the 5 Ports are Places defenſive of the Realm, whereby there may be a ſpecial Reaſon that they ſhall not attend elſewhere for their Juſtice than within the Cinque Ports. —— 2 And. 151. pl. 85. S. C adjudged by Aſſent of all the Juſtices, that the Cuſtom ſhall not be allowed; and that Judgment ſhall be given for the Plaintiff.

10. So in Treſpaſs the Defendant juſtified by a Cuſtom, that *if Hogs came into the Street they ſhould be taken and killed and carried to the Hoſpital* for Suſtenance of the Poor there, and allowed good, though contrary

trary to Equity. Mo. 588, 589. Arg. cites 11 R. 2. Fitzh. Cuſtom pl. 46.

11. So the Cuſtom *of York*, that *Goods there, Foreign bought and Foreign ſold* ſhall be forfeited, is a good Cuſtom, but againſt Common-Equity; and if it was univerſal throughout the Realm, it certainly would not be allowable. Mo. 589. Arg. cites D. 270. 10 & 11 Eliz.

12 So *in London*, a *Villein inhabiting there for a Year* ſhall be *infranchiſed*. Arg. Mo. 589.

(D) What Cuſtoms are good.

What Cuſtoms ſhall be good *in Deſtruction of a Preſcription.*

S. C. cited Arg. Bulſt. 115, 116. —— See Cuſtom (C) pl. 2. S. C. —— See Tit. Stopping Lights per tot.

1. CD. 9. William Aldred 58. b. is cited, that the 29 El. Bland brought an Action upon the Caſe againſt Moſely, and counted, That whereas Time out of Memory &c. there had been ſeven Lights to his Houſe, the Defendant in York City had erected an Houſe upon his Land, and ſtopped them, to which the Defendant ſaid, That the Cuſtom of the City is &c. that ſuch Obſtruction ſuper Terram ſuam per Ædificationem is lawful, and adjudged not good, becauſe the Cuſtom cannot take away the Preſcription, and it may be, that the Preſcription began by Grant. Quære, for there is ſuch Cuſtom in London.

(E) What ſhall be *againſt the Law of Reaſon.*

Fol. 559.

Hob. 175. pl. 196. Topſal v. Ferrers, S. C. adjudged. —— S. C. cited by Twiſden as a bad Cuſtom. Mod. 48 in pl. 103.

1. IT is not a good Cuſtom in London, that if any Stranger comes into any Pariſh in London, and dies there, and his Body is carried and buried out of the Pariſh, that ſo much ſhall be paid for his Burial, and other Things belonging thereto, as for the Sermon &c. to the Pariſh where he dies, as is paid in the Place where he is buried; for this is againſt Reaſon to bind Strangers by ſuch a Cuſtom for Burial, who are not compellable to come to the Church to receive the Sacraments there. P. 15 Ja. B. Sir *F. Ferris's* Caſe, reſolved per Curiam, and a Prohibition granted accordingly, upon a Suit in the Spiritual Court, by the Pariſh of St. Bottolph, London, where the Party died, for theſe Duties.

Cro. J. 203 pl. 36. S. C. adjudged; for the Cuſtom is between the Lord and his Tenants, which by Indenture may have a good and lawful Be-

2. It is a good Cuſtom, That whereas J. S. is ſeiſed in Fee of the Manor of T. and all the Tenements in the ſaid Town are held of the ſaid Manor; that he and all thoſe &c. have had Time out of Mind &c. a Bakehouſe, Parcel of the ſaid Manor, maintained at their Charge, and that this Bakehouſe was ſufficient to bake Bread for all the Inhabitants, and for all Paſſengers through the ſaid Town, and the Bread there baked and uſed, &c. to be ſold at reaſonable Prices, and that no other Perſon, within the ſaid Town, had uſed to bake any Bread to ſell to any Perſon. This is a good Cuſtom, though it reſtrains other Men to exerciſe their Trades within a certain Place.

place. H. 32 El. B. R. between *Sir G. Farmer and Brooke*, per Curiam. M. 32. 33 El. B. R. adjudged, for this might have a reaſonable Beginning to bind his own Tenants, as this only does. Cr. 8. 125.

ginning, and peradventure their Lands were given to them upon this Condition. —— Le. 143. pl. 199 S C argued. —— Ow 67 S. C. adjudged, that the Action will not lie. —— S. C cited 8 Rep 125. b. as adjudged per tot. Cur. a reaſonable Cuſtom. —— S C. cited 2 Brownl. 179 Arg. —— S. C. cited 2 Bulſt. 195. Arg. as adjudged a good and reaſonable Cuſtom. —— S. C. cited 3 Bulſt. 61 by Coke Ch. J. who ſaid, that the Plaintiff ought to aver, that his Oven was ſufficient to ſerve them all. —— 2 Roll Rep. 201. Arg. cites S. C —— Raym. 327. Arg cites S C. and Mich 1657. B. R. **Allot v. Jackſon.** and reſolved that the Plaintiff muſt aver, that his Mill was ſufficient to grind all, and that he was bound ſo to do.

3. If there be a Cuſtom within a Pariſh, That the Parſon of the ſaid Pariſh ought Yearly to find a Bull and a Boar within the ſaid Pariſh, for the Increaſe of Cattle for the Maintainance of Hoſpitality; and that, in Conſideration thereof, the Parſon ſhall have the Tenth of the Increaſe &c. This is a good Cuſtom, for it is grounded upon a good Conſideration, inaſmuch as the Parſon ſhall have the Tythe and Tenth of the Increaſe. Cr. 39 El. B. R. per Curiam.

Mo. 355, 356 Yelding v. Fay adjudged that the Action lies. —— Cro. E. 569. pl. 4. Yielding v. Fay, S. C. adjudged.

—— See Actions (N. c) pl. 35. and the Notes there.

4. It is a good Cuſtom, that where he and all &c. have Time out of Mind been ſeiſed of a Mill in the Pariſh of D. that all the Inhabitants within the ſaid Pariſh, ought to grind all the Grain that they expend in their Meſſuages, or Tenements, at the ſaid Mill. This is a good Cuſtom, though all the Inhabitants are not his Tenants. M. 11 Ja. B. R. between *Higgs and Gardiner* adjudged; for this Cuſtom may have a reaſonable Beginning, as by Compoſition upon building the Mill.

2 Bulſt. 195. Hix v. Gardiner, S. C. adjudged for the Plaintiff.

5. A Cuſtom againſt Reaſon is void. D. 1. Taniſtry 32. b.

6. [As] a Cuſtom, which is injurious and prejudicial to a Multitude, and beneficial only to ſome particular Perſon, is repugnant to the Law of Reaſon. Davies 1. Taniſtry 32. b.

7. A Cuſtom in a Town for a Lord to enter into the Lands of his Tenant, till an Agreement made for the Arrears when the Tenant ceaſes for two Years, is not good, for it is an ill uſage to ouſt a Man of his Inheritance. 43 E. 3. 32. Curia.

Fitzh Cuſtom, pl. 15. cites S. C. and Paſch. 45 E 3. and per Cur. it is alleged to be not good to ouſt a Man of his Inheritance without Anſwer; beſides, the Uſage was in this Vill only, and not in the Neighbourhood. —— S. C. cited Arg. Bulſt. 115.

8. But if this Cuſtom had extended it ſelf into many Towns, it had been good. 43 E. 3. 32.

Fitzh Cuſtom, pl. 15. S. C. & S P. ſeems to be admitted. —— See ſupra, pl. 7. in the Note.

9. It is a good Cuſtom, that the Tenants of the Manor ought of themſelves to chooſe a Beadle to collect the Rent and Amercements of the Manor, and * that if the Beadle be not ſufficient, that the Tenants ſhall anſwer them to the Lord †. 44 E. 3. 13. 11 H. 4. 2. 11 H. 6. 52. b.

† Fitzh. Avowry, pl. 73. cites S. C. —— * Fol. 560

Br. Avowry, pl 25. cites S. C. —— Br. Cuſtoms, pl 18. cites 14 H 4 2. S P. —— But 11 H. 4. 2 has no ſuch Point, and therefore Roll ſeems to be miſprinted for 14 H. 4 2.

10. Alſo the Cuſtom is good, if it be beſides what is before, that if the Beadle elected by the Tenants refuſes to do it, that he ſhall be

amerced, and that the Lord may distrain him, till he hath found Sureties to perform his Office, **though the Tenants are to answer for him.** 11 H. 6. 52. b.

Issue was taken upon the Custom, *that the Tenants should have them to the Fold, and not the Lord, prout &c.*

11. **It is a good Custom,** that the Lord of the Town shall have to his Fold the Sheep of Strangers, which come upon the Land of his Tenants, and not the Tenants. 46 E. 3. 13.

Br. Customs, pl. 8.

Fitzh. Brief, pl. 599. cites S. C. but S. P. does not appear.

12. **It is a good Custom,** that when a Man hath agisted his Cattle in my Park, in the Time of a great Snow, for Necessity to cut the Branches of the Oaks for them. 46 E. 3 12. b. **admitted; but such Usage is not sufficient, unless it hath been Time out of Mind &c.**

And the whole Court held, that this is *not Custom, but Extortion;*

13. **It is not a good Custom** in a Leet, that if the Petit 12 make any false Presentment, and it is found false by the Grand Inquest, that the Petit 12 shall be amerced; **for this is against common Right, and Extortion.** 9 H. 6. 44. b. **Curia.**

for the Verdict of the one 12 is intended in the Law to be as good as the Verdict of the other 12. Br. Customs, pl. 3. cites S. C. —— Fitzh. Tit. Custom, pl. 1. cites S. C.

Br. Customs, pl. 3. cites S. C. ——

14. But **it is a good Custom,** that if they conceal any Thing that ought to be presented, that they shall be amerced. 9. H. 6. 44. b.

Fitzh. Custom, pl. 1. cites S. C.

Br. Prescription, pl. 98. cites S. C. The Prior of Dunstable's

15. **It is a good Custom,** that every Man of the Town that hath an House next adjoining and abutting to the High-Street, may sell all Merchandizes in his Shop within the said House, in the Time of the Market which is held in the High-Street. 11 H. 6. 19. b. 25.

Case the Prescription was held ill. Afterwards the Defendant prescribed the Custom of the Vill to be, that every Burgess seised of any House adjoining to the High Street, may sell in his own House, and that he is a Burgess, and was seised of a House adjoining to the High Street, and sold &c. —— 8 Rep. 127. a. cites S. C. and held, that the Defendant pleading himself to be a Housholder within the said Vill, and prescribed as such, was not good &c.

4 Le. 239. pl. 382. Glascock's Case, S. C. & S. P. adjudg'd.

16. **It is a good Custom,** that a Copyholder in Fee may cut down Trees, and sell them at his Pleasure. **P. 6. Ja. B. between** *Glascock and Peche.*

* Cro. Car. 220, 221. pl. 7. Rockey v. Huggins, S. C. adjudged — Jo. 245. pl. 2. S. C. resolved per tot. Cur.

17. **But** otherwise **it is** of a Copyholder for Life. **P. 6 Ja. B. Tr. 7 Car. B. R. between** * *Rooke and Huggins,* **adjudged, upon a Special Verdict per totam Curiam, where the Cutting of Elms by a Copyholder for Life, by such Custom was adjudged a Forfeiture, and cited** ‡ *Powell and Peacock,* **adjudged. Hobert's Reports** 16. **said by Warburton to have been lately adjudged.**

Precedent shewn to the Court. —— Noy 2. cites S. C. —— ‡ Cro. J. 29. S. C. adjudged —— S. C. cited Cro. C. 221. and the S. C. cited 2 Brownl. 89.

Brownl. 132, 133. Rolls v. Mason, S. C adjudged — 2 Brownl. 85 to 91. S. C. argu'd by Counsel, and Ibid. 192. to 203. S. C. debated by the Court, and Judgment for the Defendant that the Custom was good. —— S. C. cited Cro. C. 221. in pl. 7. by Croke J.

18. [But] **It is a good Custom,** that a Copyholder for Life, who by Custom may name his Successor, may cut Timber Trees, and convert them at his Pleasure; **for he is quasi a Copyholder in Fee. Tr.** 10 **Ja. between** *Rawles and Mason,* **per Curiam.**

19. Where

19. Where a Cuſtom is, *that every Tenant of the Manor, who diſtreins for Damage feaſant in his Manor ſhall impound in the Park of the Lord, or ſhall be amerc'd*, this is no good Cuſtom; for the *Lord is not damnified.* Br. Cuſtoms, pl. 31. cites 21 H. 7. 20. per Fiſher and Kingſmill.

20. *So where Tenants make a Law that each Pariſhioner ſhall pay annually to the Church ſuch a Sum, and if not that he ſhall forfeit to the Lord* 20 *d.* this is no good Cuſtom or Reaſonable Law; for the Lord is not damnified by this Non-payment, nor is he to take Profit by it. Ibid.

21. *Contra* if he was *to forfeit* 20 *d. to the Church-Wardens* &c. and per Pollard it is a good Preſcription, or Cuſtom, *that the Tenants of the Manor near ſhall not fiſh, unleſs in the Lord's Boat*; for the *Lord is at Charges in Reparation of the Boat*, and ſo he is by Reparation of the Park or Pound, which Kingſmil denied. Ibid.

22. A Cuſtom was *to have ſo much per Tun of every Ship which came in to W.* &c. It was *objected, that a Tun of ſome Merchandizes was not worth ſo much as they claimed* to have for the Cuſtom, yet it was adjudged good. Arg. Sid. 18. cites Mich. 20 Jac. Rot. 3009. Napper v. Manſell

23. A Cuſtom *to elect a Canon to ſucceed in the next vacant Place, there being no Vacancy at the Time*, was held to be ridiculous, and a Mandamus was denied. 2 Jo. 199. Paſch. 34 Car. 2. B. R. Dr. Owen v. Dr. Stainhow.

(F) *What* Things *may be done by Cuſtom.*

1. **It is a Cuſtom,** That when one goes to Plough, **that** he may turn his Plough upon the Land next adjoining, **be it Sow'd or not***. 22 E. 4. 8. b. **adjudged**; **but** † 21 E. 4. 28. b. **dubitatur.**

* Br. Treſpaſs, pl. 351. cites 22 E. 4. 8. and 21 E. 4. 28. that it is a good Juſtification in Treſpaſs for ſubverting the Soil, and ſeeding the Graſs by a Cuſtom, that he may turn his Plow upon the Land next adjoining, by which he ſo did, and his Horſes in the Turning ſubverted a Foot of Land, and took a mouthful of Graſs contra voluntatem ſuam, and well. ——S. P. Dav. 30. a. Arg. in the Caſe of Taniſtry, and Ibid. 32. b. cites 21 E. 4. 28.

† Br. Cuſtoms, pl. 51. cites S. C. and that the Cuſtom was admitted good, but ſays nothing of its being good in Caſe the Land be ſown; but that he may do it if the Land be not ſown with Grain. And per Cur. he ſhall ſay, that it has been uſed Time out of Mind, but ſhall not ſay, Quod licebit.

2. **It is a good Cuſtom** to dry Nets upon the Land of another Man, **in favour of Fiſhing and Navigation.** Davies 1. Taniſtry 32. b.

3. **It is no good Cuſtom,** That none ſhall put his Cattle into his Land before the Lord, **for it is not reaſonable, that if the Lord will not put in his Cattle, that the Tenants ſhall loſe the Profit of their Soil**; but if a Day is limited **it is otherways** *. 21 E. 4. b †. 2 H. 4. 24. b. Davies 1. Taniſtry 32. b.

* Br. Cuſtoms, pl. 51. cites S. C. and S. P. by Littleton. † Br Cuſtoms, pl. 12. cites S. C. —— Fitzh. Cuſtom, pl. 10. cites S. C. —— S. C. cited per Cur. 5 Rep. 84. a. b.

4. **It is a good Cuſtom,** That none ſhall put in any Cattle in certain Lands after the Corn cut, and **Vines** till Michaelmas following, but that two Men ſhall have their great Cattle there, to take the firſt Seiſin of the Paſture; **and this Cuſtom is good againſt the Lord alſo.** 48 E. 3. 23. b.

Br. Cuſtoms, pl. 9. cites 46 E. 3. 23. that the Cuſtom is, that none ſhall put in his Beaſts after the Corn cut and carried away, till Mich. and becauſe the Plaintiff put his Beaſts in

in, he took them, and ſaid, that he is Lord of the Soil; and the other ſaid, that the Uſage extends as well to the Lord as another Perſon, and the other e contra. ——— 48 E. 3 23, has no ſuch Point.

Fol. 561.

See tit. Heriot (G) (H)

5. **It is no good Cuſtom,** That the Lord of the Manor ſhall detain a Diſtreſs taken upon the Demeſnes, till a Fine at his Will paid for the Damage. **Lit.** 46. **Davies** 1. **Tanistry** 33.

5. **A Cuſtom,** That the Lord may take for his Heriot the Beaſt of a Stranger, levant and conchant upon the Land of the Tenant, **is not good. D.** 3. **El.** 199. **Davies** 1. **Tanistry** 33.

7. **A Cuſtom,** That the Lord **of the Manor** ſhall have 3 d. [3 l.] for a Pound Breach of every Stranger, **is not good** *. 21 **H.** 7. 40. **Da.** 1. **Tanistry** 33 †. 11 **H.** 7. 13, 14. **But is good againſt the Tenants of the Manor.** 11 **H.** 7. 13.

* S. P. For it cannot have a lawful Commencement. Br. Cuſtoms, pl. 32. cites 21 H. 7. 40 ——— Ibid pl. 75, cites S. C. and Fitzh. tit. Preſcription, pl. 67. ——— Br. Preſcription, pl. 40. cites S. C. and ſame Diverſity. ——— Fitzh. Preſcription, pl. 67. cites S. C.

† Br. Preſcription, pl. 106. cites S. C. and ſame Diverſity.

8. **Where by a Cuſtom the** Homage of the Manor hath uſed Time out of Mind to make By-Laws for the better ordering **the Tenants of the Manor, touching** touching their Common, under a Pain, **it is a good** Cuſtom, that the Lord **of the Manor** hath uſed **Time out of Mind &c.** to diſtrain the Cattle of him that broke the By-Laws, for the Penalty in any Place within the Manor, **though it be within the proper Soil of the Lord, or others, and not in the Lands of the Offender, for this is not iſſuing out of the Land. D.** 15 **El.** 322. 23. **adjudged; but there** 24 **moved again in another Caſe.**

9. It was ſaid, for Law, that by no Cuſtom can *Bailiff or Steward leaſe Frank Tenement*; Per Cur. contra of Copyhold, as it ſeems, if it be taken in Court according to the Cuſtom of the Manor. Br. Cuſtoms. pl. 33. cites 19. Aſſ. 9.

10. The *Cuſtom of York* is, that a *Feme Covert may take Land purchaſed by her Baron, of the Gift of the Baron, and that if the Baron diſcontinues and dies, and the Feme does not claim within the Year and Day, ſhe ſhall be barred.* Br. Cuſtoms. pl. 56. cites 12 H. 3. and Fitzh. Preſcription, 61.

11. Of every Cuſtom there *are Two Eſſential Parts*, viz. *Time and Uſage*; that is, Time out of Mind and continual and peaceable Uſage without lawful Interruption. Co. Litt. 110. b.

12. That may be good by Cuſtom without Conſideration, which will not be good by Preſcription without Conſideration, As Cuſtom *to turn his Plow upon the Head-Land*, and ſo for *Fiſhermen to dry their Nets* upon the Land of another, and ſo *to dig the Land of others eo make Bulwarks* in Time of Danger &c. becauſe thoſe Things are pro Bono Publico. 3 Lev. 307, 308. Trin. 3 W. & M. in C. B. in the Caſe of Simpſon v. Bithwood.

(G) *What*

(G) *What* ſhall be *againſt* the Law of *Reaſon.*

1. **IT is a good Cuſtom,** That the Corporation of **Litchfield** have had a Market **there** Time out of Mind &c. and **that the Corporation** ought to repair the Way to it, and to appoint a Bellman that ought to ſweep the Market-place, and in Recompence thereof, the ſaid Bellman Time out of Mind &c. **from thoſe that brought their Grain to the ſaid Market, and untied their Sacks, there to ſell it,** had uſed to take a Pint of Grain, if it was but one Buſhel or under, but if it was above a Buſhel, then a Quart, to the Uſe of the ſaid Corporation; **This is a good Cuſtom, for the Men that are charged by it** have a reaſonable Benefit **thereby. P.** 11 **Ja. B. R. between** *Hill and Hawkes,* **& Tr.** 12 **Ja. B. R. adjudged.**

Mo. 835. pl. 1124. Hill v. Hawker. S. C. and the Cuſtom adjudged good, tho' the Corn was not ſold, but brought in to be ſold; but without a Special Cuſtom Toll is not due of Common Right of Corn brought in only and not ſold. ——2 Bulſt. 201. &c. Hill v. Hanks, S. C. and the Cuſtom adjudg'd good.——Roll. Rep. 1. S. C. adjornatur. Ibid. 44. pl. 12. S. C. adjudg'd the Cuſtom good.

2. **It is a good Cuſtom, That the** Corporation **of Gravesend** have uſed Time out of Memory to maintain a Barge for Paſſengers between Graveſend and London, and that no Foreigner ought to carry any Perſon from Graveſend to London, without Licence of the Company of Watermen of Graveſend. **M. 5 Ja. B. R. between** *Pincocke and Sanders,* **adjudged upon Evidence at the Bar.**

2 Brownl. 177. Paſch. 1612 10 Jac. C. B. Graveſend's Caſe. S. C. argued by Counſel, and debated by the Court.——S. C. cited Arg. Raym. 327.

3. **It is a good Cuſtom,** That where the Biſhop of **Sarum** was ſeiſed in Fee, in the Right of his Biſhoprick, of certain Mills within the City of **Sarum, that** all the Inhabitants reſident within the City in any ancient Meſſuage held of the ſaid Biſhop, have uſed a Tempore &c. all their Grain by ſuch Inhabitants in their ſaid Houſes ſpent, at the ſaid Mills, and not elſewhere, without Licence &c. to grind, and pay for the ſaid Grinding; and in Conſideration thereof, the Biſhops, a Tempore &c. have uſed to keep Servants &c. to grind, and Loaders to carry &c. **for here are mutual Conſiderations, and mutual Actions lie; for one is to grind there, and the other to maintain his Mills, and all Proviſion for Grinding. Hobert's Reports** 256, **between** *Harbin and Green,* **per Curiam; though this extends as well to Grain bought, as to Grain that grows upon their Tenements.**

Hob. 189. pl. 233. Trin. 14 Jac. S. C.—— S. C. cited Sty. 421. in Caſe of Kemp. v. Gord.—— Hard. 67, 68. Trin. 1656, in the Exchequer. Vaughan v. Manſel. S. P. and cites S. C. but the Ch. Baron, and Parker held, that ſuch Cuſtoms muſt have a reaſonable Intendment viz. that all ſuch Corn as is ground, muſt be ground there. ——2 Saund. 117. Paſch. 22 Car. 2. B. R. Per Twiſden in Caſe of Coryton and Litheby, that according to ſuch Allegation, the Defendant cannot ſpend any Corn in his Houſe, unleſs it be firſt ground, and ſo he cannot feed any Chicken, or give any Corn to his Horſes, or make Furmety, (as he ſaid) with it, unleſs it be ground; and therefore it was unreaſonable; and Judgment accordingly ——Vent. 167 Mich. 23 Car. 2. B. R. the S. C. adjudg'd —— 2 Lev 27. Litheby v Coryton S. C. and Twiſden J. ſaid, that the Declaration ſhould have been, that they ought to grind all the Corn which is ground and ſpent within their Houſes, and not all Corn ſpent there; For Corn may be ſpent without being ground at all, as for Horſes, Swine, Poultry &c. and Judgment accordingly. —— Lev. 15. cites S. P. held accordingly, Mich. 1654. Alant v. Janon. *See Wolle 23 Rep. 654.*

4. But **such Custom is** not good, if it extends to Grain sold in his House, to restrain such Inhabitant from selling Grain in his House *, without grinding thereof. **Hoberts Reports, 259. between** *Harbin and Green*, **adjudged.**

* Fol. 562. Hob. 189. pl. 233. Trin. 14 Jac. S. C. adjudg'd, and Hobart Ch. J held, that if he had assign'd the Breach only in Corn spent, yet it would not have served, because the Custom itself being intire, is totally void, though some Part of it alone might be good in Law. ——Mo. 887. pl 1247. S. C. adjudg'd.

5. An *Usage by Ten Years* is good Custom by the *Ecclesiastical Law*. Per Doderidge J. Roll. Rep. 419. 14 Jac. B. R. in Case of Gollin v. Harden.

6. Custom to *charge another's Inheritance for a Thing done in Preservation of it*, is good. Sid. 161. pl. 16. Mich. 15 Car. 2. B. R. Smith v. Barret.

7. Custom *for those that govern the Common to inclose to their proper Use*. Sid. 162. Mich. 15 Car. 2. B. R. in Case of Smith v. Barret; Per Windham J. who said it was the Custom in Kingsmore in Somerset.

8. The Mayor and Commonalty of London declared on a Custom, *that they and their Predecessors, have had of every Master of a Ship* 8 *d. per Ton, for every Ton of Cheese brought from any Place in England to the Port of London, from the East of London-Bridge in the Name of Weighage*, and that the Defendant being Master of a Ship brought thither so many Ton &c. Adjudged; that the Liberty of bringing Goods into a Port for Safety, imports a Consideration in itself; And so a Judgment in B. R. was affirmed in Cam. Scacc. 3 Lev. 37. Mich 33 Car. 2. London (Mayor and Commonalty) v. Hunt.

(H) What shall be *good* Customs.

A Copyholder by Custom may name his Successor, and if the Lord refuse to admit him, the Homage may set a reasonable Fine, and so he shall be admitted Brownl. 137. Rolls v. Mason, S. C. —— 2 Brownl. 85. S. C. argued. And ibid. 192. &c. S. C. & S. P. agreed to be good.

1. **It is a good Custom,** That a Copyholder for Life may nominate him that is to succeed him. **Trin. 10 Ja. between** *Rawles and Masoon*, **per Curiam.**

2. **Jurata presentat, quod est quædam Consuetudo in Hundredo de Wid' in Kancia,** quod si quis in Adulterio Prolem genuerit, & ipse inde non possit se acquietare per Legem suam, aut recognovit Factum, ita quod convictus sit, **quod ipse** forisfaciet omnia Bona & Catalla sua Domino Regi; & **per hanc Consuetudinem Ballivus Reginæ seisivit omnia Bona cujusdam Adulteri, pro quorum Captione nunc presentatur, & fatetur quod talis habetur Consuetudo in placitando hic. Mich. 21 E. 3. B. R. Rot. 10.**

3. **It is a good Custom,** That an Estate of Freehold and Inheritance hath used to pass by Surrender, without the Assent of the Lord in his Court, **by Delivery over by the Bailiff to the Feoffee, according to the Form of the Charter, to be inroll'd in Court, or such like. Co. Lit. 59. b.**

4. **If the** Lord of a Copyhold **by Custom** claims **to have** a Fine **of the Copyholder,** upon every Alteration of the Lord, be it by Alienation, or otherwise, **this is a void Custom as to the Alteration, or Change of the Lord,** by the Act of the Lord himself, for by such Means

Means the Copyholders might be oppreſſed by the Multitude of Fines by the Act of the Lord. Co. Lit. 59. b.

5. But it is a good Cuſtom, That the Copyholder hath uſed to pay a Fine upon the Alteration of the Lord, by the Act of God, as by Death of the Lord. Co. Lit. 59. b. where is cited a Caſe to be reſolved upon a Reference out of Chancery, Trin. 39. El. Armſtrong's Caſe. S. C. cited Arg. Het. 127.

6. [So] It is a good Cuſtom, That a Copyholder hath uſed to pay a Fine upon every Alteration of the Tenant, be the Alteration by the Act of God, or by the Act of the Party. Co. Lit. 59. b. S. C. cited Het. 127. Arg.

7. It is a good Cuſtom, That a Man * that hath a Ferry over a River &c. * It ſeems the Word (that) ſhould be omitted.

8. A Man may preſcribe or allege a Cuſtom, to have ſolam Veſturam Terræ from ſuch a Day to ſuch a Day, and by this the Owner of the Soil ſhall be excluded from feeding there. Co. Lit. 122. See Tit. Preſcription (L) pl. 6, 7. and the Notes there.

9. So a Man may preſcribe to have ſeparalem Paſturam of ſuch Land, and exclude the Owner from feeding there. Co. Lit. 122. See Tit. Preſcription (L) pl. 6, 7. and the Notes there.

10. In the *Iſle of Man* is a Cuſtom, that if one *ſteals a Horſe* he ſhall not be hanged, but ſhall be fined and go quit, becauſe the Owner may have his Horſe again, for he cannot be eaten; But if one ſteals a *Hen or a Capon* &c. he ſhall be hanged; For it ſhall be intended that it was taken to be eat, and ſo the Owner could never have it again. This is a good Cuſtom. Mich. 35 H. 6. 37. b. 28. a. per Needham. Br. Cuſtoms, pl. 5. cites S. C. —— 4 Inſt. 285. cap. 69. cites 12 H. 8. 5. a. that if a Man ſteals a Horſe or an Ox, it is no Felony; for the Offender cannot hide them, [it is ſaid in the Margin, that they have no Woods there] but if he ſteals a Capon, or a Pig, he ſhall be hanged &c.

There are ſeveral Cuſtoms that are good *Ratione Loci* which are not allowed throughout England; As the Caſe of Feme ſole Merchant in London; and the Cuſtom of the Iſle of Man to *hang* for ſtealing a Capon, but not an Ox. Sid. 267. pl. 18. Arg. cites 12 H. 8. 5.

11. A Cuſtom *that a Leſſee for Years ſhall hold for Half a Year beyond his Term* is not good; agreed by all the Juſtices. So a Cuſtom *that a Leſſee for Life may leave pur Auter Vie* is not good; Per Hales & Mountague Mo. 8. pl. 27. Hill. 3 E. 6. Anon.

12. Cuſtom to have an *Heriot of the Purchaſor* of Lands within the Manor, if the Copyholder, the Vendor, has no live Beaſt, was adjudged a Void Cuſtom. Bendl. 302. pl. 295. Trin. 13 Eliz. Lyne v. Bennet.

13. A Cuſtom was found by Verdict, that Copyholders may let for a Year *ad Paſturandum, not ad Colendum.* Le 16. pl. 19. Paſch. 26 Eliz. B. R. in the Caſe of Cham v. Dover.

14. Where *Common-Law and Cuſtom meet*, and ſo that of Neceſſity one muſt have the Preference and ſtand, the Common-Law ſhall be *preferred*, and take Place before the Cuſtom; as Rent Charge granted out of Land at Common-Law and Borough-Engliſh &c. this Rent deſcends according to the Common-Law. And 191. pl. 226. Mich. 27 & 28 Eliz. in Caſe of Smith v. Lane.

15. Cuſtom cannot be good *againſt a Statute.* Cro. E. 85. pl. 4. Hill. 30 Eliz. B. R. Griſlin v. Wood.

16. In Kent there is a Cuſtom, that *if the Free-Tenants of a Caſtle do not pay their Rent they ſhall loſe the Lands holden of it*; And the *Cuſtom of*

Lidford

Lifford-Caſtle in Com. Devon, is, *that a Freeholder of Inheritance may not paſs his Freehold, unleſs by Surrender into the Hands of his Lord.* Sic dictum fuit. 5 Rep. 84. b. Trin. 41 Eliz. C. B.

17. Every Cuſtom ought to have *Four inſeparable Qualities.* Firſt, it ought to have a *Reaſonable Commencement*, (For quod ab initio non valuit tractu Temporis non convaleſcet, & Conſuetudo ex certa Cauſa rationabli Uſitata privat communem Legem. Secondly, it ought to be *certain and not ambiguous*; For Incerta pro nullis habentur. Thirdly, it ought to have *Continuance, Time out of Mind without Interruption*; For Conſuetudo ſemel reprobata non poteſt amplius induci. Fourthly, It ought not to exalt itſelf upon the Prerogative of the King; For Nullum Tempus occurrit regi.) Dav. 32. a. to 34. a. Hill. 5 Jac. B. R. The Caſe of Taniſtry.

All Cuſtoms ought to have a *reaſonable Intendment*, As if a Cuſtom be for an Infant to make a Feoffment, Infant Tenant in Tail cannot do it; Per Fyre J. Show. 84. cites Roll 567. Yelv. 1. and Cro. E. 879. Remainderman not bound by the Cuſtom, becauſe it muſt be taken ſtrictly. Ibid. and cites 8 Rep. Letchford's Caſe.

18. Cuſtoms ought to be *reaſonable*, and if they are generally *Inconvenient* they cannot be reaſonable, and if they are generally inconvenient, though not *miſchievous*, yet they are not good. Arg. and agreed per Counſel of both Sides. 2 Brownl. 87. Paſch. 9 Jac. C. B. in Caſe of Rowles v. Maſon.

19. A Cuſtom was alledged in the Town of J. *to elect every Year two Burgeſſes, who uſed to make a Feaſt* ſuch a Day, and the Defendant being elected Burgeſs refuſed to make that Feaſt, for which he was *fined* 20*l. and impriſoned till he paid it.* It was holden by the Court to be a good Cuſtom, and well returned, and the Priſoner remanded. Cro. J. 555. pl. 17. Mich. 17 Jac. B. R. Wallis's Caſe.

Litt. Rep. 233. S. C. adjudged. — Hutt. 101 S. C. adjudged; but a Cuſtom, that if the Copyholder had ſurrendered to the Lord that the Leaſe ſhould be void, had been a bad Cuſtom, becauſe he might ſubvert and deſtroy, by his own Act, the ſame Eſtate which he himſelf had made.

20. Cuſtom, that if *a Copyholder leaſes for a Year, without Licence, and dies within the Year, it ſhall be void againſt the Heir*, is a good Cuſtom. Het. 126. Mic. 4 Car. C. B. Turner v. Hodges.

21. A Cuſtom in the Dutchy of Cornwall, that in the ſame Lands, an Eſtate in Fee ſhould deſcend to the Younger Son, according to the Nature of Borough-Engliſh; But an Eſtate in Tail to the Heir at Common-Law, and held good per tot. Cur. (abſente Crooke.) Mar. 54, 55. pl. 82. Mich. 15 Car. Anon.

22. Tis a good Cuſtom *to diſtrein the Under-tenant*, for Amerciament laid on the Tenant for not repairing his Copyhold. Mar. 161. pl. 231. Hill. 17 Car. Thorne v. Tyler.

23. Cuſtom, that if a *Man comes upon my Land that I may beat him*, or if he puts my Goods into his Houſe, that I ſhall burn his Houſe, are not lawful Cuſtoms. Br. Cuſtoms, pl. 5. cites 35 H. 6. 25.

Nels. Chan. Rep. 87, 88. S. C. & S. P. per Cur.

24. That cannot be called a Cuſtom, which is *grounded upon Fraud.* Chanc. Caſes 30. Mich. 15 Car. 2. Borr. v. Vandall.

25. Cuſtom of the Manor of Taunton, that the *Wife* of Copyholder ſhall *have the Inheritance of the Baron*, and if ſhe marry a ſecond Husband and die, *ſecond Baron* ſhall *have all the Inheritance.* Cited by Windham J. Sid. 267. pl. 18. Trin. 17. Car. 2. B. R. in Newton's Caſe.

The Caſe was, in an Action for Falſe Impriſonment, the Defendant juſtified by a Cuſtom in the City of Carliſle, that if a Perſon be ſued in an Action of Covenant,

26. Every *Cuſtom ſuppoſes a Law, and if it it be not irrational, and entertains no Contradictions it is good*; Per Vaughan Ch. J. Freem. Rep. 64. pl. 76. Mich. 1672 in Caſe of Collſherd v. Jackſon.

Tenant, and any other Perſon be Bail, that if the Principal no not pay the Damages that are recovered againſt him &c. that the Bailiffs have uſed to take the Bodies of ſuch Bail &c. And ſhews, that an Action of Covenant was brought againſt J. S. and that a Recovery of 39 l. in Damages was had againſt him, and that the Plaintiff was Bail, and thereupon a Capias was ſued out againſt the Principal, and returned Non eſt inventus; and thereupon a Capias was ſued out againſt the Bail, by Virtue whereof he arreſted him. Vaughan ſaid, if an Act of Parliament were made, that if the Principal do not pay the Money the Bail ſhould be taken without any Capias ſued forth againſt the Principal, no Man would doubt but it were good. Freem. Rep. 63, 64. pl. 76. Mich. 1672. Colſhed v. Jackſon.

27. All Cuſtoms are to be *taken ſtrictly*, when they go to the *Deſtruction of an Eſtate*. 3 Mod. 224. Trin. 4 Jac. 2. B. R. by Eyre J. in Caſe of King v. Dilliſton. S. P. Yelv. 1. in Baſpole's Caſe. —— S. P. Le. 1 in Caſe of Bornford v. Packington. —— S. P. Arg. Cart. 88. in Caſe of Smith v. Paynton, cites the ſame Caſes, and S. P.

28. Holt Ch. J. cited a **Caſe of Malden in Eſſex.** The Corporation there preſcribe *in a Que Eſtate, that they, and all thoſe* &c. *Time whereof* &c. *have uſed to repair the Port, in Conſideration whereof, they have uſed Time whereof* &c. *to receive for all Lands, ſold within the Precinct of the Borough, a certain Rate of* 10 *l. in the Pound, out of the Purchaſe Money*; and it was adjudged a good Cuſtom; and this is what they call (*Land-cheap*;) for the Landholder reaps a Benefit by the Trade coming to the Town, by Reaſon of the Port. Ld. Raym. Rep. 386. Mich. 10 W. 3. Vinkenſterne v. Ebden.

29. The *Reaſons by which a Cuſtom is ſupported*, are generally theſe. Firſt, becauſe the Party that is bound by it, has *Benefit by it*. Secondly, that the Party that claims the Advantage of it, is at *Charge* by Reaſon of it. Thirdly, that it may have a *Reaſonable Commencement*, or *ſuppreſs Fraud*, and the Two Firſt of theſe Reaſons hold in the Caſe of Toll Travers and Toll-thorough. Arg. 6. Mod. 124. Hill. 2 Ann. B. R. in Caſe of Cuddon v. Eaſtwick.

Yet if no Reaſon can be given for the Beginning of a Cuſtom, non ſequitur that the Cuſtom for that Cauſe is unreaſonable, and was againſt Reaſon in the Beginning, for there are ſome Things for which no *Reaſon can be given*, as Borough Engliſh and Gavelkind; Per Coke Ch. J. 2 Bulſt. 196. Hill. 11 Jac. B. R. in Caſe of Hix v. Gardiner.

30. A Cuſtom which may be *general*, and extend to all the Subjects in England, and is *not warranted by*, but contrary to *the Common Law*, is void. Gibb. 51. Paſch. 2 Geo. 2. B. R. Sherborn v. Boſtock.

(I) *Againſt the Law* of the Land.

1. **EVERY Cuſtom** againſt the Maxims of the Common Law **is not void.** Davies 1. **Taniſtry** 30.

2 **For it is a good Cuſtom,** That a Feoffment of Tenant in Tail with Warranty, ſhall not be a Diſcontinuance. 30 **Aſſ. pl.** 47. Br. Cuſtoms, pl. 63. cites S. C.

3. **It is a good Cuſtom,** That a Woman ſhall not have Dower, where ſhe received, during the Coverture, part of the Money for the Sale of the Land. 20 **E.** 3. **Brook Cuſtoms** 53. Fitzh. Preſcription, pl. 30. cites S. C.

4. **It is a good Cuſtom,** That if a Man marries a Widow, ſhe ſhall not have Dower. **Kitchin** 149. **Da.** 1. 30. **b.**

Fol. 563

5. But **a Custom,** That the Wife of Tenant in Fee shall not be endowed, **is not good. Da. 1. Gavelkind 49. b.**

6. **A Custom,** That the Wives of Irish Lords, or Captains, ought to have the sole Property in certain Parts of the Goods during the Coverture, with Power to dispose of them without the Assent of the Husband, **is not good, because it is against the Common Law. Da. 1. Gavelkind.**

Br. Customs, pl. 21. cites S. C.—Ibid. pl. 74. cites S. C.——

7. **It is a good Custom,** That if a Man be seised of Land for 40 Weeks, though without Title, he shall not be ousted by Entry without Action. 21 E. 3. 46. **b. adjudged.**

Jenk. 21. pl 40. cites S. C. and says, that this is a good Custom.

* Br. Customs, pl. 19. cites 14 H. 4. 2. S. C. says, it is admitted, that such a Custom to have a Fine for Alienation is a good Custom, but that he ought to allege Seisin &c. and ought to shew what Fine certain he shall have, per optimam Opinionem, and that such Custom ought to be shewn to be allow'd in Eyre, per Cur. because it is against Common Right——Fitzh. Customs, pl. 12. cites S. C.

8. **A Custom,** That the Tenants of an Honour shall pay for every Alienation a Fine to the Lord, **is not good, because it is against the Law, that any should make Fine for an Alienation but the King's Tenants *. 14 H. 4. 3. But quære thereof, for if it were against Reason, the Law would not allow it the King. Contra** ‖ 14 H. 4. 1.

‖ Br. Customs, pl. 17. Hank J. said, that in several Places there is a Custom, that Frank-tenant who is seised in Fee, when he will alien shall come into Court and surrender the Land, and the Alienee shall make Fine, and if he does not, the Lord may seise for the Alienation.

9. **A Custom** against common Right, **is not good.** 7 H. 6. 32.

10. **A Custom is not good,** that trenches in Prejudice of the whole Realm. 7 H. 6. 32.

[I. 2] *As to Proceedings in Inferior Courts. In what Cases not good.*

* See Tit. Process (D) pl. 1. 2 S. C. and the Notes there.

11. **It is not a good** Custom of a Court to award a Capias in an **Action of** Debt, or other such Writ, before any Summons awarded, **for this is against the Course of the Common Law, and all Courts. Pasch. 3 Jac. B. R. between** *Banks and Pembleton,* **in a Writ of Error. Pasch. 5 Jac. B. R. between** † *Ballard and Cooke,* **the which intratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between** ‡ *Moyle and Catchmed,* **adjudged, which intratur, Trin. 4 Jac. Rot. 1609.**

† See Tit. Error (L. b) pl 6. and (G c) pl. 4 S. C.

‡ See Tit. Error (L. b) pl. 6. and (G. c) pl. 4. S. C.

Cro E. 168. pl. 5. Kimersly v. Cooper. S. C. but because it was not alleg'd, that London is an ancient City, the Declaration was not good; For it is a thing traversable, the Action being grounded upon it, and therefore adjudg'd for the Defendant——2 Le 98. pl. 120. Rymersly v. Cooper. S. C. and adjudg'd against the Plaintiff for the said Default in the Declaration.

12. **It is a good Custom in London,** That the Mayor, Recorder, or any Alderman, being a Justice of Peace, may take Depositions of **any Person produced before them,** in perpetuam rei memoriam ex parte alicujus Personæ, and that such Depositions shall be recorded there **in perpetuam rei memoriam,** and that these Depositions so taken, for any Persons there given in Evidence, shall be good Evidence to a Jury, **to induce the Consciences of any, and to enforce the Truth. This is a good Custom, though these Depositions may be taken in perpetuam rei memoriam, without any Suit depending contra. Hill. 32 El. B. R. between** *Kinnersby and Cooper.*

13. It

13. **It is not a good Cuſtom in London,** That if a Man becomes Bail for another in an Action there, and the Plaintiff recovers againſt the Principal, and ſues out a Capias againſt him, and the Sheriff returns non eſt inventus, that preſently upon this Return, without any Scire Facias againſt the Bail, the Bail may be taken in Execution upon his Recognizance; **for this is againſt the Law and Reaſon, inaſmuch as if he had ſued his Scire Facias againſt the Bail, they might have pleaded the Releaſe of the Plaintiff, or Death of the Principal &c. Trin. 32 El. B. R. between** *Devered and Ratcliffe*, **adjudged.** Cro. E. 185. pl. 7. S. C. the Cuſtom, adjudg'd unreaſonable. ——2 Le. 29. pl. 33. S. C. ſad-judg'd accordingly.—Cro. C. 561. pl. 5. Mich. 15 Car. B. R. Anon. S. P. as to the City of Weſtminſter.——5 Mod. 95. S. P. per Cur. obiter; but ſaid, that this Cuſtom cannot be ſupported by Reaſon, and though the Cuſtoms in London are confirm'd by Act of Parliament, yet ſuch Cuſtoms which are *contradictory to Reaſon, and* to the *Principles of the Common Law,* ſhall not be allow'd in B. R. 5 Mod. 95. Trin. 7 W. 3.——Jenk. 83. pl. 62. S. P.

14. **So it is not a good** Cuſtom in an inferior Court upon a Judgment in the ſame Precept, in Nature of a Capias ad Satisfaciend' to give a Warrant to the Bailiff to take the Principal in Execution, if he may be found, and in his Default to take the Bail; **for this is againſt the Law to take the Bail before a Capias returned againſt the Principal, and Scire Facias againſt the Bail, Hill. 10 Car. B. R. between** *Seaborne and Savaker*, **per Curiam, upon Demurrer. Intratur, Trin. 10 Car. Rot. 572.**

15. **It is not a good** Cuſtom in an inferior Court (which is not within the Statute of 32 [35.] H. 8.) to grant a Tales de Circumſtantibus, **becauſe this was againſt the Law. Paſch. 16 Jac. B. R. between** * *Goodyeare and Elvin*, **dubitatur. Mich. 11 Car. B. R. between** *Cowpland and Burnet*, **adjudged † in a Writ of Error, upon a Judgment given in the Liberty of the Dean and Chapter of York, and the Judgment reverſed accordingly. Intratur, Hill. 10 Car. Rot. 1195.** * See Tit. Trial (R. e) pl. 1. and the Notes there. † Fol. 564.

16. **It is a good Cuſtom in an** inferior Court, That when any Man comes to the grand Diſtreſs in any Plea, and it is returned that he is diſtrained by his Goods, & quod nihil habet ulterius per quod diſtringi poteſt, that his Goods ſhall be delivered to the Plaintiff, finding Security, that if the Suit paſſes for the Defendant, that he ſhall have again his Goods, **and that, if it paſs for the Plaintiff, that he ſhall have them. Mich. 13 E. 3. B. R. Rot. 160. in Maidſtone in Kent, in the Court of the Archbiſhop.**

17. **A Cuſtom in an** inferior Court, to try Iſſues by Six Jurors, **is not good, though many Courts have uſed it, and many Judgments depend thereupon. Trin. 8 Car. B. R. between** *Tredinwicke and Peryman*, **adjudged in a Writ of Error upon a Judgment in Bodmyn in Cornwall, and the Judgment reverſed accordingly; though it then appeared to the Court, by many Certificates, that more than Twenty Courts in Cornwall have the ſame Cuſtoms, and** infinite Trials there accordingly. Cro. C. 259. pl. 3. Tredimmock v. Perryman. S. C. adjudged, that the Cuſtom was void; and Jones J. ſaid, that though in ſome Parts of Wales there are ſuch Trials by ſix only, that is by reaſon of the Statute of 34 H. 8. which appoints, that ſuch Trials may be by ſix only, where the Cuſtom hath been ſo.—— Cuſtom to *try by ſix Jurors*, unleſs it be in Wales, where it is confirmed by Act of Parliament, or to *take Execution of Body and Goods*, is a void Cuſtom. Sid. 233. pl. 36. Mich. 16 Car. 2. B. R. Aike v. Hunkin.

18. **It is a good Cuſtom in the** County-Palatine of Cheſter, That if Judgment be there given in a baſe Court, and **thereupon** a Writ of Error is brought before the Chief Juſtice there, and he reverſes the Firſt Judgment, to give Coſts to him at whoſe Suit it is reverſed. **Trin. 9. Car. B. R. between** *Foden and Maddock*, **Intratur. Paſch. 8 Car.**

8 Car. Rot. 397. admitted in a Writ of Error, where it was certified as a Cuſtom, and agreed per Curiam, to be a good Cuſtom.

Error of a Judgment in N. in Debt upon Obligation, where the Defendant confeſſed it to be his Deed, but according to the Cuſtom there prayed Quid inquiratur de debito; a Precept was awarded to make an Inqueſt, which was returned, and found to be a Sum certain, for which the Plaintiff had Judgment; This was aſſigned for Error, but becauſe it was done according to Cuſtom, it was not reverſable, and the Judgment was affirmed. Cro. E. 594 pl. 12. Trin. 44 Eliz. B R. Grice v. Chambers.—— An Action of Debt was brought upon a Bond in an Inferior Court; the Defendant cognovit Actionem & petit quod inquiratur per patriam de debito. This Pleading came in Queſtion in B R. upon a Writ of Error; but was maintained by the Cuſtom of the Place, where &c. Hales ſaid, that it was a good Cuſtom; for perhaps the Defendant has paid all the Debt but 10l. and this Courſe prevents a Suit in Chancery. And it were well if it were eſtabliſhed by act of Parliament, at the Common Law. Mod. 96. pl. 1. Mich. 25 Car. 2. B. R. Anon.

19. It is a good Cuſtom in an inferior Court, that in an Action of Debt, if the Defendant does not deny the Debt, but petit quod inquiratur de vero Debito ſecundum Conſuetudinem, that a Jury may be returned, that ſhall try it, and if they find it to be a true Debt, that the Plaintiff ſhall have Judgment thereupon Mich. 11 Car. B. R. between *Smith and Watſon*, adjudged in a Writ of Error upon ſuch Judgment in Norwich, and the Firſt Judgment affirmed accordingly. Intratur, 10 Car. Rot. 676.

20. If there be a Cuſtom in an inferior Court, that if a Man brings an Action againſt another there, and the Defendant appears, and pleads to Iſſue, and at the Day of Trial, the Defendant being ſolemnly called, does not appear, nor find Pledges, qui eum manucapere voluerint, to have his Body from Court to Court, at every Court thereafter to be held, till the Plea be determined as he ought by the Cuſtom, but in Contempt of the Court, receſſit & defaltam facit, and Judgment is thereupon given; yet this is not a good Cuſtom, but utterly unreaſonable; but they ought, according to Law, to take the Inqueſt by Default; for if he had appeared, and ſtaid in Priſon without finding Pledges, yet they ought not to have given Judgment againſt him, if he would have pleaded to Iſſue. Trin. 11 Car. B. R. between *Burges and Sparke*, per Curiam adjudged, and ſuch Judgment given in Plymouth reverſed accordingly. Intratur, Hill. 12 Car. Rot. 576.

‡ Sty. 228. Trin 1650 Oreſwick v. Armery. S. P. and ſeems to be S. C. and Judgment affirm'd; For the Court ſaid, that Debt will lie by a Cuſtom on a Conceſſit Solvere; though it will not if brought by an Executor.—— Sty. 198. Hill. 1649. B. R. Paſchall v. Sparing. S. P. ——S. C. cited 2 Ld. Raym. Rep. 1432. Mich. 13 Geo. B. R. in Caſe of Story v. Atkins, in which it was held in an Action brought in London, that the Cuſtom need not to be ſet forth at large in an Aſſumpſit Solvere, any more than in a Conceſſit Solvere, in which Caſe it has been adjudg'd, the Cuſtom need not be ſet forth at large, but that, declaring Secundum Conſuedudinem &c. was ſufficient; and cited 4 Le. 105. Mich. 29 Eliz. B. R. Poutier's Caſe. And Forteſcue J. ſaid, it had been not long ſince adjudg'd in this Court, in Caſe of Stevens v. Britland, that there is no Neceſſity to ſet out the Cuſtom at large in a Conceſſit Solvere &c. but that laying it ſecundum Conſuetudinem &c. is ſufficient.

* Fol. 565.

21. It is a good Cuſtom in Briſtol, in the Court of Tolſy there, held before the Sheriffs and Bailiffs of the City, to maintain an Action upon the Caſe, upon a conceſſit ſolvere, ſcilicet, that the Defendant conceſſit ſolvere to the Plaintiff 60 l. pro diverſis denariorum ſummis eidem Quærenti per Defendentem prius debitis ſolvend; though this is not good at Common Law, and though a Man cannot beforehand know upon what Contract this is brought till it comes to Trial. Mich. 15 Car. B. R. between ‡ *Orchard and Jenkens*, per Curiam, in a Writ of Error out of Briſtol, where this was aſſigned for Error, that it was againſt the Law, as to this Matter, but reverſed for another Cauſe, and the Judgment affirmed * accordingly. Intratur, Mich. 14 Car. Rot. 194. and ſo adjudged in a Writ of Error upon a Judgment in Briſtol Hill. 11 Car. B. R. Rot. 1238, 1239, in Two Actions between *Lawford and Cooke*, and the Judgments affirmed accordingly.

22. Treſpaſs

22. Treſpaſs by J. againſt B. becauſe the *Plaintiff is Lord of the Hundred and ought to diſtrein for the King's Duties throughout the Hundred*, that he diſtreined ſuch a Day for the King's Duties, and the *Defendant made Reſcouſe*, the *Defendant preſcribed in Cuſtom in his Manor, where* &c. *that when any Diſtreſs is taken there* for Debt of the King, or other Cauſe, that *he ſhall take it and put it into his Park for Three Days, and if the Offender*, in this Time, *tenders Amends, that he ſhall re-have his Goods*, and ſaid, that the Plaintiff's Bailiff diſtreined for Debt to the King, and his Bailiff took it and put it into the Park for Three Days, and demanded Judgment ſi Actio, and becauſe it is only *a Bondage to the Defendant* to keep the Diſtreſs, and no Profit, and that ſuch Cuſtom cannot bind the King without ſpecial Grant of it, therefore by Award the Plaintiff recovered his Damages, and the Cuſtom condemned. Br. Cuſtoms pl. 20. cites 21 E. 3. 4.

23. A Cuſtom was alleged *in the Town of C. that if the Tenant ceaſe by Two Years, the Lord ſhould enter into the Freehold* of the Tenant, *and hold* the ſame *until he were ſatisfied* of the Arrearages, and it was adjudged a Cuſtom againſt the Daw of the Land, to enter into a Man's Freehold in that Caſe without Action or Anſwer. 2 Inſt. 46, 47. cites 43 E. 3. 32.

24. Præcipe quod reddat, where the Cuſtom is, *that the Heir ſhall have his Land at the Age of Fifteen* Years, *or may alien when he can meaſure a Yard of Cloth*, yet in *Præcipe quod reddat*, ſuch Heir ſhall have his Age, and ſo it ſeems, that *Cuſtom ſhall be taken ſtrickly*, and not extend to be ouſted of his Age in thoſe Points. Br. Cuſtoms pl. 14. cites 11 H. 4. 29, 30.

25. A Cuſtom of a Manor was found, that a *Feme Covert might deviſe* her Copyhold Lands to her Baron, or to a Stranger, by Aſſent of her Baron; The Court thought the Cuſtom not unreaſonable. Mo. 123. pl. 268. Paſch. 25 Eliz. Anon.

Godb 143. pl. 178. 33 Eliz. C. B. Shipwith v. Sheffield. S. P. of a Gift to the Husband; but the Court held the Cuſtom unreaſonable, and it ſhall be intended, that ſhe being ſub Poteſtate viri, did it by Coercion. Fleetwood urged, that the Cuſtom might be good, becauſe the Wife was to be examin'd by the Steward of the Court, as the Manner is upon a Fine, to be examin'd by a Judge; but to this the Court ſaid nothing.——3 Le. 81. pl. 122 Paſch. 20 Eliz. C. B. Skipwith's Caſe. S. C. adjornatur.—— 2 And. 152. per Cur. cites 3 E. 3. It. North, where it was agreed, that ſuch Cuſtom was not allowable by Law.

26. In a Writ of Error by W. v. B. upon a Judgment given in the Court of the City of Briſtol; the Caſe was, that B. was Plaintiff in the ſaid Court, againſt W. in an Action of Covenant, and declared of a *Covenant made by Word by the Teſtator of W. with B.* and declared alſo, that within the ſaid City there is a *Cuſtom, that Conventio Ore tenus facta, ſhall bind the Covenantor, as ſtrongly as if it were made by Writing*; and it was holden by the Court, that that Cuſtom doth not warrant this Action, for the Covenant *binds by the Cuſtom the Covenantor, but does not extend to his Executors*, and a Cuſtom ſhall be taken ſtrictly, and therefore the Judgment was reverſed. 2 Le. pl. 3. Hill. Eliz. B. R. Wade v. Bemboe.

An Action of *Debt* was brought *upon a Conceſſit Solvere, according to the Law Merchant, and the Cuſtom of the City of B.* and Exception was taken, becauſe the Plaintiff did *make mention in the Declaration of the Cuſtom*; But becauſe in the End of his Plea he ſaid, Proteſtando ſe ſequi querelam ſecundum Conſuetudinem civitatis B. the ſame was awarded to be good; and the Exception diſallowed Godb. 49 pl. 61 Mich. 28 & 29 Eliz. B. R. Anon. —— Sty. 145. Mich. 24 Car. B. R. in Caſe of Twigg v. Roberts, the Court ſaid, that this Cuſtom had been allow'd againſt the Party that made the Contract; but the Doubt in the Principal Caſe is, Whether it be good againſt an Executor? For a Conceſſit Solvere is without any Conſideration, and Roll Ch. J. ſaid, this Cuſtom breaks three Rules of the Law.

But there may be a Cuſtom in a Manor, *that every Tenant that holds in Bondage, the Freehold being in the Lord*, ſhall pay ſuch Fine, though his Perſon be free. Ibid. —— Litt. S. 209. and Co. Litt. 139. b. 140. a.

28. A Lord cannot preſcribe *to have a Fine of every Tenant that marries his Daughter without his Licence*, for it is againſt the Freedom of a Freeman, that is not bound thereto by a particular Tenure. Hawk. Co. Litt. 211.

29. No Cuſtom can help that which is againſt Common Law, As where in Caſe, the Court of S. the S. the Defendant made Default, & habuit Diem per Conſuetudinem Villæ prædict. this is againſt Law, it being an apparent Diſcontinuance, and Judgment there given was reverſed. Cro. J. 357. pl. 15. Mich. 12 Jac. B. R. Peplow v. Rowley.

30. A Cuſtom was alleged *in the Spiritual Court, that all thoſe that dwell in ſuch a Houſe had uſed to find Meat and Drink for the Churchwardens and the Parſons, going in Proceſſion in Rogation Week*, at the ſaid Houſe; but the Cuſtom was held to be againſt Law. Mo. 916. pl. 1301. Mich. 13 Jac. Reynolds's Caſe.

31. Cuſtom alleged, that he and all the Occupiers of the ſaid Meadow-Cloſe have uſed *fugare & refugare averia*, from the Meadow-Cloſe to the Moor-Cloſe, and from thence to the Court-Cloſe; This is a Cuſtom only *to do a Wrong* and ſo not good, and Judgment accordingly, 3 Bulſt. 326. Hill. 1 Car. B. R. Turner v. Denning.

32. In the *Borough Court of Southwark*, a *Capias* was awarded *againſt the Defendant*, who was ſued there *as Adminiſtrator, and Devaſtavit returned* upon him, and *Fieri Facias* was awarded *againſt the Bail, ſecundum Conſuetudinem*; it ſeems admitted, that this Cuſtom is void; but the Writ of Error was abated, becauſe the Principal and Bail joined in it. Palm. 567. Trin. 4 Car. B. R. Plaw v. Richards.

Mod. 202. pl. 33. S. C. adjudged, North dubitante.

33 Treſpaſs for taking Beef; the Defendant pleads a Cuſtom *to chuſe Superviſors of Victuals at a Court-Leet*; that he was there choſen, and having reviewed the Plaintiff's Goods, *found* the *Beef to be corrupt, which he took and burned.* The Plaintiff demurs, for that the Cuſtom is unreaſonable, and when Meat is corrupt and ſold, there are proper Remedies at Law, by Action on the Caſe, or Preſentment at a Leet; and cited 9 H. 6. 53. 11 E. 3. 4. 6. and Stat. 18 Eliz. cap. 3. But the Court held it good Cuſtom, and Judgment was given for the Defendant; the Chief Juſtice being not clear in it. 2. Mod. 36. Trin. 27 Car. 2. C. B. Vaughan v. Wood.

3 Keb. 361. pl. 37. S C. held accordingly, and that the Security ſhould be only for Appearance, and not for the Debt.

34. Treſpaſs for taking his Goods; The Defendant juſtifies by Virtue of four ſeveral Attachments out of *Bloomsbury Court* and ſets forth that the Cuſtom there is, *upon ſuch Attachment to detain the Goods till the Owner give Security ad Satisfaciendum the Plaintiff de debito.* Reſolved the Cuſtom was unreaſonable. Freem. Rep. 321. pl. 400. Mich. 1674. B. R. Watſon v. Parſons.

35. It is a General Rule that Cuſtoms are *not to be enlarged beyond the Uſage*, becauſe it is the Uſage and Practice that makes the Law in ſuch Caſes, and not the Reaſon of the Thing. Per Trevor Ch. J. Gibb. 243.

For more of Cuſtoms in General, See **Cuſtom**, and other Proper Titles.

(A) Cuſtoms

Cuſtoms of London.

(A) An *Action* brought there by the Cuſtom. Fol. 550.

1. AN Action by the Cuſtom lies in London for theſe Words ſpoke of a Woman, Thou art a Whore, and will play the Whore for Two-pence, for in London ſuch Women ſhall be carted. M. 13 Car. B. R. between *Bavoir* and his Wife, againſt *Cooper*, per Curiam, after an Habeas Corpus and Procedendo granted, a Superſedras was denied; But the Opinion of Berkeley was the contra, for that Co. 4. Oxford's Caſe, is contra; And in this theſe Precedents were cited, ſcilicet, between *Bond and Watſon*, Trin. 8 Car. B. R. a Procedendo granted for ſuch Words, and a Superſedeas denied per Curiam; And the Court ſaid in this Caſe, That if a Judgment be given in London in this Action, a Writ of Error lies, in which the Law may be decided; and therefore it is not reaſonable to grant a Superſedeas to hinder the Suit there. Trin. 1650, between || *Penton and Harriſon*, adjudged per totam Curiam, and a Procedendo granted accordingly, where the Words were, Thou art a Whore, and my Husband's Whore.

* Cro. C. 486. pl. 11. Bower & Ux. v. Cooper, S. C. accordingly. † Sty. 229. Denton v. Hariſon, S. C. accordingly. —— Cro. C. 550. pl. 14. Hill. 9 Car. B. R. Hart's Caſe, a Procedendo was denied, and ſaid, that an Action lies not, but that ſhe ſhould ſue for Defamation in the Spiritual Court only. —— Mar. 107. pl. 184. Trin. 17 Car. B R. Anon. a Procedendo was granted, and ſaid by the Counſel, and agreed by the Court, that of late Years many Procedendo's had been granted in the like Caſes in B. R. —— Sty. 69, 70. Mich. 23 Car. Iſaack v Green, S. P. adjornatur. — S. P. and Procedendo granted by three Juſtices, Hide Ch. J diſſenting. Raym. 81. Mich. 15 Car. 2. B R. Hawes v. Wheeler. — Lev 116. Mich. 15 Car. 2. B. R. Wheeler v. Welch, S. P. ſeems admitted, and ſeems to be S. C. —— Keb. 578. pl. 40. S. C. adjornatur, Haies v. Wheeler. —— A Procedendo was granted. Carth. 75, 76. Mich. 1 W. & M. in B. R. Watſon v. Clerke.

2. Debt, becauſe the Defendant was with him at Table by ſeven Weeks for 12 d. the Week, the Defendant tender'd to wage his Law. Laicon ſaid to the Law, he ſhall not be receiv'd; for he was at Table *in London*, where *by Cuſtom he cannot wage his Law for Boarding*. Per Littleton, this is no Matter here. Per Billing, the Action lies here, if he *counts upon the Cuſtom*. Br. Cuſtoms; pl. 43. cites 1 E. 4, 5.

3. *As in Rationabili parte Bonorum* here. Ibid.

4. *Contra upon the Cuſtom of ſuch a Country*. Ibid.

5. For where the *Cuſtom* is *ariſing upon the Land, this is allowable in every Court, as Gavelkind, Borough-Engliſh*, and *Feme to have Dower of the Moiety, but for an Infant to have Portions of Goods*, this *ſhall not be maintain'd in the Court only where the Cuſtom is*. Br. Cuſtoms; pl. 43. cites 1 E. 4, 5.

6. *The ſame*, that *in Debt a Man ſhall not wage his Law, where an Alderman of London witneſſes the Contract*; thoſe Cuſtoms ſhall be allowed in the Places where they ariſe, but not in this Court, or in another Court, and therefore the Law does not lie here. Br. Cuſtoms, pl. 43. cites 1 E. 4. 5.

7. All *ſuch Cuſtoms pleaded in Bar* here are good Barrs here; *But when Action ſhall be brought upon a private Cuſtom, this ſhall not be brought in Bank*, as *Debt in London againſt Executors upon a Simple Contract*

tract, does not lie here, but it lies well in London; for there the Cuſtom is known, and *yet ſuch Recovery had there, and pleaded here, is a good Bar*, quære; For the beſt Opinion was, that the *Law lies well*. Br. Cuſtoms, pl. 43. cites 1 E. 4, 5.

Mo. 136. pl. 280. (bis) Trin. 25 Eliz. Anon. S. P. and ſeems to be S. C. and a Procedendo was granted.

8. *O. and J. were bound as Sureties with one A. to B. who recovered againſt J. in London, and had Execution* againſt him; and now *J. ſued O. to have of him Contribution* to the ſaid Execution, ut Uterque oneretur pro rata, *according to the Cuſtom of London*; *O removed the Cauſe by Privilege into B. R.* whereupon came J. and prayed a Procedendo; and becauſe, upon this Matter, no Action lies by the Courſe of the Common Law, but only by Cuſtom in ſuch Cities, the Cauſe *was remanded*; for otherwiſe, the Plaintiff ſhould be without Remedy. 2 Le. 166, 167. pl. 202. Paſch. 26 Eliz. B. R. Offley v. Johnſon.

9. *Debt in B. R. upon a Recognizance acknowledged to the Chamberlain of London*, according to the Cuſtom *for Orphanage Money*, adjudged per tot. Cur. to be well brought in B. R. Cro. E. 682. pl. 13. Trin. 41 Eliz. B. R. Wilford's Caſe.

10. By the Cuſtom of London, the Debtor may be *arreſted before the Money is due*, to make him find Sureties. Vent. 29. Paſch. 21 Car. 2. B. R. in a Nota there.

Litt. Rep. 324 S. C. in totidem Verbis, ſaving that Litt. is in French, and Hetl. in Engliſh.

11. A Woman declared, by Bill original, in Nature of Debt *pro Rationabili parte Bonorum*, in the Court of the Mayor and Aldermen of London, and *alleges the Cuſtom*, that when Citizens and Freemen of London die, their Goods and Chattles, above Debts and neceſſary Funeral Expences, ought to be divided into three Parts, and *that the Wife of the Teſtators ought to have one Part*, the Executors another, to diſcharge Legacies, and diſpoſe at their Diſcretion, and the Children of the Teſtator, Male or Female, which are not ſufficiently provided for in the Life of the Father, to have (notwithſtanding the Legacies in the Will) the other third Part, and that the Suit for the ſame ought to be in that Court &c. But the Court agreed, that it may be remanded here, and that being removed in B. R. it may be proceeded upon here, and that it is an Original Writ by the Common Law; and ſaid, there were ſeveral Precedents to this Purpoſe. And Richardſon Ch. J. ſaid, that the Plaintiff might have declared, without alleging the Cuſtom, becauſe it was well known there; but otherwiſe, where an Action upon the Cuſtom is brought in a Place where the Cuſtom extends not. Hetl. 158. Hill. 5 Car. C. B. Caſon's Caſe.

2 Keb. 585. pl. 122. Moreton v. Packman & Ux. S. C. and a Procedendo was awarded.

12. A Cauſe was removed out of London by Habeas Corpus, wherein the Plaintiff had declared againſt the Defendant as a *Feme Sole Merchant*; and Bartue moved for a Procedendo, becauſe (he ſaid) they could not declare againſt her here as a Feme Sole, for that ſhe had a Husband. Jones contra. The Husband may then be joined with her, for he is not beyond Sea. Twiſden ſaid, I think a Procedendo muſt be granted for the Cauſe alleged. It was reſolved in the Caſe of *Langlin and Brewin*, in Cro. (though not reported by him) That if the Wife uſe the ſame Trade that her Husband, ſhe is not within the Cuſtom. And they are to determine there, whether this Caſe be within their Cuſtom; perhaps a Victualler (as this Trade is) is not ſuch a Trade as their Cuſtom will warrant; and whether it will warrant it or not, is in their Judgment. A Procedendo was granted. Mod. 26. pl. 70. Mich. 21 Car. 2. B R. Anon.

2 Saund. 252. Green v. Cole.

13. *Waſte* was brought in the Huſtings upon a Leaſe for Years of a Brewhouſe. Lev. 309. Hill. 22 and 23 Car. 2. B. R. Cole v. Green.

S. C.——Mod. 94 pl. 4. Cole v. Forth. S. C.——3 Keb. 8. S. C.

13. Holt

13. Holt moved for a Procedendo in an *Action againſt a Feme Sole, Merchant in London*, removed hither, and alleged, That by the Cuſtom of London, it ſhould be tried there; and it was granted per Cur. Comb. 42. Hill. 2 and 3 Jac. 2. B. R. Soan v. Mace.

(B) The Cuſtom *touching Orphans.*

1. A Woman before **ſhe contracts** Marriage **with J. S.** agrees **with him,** that ſhe ſhall have Power to deviſe the Sum of 200 l. **to any Perſon, and after the Marriage,** ſhe, by her Will, gives it to the Children of the firſt Husband, **and dies.** The Husband after acknowledges a Judgment **at the Common Law** for the Security **of** it, **yet,** by the Cuſtom of Orphans of London, he may be compelled by the Court of Orphans **of London,** to give new Security for it at the Chamber of London. **Paſch. 17 Jac.** *B. Andrews's* **Caſe per Curiam.** Hutt. 30. S. C. & S. P. per Cur. accordingly, and being committed for Refuſal he brought a Habeas Corpus, but he was remanded; for the Court held it a laudable Cuſtom.

2. **If a Man for Orphanage-Money** gives a Security in the Prerogative Court, **yet he** may be compelled to give other Security to the Chamber of London. **P. 17 Ja. B. ſaid by Hutton to be the Caſe of one *Luſh*, of late Time, reſolved.** Hob. 247. pl. 315. Mich. 16 Jac. Luch's Caſe, S. C. and though the Deceaſed in this Caſe was a Free-woman Fiſhmonger, yet becauſe the Adminiſtrator, who had exhibited an Inventory of 1000 l. Debt unreceived, was required to give Bond to the Chamberlain, which he refuſed, and though it was alleged for the Adminiſtrator, who was committed, that he was already bound in the Prerogative Court to make Account, and ſo he ſhould be twice bound; and likewiſe alleg'd, that he was inform'd that there were no ſuch Cuſtom for Widows of Freemen, the Court anſwered, that they could not examine the Truth of the Cuſtom, but the Validity of it, and they held it reaſonable enough if it were true; and if the Eccleſiaſtical Court would impugn a lawful Cuſtom, the Court might grant a Prohibition. —— Hetl. 132. Lache's Caſe, S. C. in much the ſame Words. —— S P. objected, that the Cuſtom alleged is not purſued, for it ought to be a Free-man, and not a Free-woman, and likewiſe, that ſhe dwelt out of London; But Coke and Doderidge held it good enough; for Homo includes both Sexes, and if ſhe was dwelling at Briſtol it is not material; for ſhe may be Frank notwithſtanding this; and a Procedendo was granted. Roll Rep. 316. pl. 27. Hill. 13 Jac. B. R. Spencer's Caſe.

3. **In London there hath been a Court of Orphans Time out of Mind, and there hath been a Cuſtom,** That if any Free-man, **or Free-woman,** dies, leaving Orphans under Age unmarried, **that** they have had the Cuſtody of their Body and Goods, and that the Executors and Adminiſtrators have uſed to exhibit true Inventories before them; and **if there appeared to be any Debt,** to be bound to the Chamberlain, to the Uſe of the Orphans, in a reaſonable Sum, to make a good Account **thereof** upon Oath, **after they have received them,** and if they refuſed, to commit them till they were bound. **This is a good and reaſonable Cuſtom; and if the Eccleſiaſtical Court will compel them to make an Account there againſt this Cuſtom, a Prohibition lies. Hobart's Reports, Caſe** 313. *Zuche's* **Caſe.** Hob. 347. pl. 315. Luch's Caſe, S. C. —— Hetl. 132. Laſhe's Caſe, S. C. See the Note to pl. 2. ſupra.

4. Adjudged that if an *Orphan*, who by the Cuſtom of London is under the Government of the Lord Mayor and Aldermen, *ſues in the Spiritual Court for any Goods, Money &c. due* to him, either by the Cuſtom of London or by any Legacy &c. or to have an Account, that a *Prohibition ſhall be granted*, becauſe the Government of Orphans of London doth by Cuſtom belong to the Lord Mayor and Aldermen, and they But though an Orphan has the Privilege to ſue there, yet if he conceives it more ſecure

and better for him to ſue in the

they have Juriſdiction of them. 5 Rep. 73. b. Paſch. 35 Eliz. B. R. Orphans of London's Caſe.

Court of Requeſts, [as in the principal Caſe he did] then he may waive his Privilege of ſuing in the Court of Orphans, and ſue in the Court of Requeſts; For Quilibet poteſt renunciare Juri pro ſe introducto &c. per tot. Cur. and Heath J. ſaid, that he always conceived the Law againſt the Caſe of Orphans in 5 Rep. 73. b.

It was ſaid per Coke Att. Gen. to have been ſo adjudged in the

5. *Debt lies in B. R.* on a *Recognizance* acknowledged to the Chamberlain, according the Cuſtom of London, *for Orphanage Money.* Cro. E. 682. pl. 13. Trin. 41 Eliz. B. R. Wilford's Caſe.

Caſe of Sharington v. Fulwood. —— 4 Rep. 64. b. S. C.

Raym. 116. S. C. adjudged per tot. Cur. for the Defendant.

6. In Treſpaſs and falſe Impriſonment, the Defendant juſtified by the Defendant juſtified by the Cuſtom of London, that the Mayor and Aldermen had the Cuſtody of Orphans (viz. of the Males till Twenty one, and of the Females till Twenty one or Marriage; and that the Plaintiff *took a City Orphan out of the Guardianſhip of A.* and at the next Court was committed Priſoner to the Defendant; On Demurrer by the Plaintiff, Exception was taken, that the Plea was not good, to take a Perſon without Notice of his Crime and to carry him to the Court to be immediately committed; that he ought to have Notice of what he was brought to the Court for, ſo that he might prepare to Anſwer. But the Court held it good, and gave Judgment for the Defendant. Lev. 162, 163. Paſch 17 Car. 2. B. R. Wilkinſon v. Boulton.

Raym. 117. S. C. & S. P.

7. As to the taking and *marrying Orphans* of London *without Licence* a *Peer has no Privilege* for ſuch Offence. Lev. 163. Paſch. 17 Car. 2. B. R. in Caſe of Wilkinſon v. Boulton.

2 Vent. 340. S. C. and Ld. Keeper Bridgman, aſſiſted by Twiſden and Wylde,

8. The *Portion of an Orphan in the Chamber of London* is of ſuch a Nature, that if the *Husband dies* without altering the Property, his *Widow and not the Executors ſhall have it.* Chan. Caſes 182. Trin. 22. Car. 2. Pheaſant v. Pheaſant.

held clearly that this was a Choſe en Action, and not deviſable. —— S. C. cited Vern. 89.

Mod 77. pl. 36. and 79 pl. 43. S. C. and H's not knowing that ſhe was an Orphan is not material. —— 2 Lev. 32. The King v. Harwood, S. C. reſolved.

9. H. was committed to Newgate by the Court of Orphans, for that he *married an Orphan without Licenſe* firſt obtained, and *was fined* 40 *l. and refuſed to pay it*; H. brought a Habeas Corpus, to which ſeveral Exceptions were taken, and among the reſt, one was, that it was not returned, that H. was a Freeman, but that and all the others were over-ruled, and he was remanded. Vent. 178. Hill. 23 & 24 Car. 2. B. R. Harwood's Caſe.

—— S. C. cited 3 Wms's Rep. 118. in a Note by the Reporter.

It was ſaid contra. Ch. Prec. 537. Mich. 1720. Anon.

10. If a Man *marries* an Orphan, who *dies under Twenty-one*, her Orphanage Part ſhall not *ſurvive* to the other Children, but ſhall go to the Husband. Vern. 88. Mich. 1682. Fowke v. Lewen.

11. One P. was *committed by the Mayor and Aldermen* of London *for marrying an Orphan without their Conſent*; and was brought into B. R. by Habeas Corpus; P. was alſo *fined* 900 *l.* and this Conviction of his Fine was removed by Certiorari. Exception was taken to this Conviction, becauſe *the Cuſtom, as ſet out, was, that they had Power to commit the Party offending where he took away an Orphan, and ſuch Orphan ſo taken away did marry*; But here the Fine is ſet for marrying without their Conſent, and it *ſays nothing as to the taking away.* But Per Holt Ch. J. every marrying is a taking away out of their Cuſtody. Hill. 4 Ann. Reg. B. R. The Queen v. Pullen.

12. A

12 A Child, entitled to an *Orphanage Part*, *dying before Twenty-one and unmarried*, * cannot *deviſe* it by her Will; for by the Cuſtom it †*ſurvives* to the other Children; but ſhe may deviſe what *Share comes* to her out of her Father's Perſonal Eſtate *by the Statute of Diſtributions*. 2 Vern. 558. Trin. 1706. Wilcocks v. Wilcox. Ch Prec. 207 Mich 1702. Jeſſon v. Eſſington. ——Ibid. 537. Anon. and cites it

decreed per Harcourt C. and Cowper C. ſucceſſively, in the Caſes of Ambroſe v. Ambroſe, and of Rawlinſon v Rawlinſon.

† The Orphanage Part ſhall ſurvive *even after a Diviſion*, and Partition made between the Children, but what was deviſed to them out of the Father's Part the Mother will come in for a Share of, according to the Statute of Diſtributions; Per Ld. Harcourt. Ch. Prec. 372. Trin. 1713. Leoffes v. Lewen.

13. An Orphan cannot *releaſe her Cuſtomary Share* it being a meer future Right, nor can the Husband do it do it, per Ld. Macclesfield; but whether ſuch Releaſe will not *amount to a Compoſition*, or Agreement in Bar of her future Right, or be as they call it, a compounding for her cuſtomary Share was not not determined. Ch. Prec. 544. 546. Mich. 1720. Kemp. Kelſey. Decreed that it is a Bar; Per Ld. Macclesfield. Trin. 1722. Ch. Prec. 594 S. C.

——S. P. but not determined. Wms's Rep. 634. to 647. Paſch. 1720. Blunden v. Barker.

14. The Husband of the Daughter of Freeman (who had another Daughter and a Son) *upon receiving a ſuitable Portion releaſed all Right and Intereſt, which he had, or might have* by the Cuſtom or otherwiſe, except what the Father ſhould give by Will or otherwiſe, and by the ſame Deed *covenanted that at any Time after the Death of the Father-in-Law he would do any further Act for releaſing of any Right, which he might have by the Cuſtom*, to the Executors &c. of the ſaid Father. The Court ſeemed inclined that the Releaſe being for a Valuable Conſideration, purporting an Agreement to quit the Right, to be binding in Equity; but however the Covenant for a Valuable Conſideration to releaſe the future Right is good, and the Executor having, before the Bill brought, tendered a Releaſe, which the Husband refuſed to execute, the Court decreed an Execution. 2 Wms's Rep. 272. Paſch. 1725. Cox v. Belitha.

15. *And* where the ſame Freeman had *left to his other Daughter (a very Weak Woman)* 3500 *l.* by his Will, and ſhe being Forty Years old, and not likely to marry, and the *Father*, after making the Will (as was poſitively ſworn by the Son the Defendant) *deſired the Son to ſecure to his ſaid Siſter an Annuity of* 250 *l. a Year, in Satisfaction of her Legacy*, which he accordingly did; and ſhe, in a Publick Manner, with the *Conſent of her Relations*, and Friends, *and the Brother-in-Law and Siſter*, as alſo the Tſuſtee in the Father's Will, *were Witneſſes* to the Deed, releaſed all her Right to her Father's Perſonal Eſtate by the Cuſtom of London to her Brother; And the Brother-in-Law and his Wife, after the Death of the ſaid Siſter, bringidg a Bill for her Orphanage Part, the ſame was diſmiſſed with *Coſts*, and decreed the Brother-in-Law in the Croſs Cauſe to releaſe his Right to the Cuſtomary Part in Purſuance of the Covenant, and to pay Coſts there alſo. Per Jekyl and Gilbert Commiſſioners. 2 Wms's Rep. 272. 274. Paſch. 1725. Cox v. Belitha.

16. The Cuſtom of London is, where there are ſeveral Children, the Father may appoint a Right of Survivorſhip amongſt them If there be a Male Child only, the Father may deviſe over his Orphanage Part, if ſuch Male Child die before the Age of Twenty-one Years, and if there be a Female Child only, then the Father may alſo deviſe over in Caſe ſuch Female Child die before the Age of Twenty-one, or her Marriage. MS. Rep. Paſch. 13. Geo. in Canc. Piddington v. Mayne.

17. *Bill*

17. *Bill againſt the City of London* by Plaintiff, *in Behalf of himſelf and the Reſt of the Proprietors of Orphan Stock*, to have an Account of the Produce of that Fund, and to have the Surplus of that Fund for ſome Years laſt paſt to be applied to make good the Deficiencies of former Years, for that by Stat. of *5 & 6 W. & M. cap.* 10. *Sect.* 13. the Produce of that Fund is applied for the Payment of the Annual Sum of 4 l. per Cent. to the Proprietors, or ſo much thereof only, as the Money, by this Act appointed to be raiſed and paid as aforeſaid, ſhall Yearly amount unto, to ſatisfy and pay towards the ſaid Intereſt to the ſaid Orphans equally in Proportion &c. and that there is no Proviſion by the ſaid Act, for making good the Deficiency of any former Year by the Surplus of any ſubſequent Year &c. King C. aſſiſted with Raymond Ch. J. and Jekyl Maſter of the Rolls held that the general Intent and Scope of this Act was, to ſecure 4 l. per Cent. to the City Orphans for ever, for the reſpective Sums due to them from the City, and the ſeveral Funds thereby raiſed, are appropriated for that Purpoſe, and the City is made Truſtee for them, and are to have no Benefit by thoſe Funds, until the 4 l. per Cent. be paid to the Orphans; and though *Sect.* 13 of the Act *ſays, that the Fund ſhall be Yearly applied only to the Payment of the Annual Intereſt of 4 l. per Cent.* yet *the Word (only) in that Place ſhall not controul and overthrow the general Tenor and Scope of the whole Act*, and that Clauſe *ſeems chiefly calculated for the Benefit of the Orphans to prevent any Miſapplications*, or to apply any Part of the Annual Fund to make good former Deficiencies before the 4 l. per Cent. for the current Year be fully paid and ſatisfied, and not give the Benefit and Advantage of any Yearly Surplus to the City, till all former Deficiencies be made good to the Orphans.

Decree, That the City ſhall account for the ſeveral Years Surpluſſes received by them, and pay over ſuch Supluſſes to the Orphans pro Rata, until the former Deficiencies be made good to them &c. Per Cur. MS. Rep. Hill. 2 Geo. 2 Canc. Ladds v. London City.

12. Where the *Husband* was *attainted of Felony, and pardoned on Condition of Tranſportation; and afterwards the Wife became intitled to ſome perſonal Eſtate, as Orphan* to a Freeman of London; this Perſonal Eſtate was *decreed to belong to the Wife, as to a Feme Sole.* 3 Wms's Rep. 32. Trin. 1729. Newſome v. Bowyer.

[B. 2] As to the Widow's Part.

S. C. cited 10 Mod. 455. Mich. 6 Geo. 1. in Canc. as held accordingly, and that in that Caſe it was held, that there the Father was to be conſidered as dying without Children, and the Eſtate was to be divided into Moieties, the one Moiety to go to the Wife, the other Moiety to be the Teſtamentary Share of the Father, and not at all conſidered what the Nature of the Eſtate was, whether Real or Perſonal, out of which the Children were advanced.

1. WHERE *all the Children were advanced*, the *Widow had a Moiety.* 2 Vern. 666. in pl. 592. Mich. 1710. cites it as the Caſe of Clare v. Acmooty.

2. The Widow is intitled to the *Furniture of her Chamber, or* in Caſe the Eſtate exceeds 2000 l. then to 50 *l. inſtead thereof.* In a Caſe before Lord Parker, 18 Mar. 1718. Biddle v. Biddle.

3. If

3. If the *Wife* be *intitled to her Cuſtomary Part*, and the *Husband dies* [and then *ſhe dies*] the *Executor of the Husband ſhall not have this*, but the [Executor of the] Wife, becauſe it is a Thing in Action. Held by Lord Chancellor. 2 Freem. Rep. 28. in pl. 30. Hill. 1677. Ireton's Caſe.

(B. 3) Cuſtom as to the Wife's Part. Bar thereof by Settlement &c.

1. THE Father, a *Freeman* of London, *poſſeſſed of a Term, aſſigned it to his Son for a Proviſion, and died*; the Widow ſued in Chancery for her Cuſtomary Part; and upon Iſſued tried before Hale, whether by this Aſſignment, ſhe ſhall be barr'd of her Cuſtomary Part; it was proved, and found by the Jury, that ſhe is not bound by it, as being voluntary, but that *ſhe ſhall be intitled to her Cuſtomary Part of it, and ſo* the like as *of Goods*. 2 Lev. 130. Hill. 26 and 27 Car. 2. B. R. City v. City.

2. If a *Woman, before Marriage, agrees to a Jointure in Bar of her cuſtomary Part*, this Agreement ſhall bind her, and ſhe ſhall never after ſue for her Cuſtomary Part. Held by Lord Chancellor. 2 Freem. Rep. 67. pl. 78. Trin. 1681, in Caſe of Bravell v. Pocock.

3. A Freeman of London leaves the City, and *lives in the Country* 20 *Years* together, and marries, and makes his Wife a *Jointure*, and dies, ſhe ſhall have her Share by the Cuſtom; per North K. Vern. 180. pl. 174. Trin. 1683. Rutter v. Rutter.

4. *Marriage Agreement provided, that if the Wife claim any of the Perſonal Eſtate by the Cuſtom* of the Province of York, then the Eſtate ſettled in Jointure ſhould be to other Uſes. Decreed, ſhe is bound by the ſaid Settlement, and ought not to claim any Part of the Perſonal Eſtate; decreed by Lord C. Nottingham. But Lord K. North decreed one Third of the Perſonal Eſtate to belong to her as Adminiſtratrix, and that it was an accruing Right, not barred by the Marriage Agreement. But Lord C. Jefferies ſet aſide the Order of Lord K. North, and confirm'd that of Lord C. Nottingham, and decreed accordingly. 2 Chan. Rep. 252. 34 Car. 2. Benſon v. Bellaſis.

5. A Freeman of London left London, and lived many Years in the Country, and by his *Will deviſed a Leaſehold to B. and all his Books to C.* and as to *all the reſt of his Eſtate*, conſiſting of Money, Goods, Mortgages, and Credits, he gave *the Uſe thereof to his Wife for Life*, and made B. and C. and others, Executors; and directed his Executors, out of his Eſtate, to pay the Wife's Funeral Charges after her Death, and gave her the Uſe of his Plate for her Life, and directed, that his Stock and Eſtate, then in D's Hands, ſhould there remain during her Life, and the Product be paid to her for her Maintenance, and gave ſeveral particular Legacies, and deviſed over the Surplus of his Eſtate after his Wife's Death. It was decreed at the Rolls, and affirmed by the Lords Commiſſioners, that the Wife ſhould have a *Moiety* of the Books and Goods, *though ſpecifically deviſed* to others; and there *being no Child*, the Widow by the Cuſtom was intitled to a Moiety, ſo that the *Teſtator could deviſe no more than a Moiety*, and therefore nothing more paſſed by the Will, and that the ſpecifick Legatees ſhould not have any Satisfaction out of the Surplus for the Moiety evicted by the Widow by Reaſon of the Cuſtom. 2 Vern. 110. Mich. 1689. Webb v. Webb.

Chan Prec. 17. pl. 17. S. C but Ld. Commiſſioner Rawlinſon ſaid, he thought that the Judgment ſhould be paid before other Legacies if there had been any.

6. A *voluntary Judgment given by a Freeman* of London, *payable three Months after his Death*, is to be poſtponed to Debts by Simple Contract, and to the Widow's Cuſtomary Part, but will bind the Freeman's Legatory Part. 2 Vern. 202. Hill. 1690. Fairbeard v. Bowers.

7. Any *Jointure* binds and bars the Wife; per Dee, City Serjeant, and ſaid, that it is called a Compoſition. 2 Vern. 066. in pl. 592. Mich. 1710.

In ſuch Caſe the Husband died worth 18000 l. and had two Sons, and two Daughters, and deviſed two Thirds of his whole Eſtate to his Daughters, and oue Third to his Sons. Per Finch C. the Daughters ſhall have 6000 l. a-piece, and the Sons 6000 l. between them. Vern. R. 6. pl. 4. Paſch. 1681. Love v. .....

8. Where a Freeman of London's *Wife is compounded with before Marriage*, by ſettling a Jointure, though of Land, the Wife is taken as *advanc'd*, and the Children, by the Cuſtom of London, ſhall have a Moiety, as if the Wife was dead, and ſo certify'd in the Caſe of Hall and Ux. v. Lumley. 17 Car. 1. 2 Vern. 665. pl. 592. Mich. 1710. Hancock v. Hancock.

Gilb. Equ. Rep. 28 S. C. in totidem Verbis.

9. The Wife of a Freeman of London *ſhall not take by her Husband's Will, and likewiſe by the Cuſtom, unleſs* it be *ſo declared* in the Will. Chan. Prec. 351. Mich. 1712. Kitſon v. Kitſon. *See 1 P. W. 329. The point ſeems to have been fully debated in Kitſon & Kitſon.*

Abr. Equ. Caſes 157. pl. 4 cites it as decreed Mich. 1714. Pott v. Lee, S. C. in totidem Verbis.

S. C. cited by Mr. Vernon, Arg. as the Caſe of Lee v Pitt, decreed by Ld. Cowper Gilb Equ. Rep. 81.

10. A Widower and Widow being about to inter-marry, and having only Perſonal Eſtate, by *Articles* made before Marriage, agreed, that *in caſe the Husband ſurvived, he ſhould have* 2000 *l. only out of his Wife's Perſonal Eſtate*, and the reſt to be at her Diſpoſal &c. *and in Caſe the Wife ſurvived, then ſhe was to have* 2000 *l. out of the Husband's* Perſonal Eſtate, *without ſaying only, or no more*; the Husband, being a Freeman of London, died, and his Wife brought her Bill for an Account of his Perſonal Eſtate, over and above the 2000 l. and to be let into her Cuſtomary Share thereof; but it was decreed, that the equal Conſtruction of thoſe Articles muſt be to exclude the Wife from any further Share out of the Eſtate; and though the Words were not ſo full to exclude her, yet the *Intent* of the Articles *appearing to be a mutual reciprocal Agreement* between them for ſettling each other's Claim, *ought not to be extended larger on one Side than the other*; and decreed, that the Wife muſt have only the 2000 l. Gilb. Equ. Rep. 95, 96. Trin. 1 Geo. cited in the Caſe of Pitt v. Lee.

11. Bill by a Widow of a Freeman of London, for her Cuſtomary Share of her late Husband's Eſtate.

The Caſe was. The Husband made his Will, and *deviſed to his Wife ſeveral Shares in the New River Water, with Remainder over* &c. *and gave her ſeveral Legacies*; the *Will was ſealed up* in a Sheet of Paper *and, incloſed in the ſame Paper, was a Bond* found, *executed by the Teſtator ſome Time before the Date of the Will*, which Bond was *conditioned to pay the Defendant, being his Nephew, the Sum of* 1000 *l. or to transfer to him* 1000 *l. Stock* in the Million Bank, *but* this Bond appeared to be voluntary, and *not given upon a valuable Conſideration* &c.

1ſt Quære; If this voluntary Bond ſhall be taken as a Debt due from the Teſtator, and conſequently to be paid out of the Teſtator's Perſonal Eſtate, before the Widow's Cuſtomary Share.

2dly, If the Widow muſt renounce and diſclaim all Benefit and Advantage by the Will, as well the Deviſe of the Shares in the New River for her Life, being Real Eſtate, as the Deviſe of Perſonal Chattels to her.

Trevor,

Trevor, Maſter of the Rolls ſaid, the Plaintiff *muſt diſclaim all Benefit and Advantage by the Will, if ſhe will have a Decree for her Cuſtomary Share, contrary to the Will*, and this is the conſtant Courſe of this Court.

2dly, This *Bond* being in Nature of a voluntary Gift, *is fraudulent* qoad *the Wife's Cuſtomary Share*, and ſhall not ſtand in her Way, and ſuch ſort of Contrivances to evade the Cuſtom, are always ſet aſide in this Court. Decreed accordingly. MS. Rep. Trin. 2 Geo. Canc. Edmundſon v. Cox.

12. A. a Freeman of London *purchaſed Land in the Name of B. and C. but no Truſt was declared.* The Conſideration Money (being 9400 l.) was mentioned to be paid by B. but was prov'd to be A's Money. But B. (who was an Attorney at Law) kept the Writings, and received the Rents of ſo much, as was lett, of the Eſtate, and A. by a Paper, all his own Hand Writing, purporting an Eſtimate of his Eſtate, and what he was worth, had charged B. as Debtor for Money lent him to buy the ſaid Eſtate, and alſo for Intereſt thereof. *A. died*; *B.* afterwards *executed a Declaration of Truſt.* Decreed, That this Declaration after A's Death, is ſufficient to bar the Widow's Cuſtomary Part. But the Court, upon the Circumſtances, recommended it to the Heirs or Deviſees of A. to let the Wife come in for Dower of this Truſt Eſtate. Wms's Rep. 321. Trin. 1716. Ambroſe v. Ambroſe.

This Decree was affirm'd in the Houſe of Lords in June 1717. Ibid. 323.

13. A Freeman *bequeath'd a Legacy to his Wife*, which, with the other Legacies, did not exceed the Husband's Teſtamentary Part, ſhe ſhall take both the Legacy and her Cuſtomary Part; per Lord C. Parker. Wms's Rep. 533. Hill. 1718. Babington v. Greenwood.

Wms's Rep. 533 at the Bottom of the Page, has a Quære added by the Publiſher, Whether ſuch Legacy muſt not be *given out of the Teſtamentary Part*, as (he ſays) appears from the Reporter's Notes to have been determined about this Time, in the Caſe of Beddle v. Beddle?

14. *Money of the Husband's and Wife's*, by Marriage Articles, lodg'd in Truſtees Hands, to be *laid out in Lands*, and ſettled, and to be in bar of Dower and Jointure is no Bar of the Cuſtomary Part; per Lord Macclesfield. For the Money in this Caſe, as ſoon as the Articles are executed, is to be look'd upon as Land too. Ch. Prec. 505, 508. Mich. 1718 Babington v. Greenwood.

15. A Citizen of London *jointures his Wife before Marriage with Land*, to which the Cuſtom did not extend. Lord Chancellor ſent to the City to certify, whether this Jointure did not bar her of her Cuſtomary Right? It was certified that it did not, becauſe not made in Bar of her Cuſtomary Part; but that had it been made in Bar, it would have bound her. 10 Mod. 457. Mich. 6 Geo. 1. in Canc. Arg. cites it as the Caſe of Atkins v. Waterton.

Gilb. Equ. Rep. 94. S C. argu'd, and Ld. Chancellor thought the Caſe very ſtrong that ſhe was intitled, but deſired to have the Cuſtom certified —— Equ. Abr. 157. &c. pl. 5. S.C. ſays, that the Certificate was, that had it been made in Bar of her Share of the Perſonal Eſtate it had been a Bar, but if expreſſed only in Bar of Dower, or Thirds of Lands, the ſame had never been in Controverſy in this Court, nor had they any Cuſtom concerning it. It was afterwards decreed, Paſch. 2 Geo. 1. to be no Bar of the Cuſtomary Share. —— Chan Prec. 508. S. C. cited as clearly decreed to be no Bar.

Both the ſame Points held accordingly by Ld. C. Parker, and ſaid, that Land, or a Real Eſtate, is of a quite different Nature from Perſonal Eſtate, and a Matter wholly out of the Cuſtom. Wms's Rep. 531, 532. Hill. 1718. in Caſe of Babington v. Greenwood.

16. Acceptance of a Settlement before Marriage *out of the Perſonal Eſtate, without any Notice taken of the Cuſtom*, bars the Widow's Cuſtomary Part of the Perſonal Eſtate, if ſhe ſurvives, as by Virtue of the Cuſtom, but does not debar her of taking any Gift or Deviſe the Huſband thinks fit to make her. Abr. Equ. Caſe 159. Trin. 1727. Lewen v. Lewen.

Select Caſes in Canc. in Ld. King's Time, 14. May 4. 1725. S. C. but not decreed. —— 3 Wms's Rep. 15 pl. 5. S. C. Ld. Chancellor declared, that the Wife in this Caſe was barr'd of her Cuſtomary Part.

(B. 4) Orphans Protected, Favour'd, and Reliev'd.

1. 4 & 5 *P. & M. cap.* 8. *S.* 7. DOES *not to take away any Cuſtom touching any Orphan within the City of London.*

2. The Defendant was bound by *Recognizance to the Chamberlain of London for payment of* divers Sums of Money for *Orphans Portions*; and departed out of this City, and *dwelt in Oxfordſhire*, leaving no Eſtate behind him in the City; ſo as the Proceſs of the City cannot take hold; therefore a Subpæna is granted againſt him upon Pain of 100l. to appear before the Mayor and Aldermen, and to ſtand to their Order. Cary's Rep. 60. cites 2 Eliz. fol. 5. Mayor &c. of London v. Dormer.---Afterwards fol. 67. Order'd, if he do not appear, an Attachment is granted.

3. An Orphan under Age whoſe Father left him 1000l. which was in the Chamber of London, *married a Wife with a good Portion*, ſhe was allow'd 240l. out of the 1000l. and ſo relieved againſt the Cuſtom of London. Chan. R. 26. 4 Car. 1. Havers v. Burton.

4. Defendant, for what Money he has put out belonging to the Plaintiff, as her Orphanage Money, ſhall account and pay *Intereſt* after ſuch Rate as is allow'd for Orphanage Money by the Court of Orphans, and no more. Chan. R. 108. 12 Car. 1. Hayne v. Nelſon.

5. Upon the *Marriage* of Orphans, the Cuſtom is to appoint the *Common Serjeant* to treat and *take Security for* the Orphan. Arg. 2 Vent. 341. Mich. 22 Car 2. in Caſe of Pheaſant v. Pheaſant.

6. On a *Bill to bring in a Foreigner to give Security* to the City for the Orphan's Portion according to the Cuſtom of the City, Bridgman K. decreed the Plaintiffs to try the Cuſtom. Chan. Caſes. 203. 23 Car. 2. Mayor &c. of London, and Byfield v. Slaughter, & al.' the Executors of the Plaintiffs Father.

7. Orphanage Part, according to the Cuſtom of the City of London, was *decreed with Coſts*. Fin. R. 248. Hill. 28 Car. 2. Hill v. Blacket and Rodes.

8. Plea of an Account of an *Orphans Eſtate, before the Aldermen of London*, was diſallow'd, and a Surcharge allow'd to be made thereon by Lord Chancellor. 2 Chan. Caſe 170. Hill. 1 Jac. 2. Newdigate v. Johnſon.

9. The *Plea for an Account before the Aldermen* was diſallow'd, and a Surcharge allow'd by the Ld. Chan. to be made, and decreed the Executor to pay Intereſt at 6l. per Cent' for the Money not paid into the Chamber, till he paid it in, though the Chamber uſually took but 5l. per Cent.' 2 Ch. Caſes, 170. Hill. 1 Jac. 2. Newdigate v. Johnſon.

10. This Cuſtom of the City of London *is the Remains of the old Common Law*, that a Man could not give away any Part of his Eſtate without the Conſent of his Children, and is ſo taken Notice of in Bracton, but being found extreamly inconvenient and hard, it *was by the tacit Conſent of the whole Nation, abrogated and grown into diſuſe*, (For what Law has ever been made to repeal it?) and kept up only in the City of London; Per Ld. Macclesfield. Ch. Prec. 596. Tr. 1722, in Caſe of Kemp v. Kelſey.

11. By the Cuſtom of London, a *Freeman cannot deviſe either the Orphanage Part, or the Contingency of the Benefit of Survivorſhip among Orphans. Neither can an Orphan* deviſe his Orphanage Part, or the Part which accrued by Survivorſhip. But ſuch Freeman may give by Will

to

to his Children, Legacies inconſiſtent with the Diſtribution under the Cuſtom; and then ſuch Children muſt make their Election, whether they will abide by the Will, or by the Cuſtom? But they cannot abide by the Will in Part only, and take the Benefit of the Cuſtom alſo. Caſes in Equ. in Ld. Talbot's Time, 130. Hervey v. Desbouverie.

(B. 5) Orphans. What Perſons are intitled to the Benefit of the Cuſtom, or excluded from it.

1. THERE is no ſuch Cuſtom, as that a Child *marrying under Eighteen Years, without the Father's Conſent*, ſhall loſe her Orphanage Part. Fin. R. 248. Hill. 28. Car. 2. Hill v. Blanket and Rhodes.

2. A Freeman of the City of London dies leaving *a Wife and Child*, the *Wife dies*, her Third ſhall go to the Executor, or Adminiſtrator; ſo if the *Child dies*, and leave an Executor, the Child's Part ſhall go to the Executor, but not to the Adminiſtrator of ſuch Child; for if there be no Executor, it ſhall go to make up and increaſe the *Orphanage* Money of the other Children. Arg. 2. Show. 409. Mich. 36 Car. 2. B. R. in Caſe of Palmer v. Allicock.

3. A Daughter of a Freeman, *marrying without her Father's Conſent*, loſes her Orphanage's Part, unleſs he is reconciled to her before his Death. Vern. 354. Hill. 1685. Foden v. Howlet.

4. The Cuſtom of London doth *not extend to Grand-Children*; As if A. the Grand-father dies, leaving the Father with ſeveral Daughters, theſe Daughters are not within the Cuſtom. Per Ld. Keeper Cowper Hill. Vac. 5 Ann.

5. A *Grandchild* is not within the Cuſtom of London to come in for his Father's or Mother's Share, together with the other Children of a Freeman; and this has been ſettled by the Ld. Chancellor, where a Deed, by Way of Proviſion for a Grandchild, being made by the Grandfather, after the Father's Death, in Order to introduce him into his Father's Place, was ſet aſide, as made in Fraud of the Cuſtom, againſt the ſurviving Children. Chan. Prec. 470 pl. 295. Paſch. 1717. Northey v. Burbage.

Gilb. Equ. Rep. 137. S C. in totidem Verbis. —— Wms's Rep. 340. pl. 90. Northey v. Strange, S P. and ſeems to be ſettled.

S. C. admitted by Counſel, and ſaid to have been ſo determined and ſettled.

(B. 6) Bar. What is a Bar of the Children's Part, or otherwiſe, and what ſhall be ſaid an Advancement.

1. RESOLVED that where a *Citizen* of London *deviſes a Legacy to one of his Children*, that *notwithſtanding that Child ſhall have his Share out of the Cuſtomary Part*, unleſs it doth appear, that by the Intent of the Teſtator, that Legacy was to go in Satisfaction of his whole Share. 2 Freem. Rep. 28. pl. 30. Hill. 1627. Ireton's Caſe.

2. A Man *deviſed* 3000 *l. to his Daughter, and the Reſidue of his Perſonal Eſtate* he deviſed *to his Brother.* The Queſtion was. Whether this Daughter ſhould have her Cuſtomary Part beſides this Legacy, by Reaſon that he gave the Reſidue to his Brother, which is a kind of an Implication, that the Daughter ſhould have the 3000 l. and no more; and if ſhe ſhould have her Cuſtomary Part too, there would be nothing left for the Brother. But the Ld. Chancellor held clearly, that *ſhe ſhould have her Legacy and her Cuſtomary Share too*; there being no Words in the Will to exclude her, ſhe *ſhall not be barred by Implication*; and if there were nothing for the Brother, he could not help that, it muſt go as far as it would. 2 Freem. Rep. 67. pl. 78. Trin. 1681. Bravell v. Pocock.

The Reporter Queries, and ſays, it ſeems only ſuch a *Proviſion* as is made *on Marriage*, or *in Purſuance of a Marriage Agreement.*

3. Per Cur. *any Proviſion* made by the Father in his Life-time for his Children, is an Advancement within the Cuſtom unleſs it be *declared by Writing*, that they are not ſufficiently advanced, and for ſometime it was held that in ſuch Writing there muſt be **mention made what Summe* they received from their Father becauſe of bringing it into Hotch-pot. Vern. 89. pl. 78. Mich. 1682. Fouke v. Lewen. Ibid. 89, 90.

2 Chan. Rep. 179. Annand v Honeywood, S C. and ibid. 183, 184.

4. The Father by a *Prior Will declares a Child not fully advanced*, and after revokes that Will, and by a *latter* declares that Child *fully advanced*, ſuch former Will is a ſufficient Declaration to let the Child into Hotch-pot. 2 Chan. Caſes 117. Trin. 34 Car. 2. Anaud v. Honeywood. &c certified and held accordingly. —— S. C. & S. P. certified, Mich. 34 Car. 2. Ibid. 129. —— Vern. 345. pl. 340. S. C. but S. P. does not appear.

5. A *Portion of Money* given by a Freeman of London *to his Son*, has ever been taken for, and towards the Advancement of ſuch Son out of his Father's Perſonal Eſtate, within the Cuſtom of the City of London. 2 Chan. Caſes 118. Trin. 34 Car. 2. Anaud v. Honywood.

Vern. 345. pl. 340. S. C. & S. P. and Ld. Chancellor ſaid, that there is no Colour to reckon this any Part of the Perſonal Eſtate —— 2 Chan Rep. 179. to 187 S. C. and the Court declared, that this Money ſhall be taken as Land, and not as Perſonal Eſtate.

6. Father on his Son's Marriage, purſuance to Articles for *purchaſing Lands to be ſettled* on his Son and his Wife &c. advances 4000 l. Quære, If this be Advancement to bar him? The Chancellor decreed, the Son to have a Share of his Father's Perſonal Eſtate, without bringing the 4000 l. into Hotch-pot. 2 Chan. Caſes 119. Trin. 34 Car. 2. Anaud v. Honeywood.

S. P. adjudged upon ſolemn Debate, by the Maſter of the Rolls. 2 Wms's Rep. 527. Trin. 1729. Cleaver v. Spurling.

7. Where a Citizen has ſeveral Children, ſome advanced, ſome not. *The advanced die.* The Father dies. There ſhall be no Conſideration had of the Dead Children, who were advanced; but it is all one as if they had never been. Decreed. 2 Chan. Caſes 119. Trin. 34 Car. 2. Beckford v. Beckford.

8. A Freeman of London having ſeveral *Chymical Receipts* of a ve- of a very great Value, as he imagined, gave them a little before his Death to J. S. who had married one of his Daughters. It was alleged in order to bring the ſame into Hotch-pot, that they brought J. S. the Defendant 500 l. a Year, and Plaintiff offered to give the Defendant 500 l. for his Intereſt therein, and ſo inſiſted that they ought to be looked upon as Part of the Freeman's Perſonal Eſtate, and that Defendant account for them to the Plaintiff, who had married the other Daugh-

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ter. But Ld. Chancellor would not decree the ſame, ſaying he would not countenance ſuch a Piece of Quackery as to put a Value upon them. Vern. 61, 62. pl 59. Mich. 34 Car. 2. Jenks v. Holford.

9. If a Citizen *conveys* to a Child *Land of Inheritance*, though it be *expreſſed for Advancement*, it barrs no Child's Part; but ſuch Child may come in for a Share &c. with the reſt. This was certified by the Recorder. 2 Chan. Caſes 160. Hill. 35 & 36 Car. 2. Rich v. Rich. Vern. R. 216. Civil v. Rich, S. C.

10. The Queſtion was, whether the Children, who are declared not fully advanced, are to bring what they had received into *Hotch-Pot* with the *Orphanage Thirds* after the Eſtate is divided into Thirds, and not into Hotch-Pot with the whole Eſtate; and decreed accordingly, not to be with the whole Eſtate; and what hath been received by any one more than their Share, and Legacies, is to be repaid, as the Maſter ſhall appoint, 2 Chan. Rep. 359, 360. 1 Jac. 2. Beckford v. Beckford. Vern. 345. pl. 339. S. C. Ld. Chancellor ſaid, It is beyond all Doubt that it muſt be brought into the Orphanage Part only. —— 2 Vern. 281, 282. pl. 269. Mich. 1692. S. C. and S. P. accordingly.

11. A Freeman gave *a Portion with his only Child* on her Marriage. Whether ſhe was excluded thereby of her Orphanage Part, the Teſtator *not having declared* by Will, or otherwiſe, that ſhe was not fully advanced? 2 Vern. 234. pl. 215. Trin. 1691. Fane v. Bence.

12. With Regard to the Advancement of a Child, it has been determined, that *ſmall inconſiderable Sums occaſionally given to a Child*, cannot be deemed an Advancement, or Part thereof. Thus *Maintenance Money*, or an *Allowance made by a Freeman to his Son at the Univerſity, or in travelling* &c. is not to be taken as any Part of his Advancement, this being only his Education, and it would create Charge and Uncertainty to inquire minutely into ſuch Matters. So *putting out a Child Apprentice*, is no Part of his Advancement, for it is only procuring the Maſter to keep him for Seven Years, inſtead of the Parent. Trin. 1718. at the Rolls. Hender v. Roſe. But the Father's *buying an Office for his Son to but at Will*, as a Gentleman Penſioner's Place, or a Commiſſion in the Army, theſe are Advancements Pro tanto. 3 Wms's Rep. 317. in the Note. cites Norton v. Norton. Mich. 1692. by the Lords Commiſſioners Rawlinſon and Hutchins.

13. Where it appears, any how, *under the Father's Hand, how much* a Child has received, though it is therein ſaid, that the ſaid Portion is, or was, in full of his Child's Part by the Cuſtom, yet the Child ſhall come in for the Cuſtomary Part of the reſt of the Father's Perſonal Eſtate, bringing the Portion already received into *Hotch-Pot*; otherwiſe it is, if it does not appear under the Father's Hand what the Advancement was. 2 Salk. 426, 427. Anon. The very declaring what the Sum advanced was, will let the Child in by the Cuſtom for his Orphanage Part; *and though the Child afterwards received further greater Sums* from his Father, and the Certainty thereof appeared by his own Anſwer, yet thoſe Sums, which were additional Gifts to his Advancement, being with the Sum mentioned by the Father, brought into Hotch pot, will not bar his Orphanage Part. Wms's Rep. 342. Hill. 1716. decreed by the Maſter of the Rolls. Northey v. Strange. ——Chan. Prec. 470. pl. 295. Paſch. 1717. Northey v. Burbage, S. C. —— Gilb. Equ. Rep. 136, 137. S. C. in totidem Verbis.

14. By the Cuſtom of London, if a *Freeman* hath *advanced a Child in his Life-time, and it appears* by his Will, or by any Writing, *what the Sum advanced is, and that the Sum advanced is leſs than the Cuſtomary Share* doth amount unto, *ſuch Child*, ſo advanced, *may come in for a Cuſtomary Share, bringing the Sum ſo advanced in Hotch-pot*; But if it doth not appear what the Advancement is, then the Advancement is a Bar of the Cuſtomary Share. The Caſe here was, that the Father of the Plaintiff

Plaintiff and Defendant *in his Will takes Notice, that he had advanced the Plaintiff in his Life-time, by giving her* 300 *l. and upwards*, and thereupon gives her 5 s. only by his Will. And the Queſtion was, whether this ſhall be taken to be ſuch a certain Sum appearing in Writing, that ſhe may put it in Hotch-pot, and come in for her Cuſtomary Share, by Reaſon of the Word (upwards) which, as it was ſaid, made it very uncertain; but decreed that this was a certain Sum appearing in Writing, and he would take it to be 300 l only; and although it was ſaid, that by the Word (upwards) it might be taken to be 500 l. or 1000 l. the Maſter of the Rolls ſaid, it could not be ſo intended here, but that it might be intended a little more, and ſo little, that the Teſtator did well know, & De minimis non curat Lex. Note, it was ſuppoſed that the Word (upwards) was inſerted purpoſely to make it uncertain, which made it look like a Trick; but if he had taken Notice that he had taken Notice that he had advanced his Daughter, and not ſaid what, ſhe had be barred; but here it was *decreed, that ſhe ſhould come in for her Share, bringing the* 300 *l. into Hotch-Pot.* 2 Freem. 279, 280. pl. 351. Hill. 1704. Bright v. Smith.

S. C. cited per Ld. C. Parker. Wms's Rep. 642, 643. and that though the

15. If a Freeman of London *enters in his Books* ſeveral Sums of Money, as paid on Account of his Daughter's Portion, he *cannot afterwards write off* again, or make the Husband Debtor for them. Per Cowper C. 2 Vern. 631. pl. 560. Hill. 1708. Dean & Ux' v. Ld. Delaware.

ſame be written by the *Free-man's Book-keeper or Servant*, it is as ſufficient as if written by the Freeman himſelf, and ſuch Advancement may be brought into Hotch-pot. ——— But Ibid. 643. in a Note added at the Bottom of the Page, is a Quære, If this is warranted by the Certificate of the Caſe, which was as follows, [and which I will add here to ſhew the Form of ſuch Certificate.] "Dean & "Ux' v. Ld. Delaware, May 9. 1710. In Purſuance of an Order of 16th of December then laſt, "it is certified, that if a Freeman of the City dies, leaving a Wife and one Daughter married in his "Life-time, and it appears by the Books of ſuch Freeman, that he had paid ſeveral Sums of Money "in Part of ſuch Daughter's Portion unto her Husband, and afterwards ſeveral other Sums, which "ought to be taken as paid on Account of the Portion, but not expreſsly enter'd in ſuch Freeman's "Books as paid in Part of Advancement, or in Part of the Portion, (all which Entries are of the "Teſtator's own Hand Writing) and ſuch Sums taken altogether do not amount to a third Part of "ſuch Freeman's Eſtate, put together with what he left at his Death, ſuch Daughter ought not to "be taken as fully advanced, but in Part advanced only; and in ſuch Caſe, by the Cuſtom of the "City, ſuch Child and her Husband are to have a Third of what the Teſtator left at his Death, "without regard of what was received in the Father's Life-time, and without putting what had "been ſo received to the Eſtate left at his Death."

Any *Land of Inheritance ſettled* by the Freeman upon his Children, is not to be called an Advancement, either in Part, or in all, within the Cuſtom, in regard they *are not within the Cuſtom*, which affects only the Perſonal Eſtate of the Freeman; *otherwiſe of a Leaſe for Years* —*But* if *Lands of Inheritance* are *given* to a Child *in Bar* of the Orphanage Part, *and accepted as ſuch*, it will be binding, or at leaſt the Child cannot have Both; Per Jekyl and Gilbert Commiſſioners. 2 Wms's Rep 274. Paſch. 1725. Cox v. Belitha.

16. A Freeman of London, who was a Widower, and had ſeveral Children, being poſſeſſed of a conſiderable Leaſehold Eſtate, *on a Second Marriage conveys* theſe *Leaſes in Conſideration of* 2000 *l. Portion, in Truſt for himſelf for Life, Remainder to his Wife for Life, in Lieu and Bar of all Dower, Cuſtomary Eſtate &c. Remainder to the firſt Son of* that Marriage, and ſo to every other Son; *and in the Settlement there was an Agreement, that Truſtees ſhould ſell theſe Leaſes and inveſt the Money in the Purchaſe of Lands of Inheritance*, to be ſettled to the Uſes aforeſaid; but the *Husband dying before any Purchaſe* made, it was held firſt, that the Wife was barred from claiming any other Part of the Perſonal Eſtate. Secondly, that the Children by the firſt Venter could have no Right to thoſe Leaſes; neither would this Settlement prevent the Children of the Second Marriage from coming in for a Share of the Reſt of the Perſonal Eſtate; for by the Agreement theſe Leaſes are now to be conſidered in Equity, as if a Purchaſe had been actually made, and the Freeman had paid the Money out of his Pocket. Equ. Abr. 153. pl. 8. cites 2 Vern 665. Mich 1700. [1710] Hancock v. Hancock; [but that is only a ſhort Note of the Caſe.]

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17. A Freeman of London married a Widow of a conſiderable Fortune, but ſhe had ſeveral Children, and it was agreed, that he *was to have* 600 *l.* only *of her Fortune*, and the reſt to be ſettled upon her Children, and *in Caſe ſhe ſurvived him ſhe was to have* 600 *l.* to be paid her by his Executors; accordingly a Deed was executed and the *Parties were mentioned to be Citizens of London.* This was decreed by Ld. Harcourt as a Satisfaction of her Cuſtomary Part, and took Notice that the Deed was expreſsly worded in Conſideration of the Marriage and Marriage Portion, ſo that he was abſolute Maſter of that 600 l. and therefore this 600 l. muſt be looked upon to come out of his Perſonal Eſtate. But as to the Moiety of the other Moiety (no Iſſue being of the Marriage) there was no Queſtion made, but the Widow would be intitled to it, and an Account was decreed accordingly. And the Maſter of the Rolls took Notice of the Deed mentioned to be made between the Parties, Citizens of London, ſo that the Cuſtom might be well ſuppoſed to be in their View. Ch. Prec. 355. pl. 248. Hill. 1711. Whithill v. Phelps.

Abr. Equ. Caſes 157. S. C. —— Gilb. Equ. Rep 81. S. C. in totidem Verbis.

18. A *Freeman* of London *having Children by his Firſt Wife, and being about to marry again, made a Settlement of ſome Leaſehold Eſtate on his intended Wife*, and the Iſſue of that Marriage; *the Marriage takes Effect.* The *Huſband dies having Iſſue, and a conſiderable Perſonal Eſtate*, The Children, by their firſt Venter, brought their Bill for an Account of the Perſonal Eſtate, and inſiſted it wholly belonged to them; and that the Second Wife and her Iſſue ought to be excluded from any Share thereof by Reaſon of the Proviſion made for them; it was decreed that *this Compoſition with his Wife before Marriage bound her, but the Children, being Infants, were left to make their Election when they came of Age, whether they would abide by that Proviſion made for them by that Settlement, or relinquiſh that, and come in for their Cuſtomary Shares only*; and afterwards on a Rehearing, what ſhould become of the Cuſtomary Part; it was held to fall into the Husband's Share; and in Caſe no Diſpoſition was made thereof by him, it muſt go according to the Statute of Diſtributions. G. Equ. Rep. 95. Paſch. 1 Geo. cited in the Caſe of Hancock v. Hancock.

2 Vern. 605. pl. 543. Hill. 1707. is not S. C nor S. P. —— Ibid. 666. pl. 592. Mich. 1710. S. C. but that is only where it is the Wife of a Freeman.

19. Smith was *a Freeman* of London, and *had Iſſue one Child only*, a Daughter, *and gives her* 3000 *l. Portion*, and marries her to the Plaintiff Maggot, and is a Party to the Marriage-Articles, wherein this Sum of 3000 l. *is declared to be given to her for her Portion* by her Father, the ſaid Smith. *Afterwards* the ſaid Smith *makes his Will, and thereby deviſes the Sum of* 1000 *l. to his ſaid Daughter, and likewiſe gives ſeveral Legacies to her Children*; he *alſo gives to his Daughter certain Lands for her Life* &c. and then follows this Proviſo (viz.) *Provided if my ſaid Daughter ſhall not within two Months after my Deceaſe, upon Requeſt to her made by my Executrix, give a good and ſufficient Releaſe to my Executrix of all her Right and Intereſt to her Cuſtomary Share* of my Eſtate &c. *Then* my Will is, that *the Legacy to her* of 1000 l. *and* the ſeveral Legacies aforeſaid *to her Children, ſhall be void, and makes his Wife (now Defendant) his Sole Executrix and Reſiduary Legatee.*

MS. Rep. Trin. 2 Geo. Maggot v. Smith.

The Bill was brought by the Husband and Wife, in Right of the Wife, for her Cuſtomary Share of the Teſtator's Eſtate.

1ſt, It was agreed, *where the Portion* of the Child *appears in certain under the Father's Hand, ſuch Portion ſhall not be taken for a full Advancement in the Life-time of the Father*, to exclude and bar ſuch Child of her Cuſtomary Share.

2dly, Where a *Freeman dies, leaving only one Child, who has had a Portion from her Father in his Life-time, ſuch Child ſhall not put her Portion in Hotch-pot*, but is intitled to her Cuſtomary Share, beſides what ſhe had for her Portion, becauſe where there are more Children than

one, ſuch Portion ſhall be put in Hotch-pot, only with the Cuſtomary Share belonging to the Children, that all the Children may be equal. See Lord Delawar's Caſe.

3dly, It was reſolved in this Caſe, that the Plaintiff's Wife *need only releaſe her Chattle Legacy, and not the Deviſe of the Lands to her for Life*, becauſe the expreſs Condition in the Will doth controul the implied Condition by the Cuſtom, that ſhe muſt renounce all Benefit by the Will, if ſhe will take Advantage of the Cuſtom in Subverſion of the Will.

4thly, If the Children, being Infants, ſhall forfeit their Legacies according to the Proviſo, or not by the Act of the Mother. This Point Lord Chancellor would not now determine upon this Bill, but ſaid, it would be time enough to do that, when they ſhould bring a Bill for their Legacies; but as to the other Matters decreed ut ſupra. Per Cowper C. MS. Rep. Trin. 2 Geo. Maggot v. Smith.

20. A *Proviſion for a Child on her Marriage by a Freeman* is no Bar to any future Share ſhe might be intitled to by the Cuſtom, any more than it would be to her taking by Deſcent or Deviſe. Cited by Mr. Vernon. Ch. Prec. 508. as decreed by Ld. C. Cowper Mich. 1717. Platt v. Stanton.

2 Vern. 753. pl. 658. S. C. but only ſome ſhort Notes of it.

21. S. brings a Bill for one Third of his Wife's Father's Perſonal Eſtate; a Settlement by Agreement &c. was made on the Marriage, and the *Father gave with his Daughter an Eſtate, as for her Marriage Portion* &c. *By Will, the Father gave a* 1000 *l. to his Wife, and five Tenements* (which were his on Leaſes) *to Truſtees in Truſt for the Daughter's ſeparate Uſe*, and made the Wife Executrix. S. being beyond Sea, left the Wife and Children upon the Mother, who maintained them. Per Cowper C. 1ſt, An *Advancement of a Daughter by a Real Eſtate as her Portion* &c. *was not an Advancement within the Cuſtom*; but if it were in Land, the Certainty doth appear, and the Land muſt be valued, and brought into Hotch-pot; *the Cuſtom has no Relation to an Eſtate of Inheritance*; If a Freeman lays out his Money, the Cuſtom is defeated; But if there was any Proviſion made by *Agreement &c. that inſtead of Money as a Portion &c. the Father ſhould diminiſh his Perſonal Eſtate by making a Purchaſe, it might be a Queſtion how far this would be within the Cuſtom? But Lands deſcended, or purchaſed, are not.* 2dly, That S. muſt have one Third of the clear Perſonal Eſtate, deducting the Widow's Chamber, * Paraphernalia, &c. 3dly, That the five Tenements given to the ſeparate Uſe of the Wife, ſhould not go in part of this one Third to which the Husband was intitled, for that the Daughter had no Election in this Caſe. She could not chooſe the one Third, becauſe that was in the Power of the Husband, and to his Account; And as the five Tenements are here given to the Truſtees, it is of a different Kind from the Husband's one Third; nor is it to the ſame Perſon; ſo it can't go in part of Satisfaction within the Meaning of the Teſtator. In Caſes of the Cuſtom, the Legatee has an Election, whether he will renounce his Legacy, or his one Third Part. Here the Father has under all Events, Ex abundanti, made a Proviſion for the ſeparate Uſe of his Daughter out of the Part which the Father had Power to diſpoſe of. 4thly, If the Legacies fall ſhort, every one muſt abate in Proportion; but if the Daughter's ſeparate Proviſion fall ſhort, which the Father intended her, the Court ought to lay hold on that which the Husband ought to recover when the Account is taken, and it ought to be brought before the Maſter, eſpecially if the Husband's going away were without the Wive's Default. 5thly, This Specific Legacy of the five Tenements muſt be valued, and every one muſt abate in Proportion. 6thly, The Wife and Executors muſt have her 1000 l. beſides her one Third Part. Mich. 4 Geo. Stanton v. Plat.

22. Sir

22. Sir W. W. in 1718. made his *Will, giving to his Daughter* 7000 *l. and to his Son and Executor, all the reſt of his Eſtate. He declared that this Legacy to the Daughter was in Satisfaction of all ſhe could claim &c. under the Cuſtom, and ſhe was to declare within one Month after his Death whether ſhe would abide by that or not*, and ſhe was *to releaſe* &c. The Teſtator lived Two Years after this Will, and after his Death, the Daughter marrying within a Fortnight, they were both made acquainted with the Will, and the Executor and Son came one Morning, and made a Delivery of ſome Plate &c. ſpecifically deviſed, and alſo aſſigned an Annuity in the Exchequer, which was given to the Daughter &c. and being asked to execute a Releaſe ſome time was deſired for Conſideration &c. In Mich. Vac. the Queſtion was, on a Plea to the Diſcovery and Account prayed by a Bill, whether what the Daughter and her Husband had done, did amount to ſuch an Acceptance as did determine their Election, and to exclude them from a Share by the Cuſtom; and per Ld. Chancellor the Plea was allowed, becauſe they had not made any Election by the Bill to wave the Will, but with a ſaving to any further Claim, or Right they might make, i. e. by amending their Bill, and running the Hazard of the Account of the Perſonal Eſtate; for whether it be more or leſs, they muſt abide by the Event of it. He declared that it was the Teſtator's Intention, that if ſhe accepted of the Legacy, ſhe was to take that in Satisfaction of the whole, under the Cuſtom, and that he never intended ſhe ſhould have an Account of the Perſonal Eſtate. to ſee whether it was her beſt way to abide by the one or the other, ſhe was to have no ſuch Liberty and therefore he confined her to a Month's Time to declare herſelf, ſo that all Objections made from her, being under any Surprize, or having any thing miſrepreſented unto her, is out of the Caſe. It is likely Sir W. W. thought the Cuſtom very hard, and he had a Mind to tie her down; but yet this muſt be a compleat Acceptance by her of all that he had impoſed, but in this Caſe it doth not appear that all was finiſhed and compleated, ſome Things ſhe did accept of, but the executing of the Releaſe was put off, and other Matters, for further Conſideration, ſo that this was not a full and entire Acceptance, though he thought that if all had been done and accepted of without the Releaſe, that was not ſo neceſſary to be done within ths Month, but might be executed at any Time. Per Ld. Chancellor. Mich. Vac. 1721. Smith v. Withers.

23. Where a *Daughter*, who married without the Father's Conſent, was afterwards *advanced in Part, and the* Freeman, the *Father, had ſettled ſome Leaſehold Eſtate to the ſeparate Uſe of the Daughter*, the Feme Covert, this ought to be brought into *Hotch-Pot*, it being, in the ſtricteſt Senſe, an Advancement of the Child *pro tanto*; 2 Wms's Rep. 273, 274. Paſch. 1725. per Jekyl and Gilbert Commiſſioners. Cox v. Belitha.

24. A *Settlement* was on the Wife of a Citizen *of Part of the Perſonal Eſtate* of the Husband, *in Bar and Satisfaction of all her Claim*, and demand *out of his Perſonal Eſtate by the Cuſtom or otherwiſe*. The *Husband died inteſtate*. The Wife is barred of her Diſtributive Share of her Husband's Eſtate by the Statute of Diſtributions by Force of the Words (*or otherwiſe*) for they can extend to nothing elſe; and it was ſaid to be twice ſo adjudged by Cowper C. in the Caſe of Pit. v. Lee, and Davila v. Davila; and decreed accordingly by King C. MS. Rep. Mich. 13 Geo. in Canc. Badcock v. Stanhope.

25. Though a *Declaration by a Freeman's Will only*, that a Child was fully advanced, is not of itſelf ſufficient, yet where the *Advancement* was *Forty Years before* the Free-man's Death, ſo that it was difficult to prove an Advancement made at that Diſtance of Time, yet a *Proof was read that the Daughter's Husband had confeſſed he had received above* 1000 *l.*

1000 *l. Portion* with his Wife from the Free-man at his Marriage, this was ſatisfactory. 2 Wms's Rep. 527, 528. Trin. 1729. at the Rolls. Cleaver v. Spurling.

Where a *Daughter of a Freeman* of London *accepts of a Legacy of* 10,000 *l. left her by her Father, who recommended it to her to releaſe her Right to her Orphanage Part*, which ſhe does releaſe accordingly; if the Orphanage Part be much more than her Legacy, though ſhe was told ſhe might elect which ſhe pleaſed; yet *if ſhe did not know, ſhe had a Right, firſt, to enquire into the Value of the Perſonal Eſtate, and the Quantum of her Orphanage Part, before ſhe made her Election*; this is ſo material *that it may avoid her Releaſe.* 3 Wms's Rep. 316. Trin. 1734. Puſey v. Desbouvrie.

27. A. a Freeman of London had Iſſue two Sons, B. C. and four Daughters, D. E. F. and G. He in his Life-time gave to B. and C. and to D. and E. 1500 l. a piece, and took ſeveral Receipts in the following Words, viz. Received of my Father A. 1500 l. which I hereby acknowledge to be on Account, and in Part of what he has given, or ſhall give unto me his Son [or Daughter] in, or by his laſt Will. Afterwards A. made his Will thus, viz. *And whereas I have heretofore paid to, given, or advanced with my Children B. D. and E.* [omitting C.] *the Sum of* 1500 *l. a piece, now I do hereby in like Manner give and bequeath unto my three other Children, C. F. and G. the ſeveral Sums of* 1500 *l. a piece*; *and* then *gives the Reſidue equally among his Children.* The Cuſtom of London being waved on all Sides, the Queſtion was, whether C. ſhould have another 1500 *l.* upon the later Words of the Will, or ſhould be in the ſame Caſe with B. D. and E. they being equally advanced by the Father and this ſeeming to be only a *Miſtake in the Teſtator*, it was inſiſted that the Receipt could not controul the expreſs ſubſequent Gift of the Father, and that the omitting C. ſhould be plainly intended a Difference between them. But Ld. C. Talbot decreed the 1500 l. received by C. in A's Life-time to be a *Satisfaction* for what A. gave him by his Will, and that he ſhould not have another 1500 l. upon the later Words. Caſes in Equ. in Ld. Talbot's Time 71. Paſch. 8 Geo. 2. Upton v. Prince.

(B. 7) As to the Children's Part in Caſe of Survivorſhip. To whom it ſhall go.

S. C. cited 3 Wms's Rep. 318. in a Nota of the Reporter.

1. IF a Freeman of London dies, leaving ſeveral Orphans, and any of them die under Age, whether this Part is by the Cuſtom to go to the Survivor? Vernon for the Plaintiff argued, that it did by the Cuſtom go to the Survivor, and had known a Caſe where one married an Orphan, and made a Settlement on her, and ſhe after died under Age; her Fortune went to her ſurviving Brothers and Siſters, and her Husband could not have it; It was admitted by the Court and Counſel, that *the Father's Will* in this Caſe (*which gave it the Survivors*) *did operate nothing, becauſe they did not claim under him; but by the Cuſtom Paramount* the Will, though a Caſe was cited Temp. Eliz. where it was held, that the Father may deviſe the Orphanage Part of the Child, if he die within Age, ſo that it be not to the Prejudice of another Orphan. Afterwards 5th 1702, the Recorder certifyed the Cuſtom to be, that *if* the *Orphan Son dies before* 21, *his Share ſurvives*; and *if a Female dies unmarried, and within the Age of* 21, *her Share ſurvives likewiſe,*

likewiſe, and the Orphan cannot give it away by Will. Chan. Prec. 207. pl. 167. Mich. 1702. Jaſſon v. Eſſington.

2. If there be a *Widow and two Daughters*, and *one of the Daughters dies*, her Orphanage Part ſhall wholly ſurvive to her Siſter, and that even *after a Diviſion and Partition made between them*; but if the *Father's Legatory Part* was *deviſed to the Daughters*, that *is under the Direction of the Statute* as a Legacy, and muſt be diſtributed between the Mother and the ſurviving Daughter accordingly; This Difference was taken and agreed by the Court. Chan. Prec. 372. Trin. 1713. in Caſe of Loeffes v. Lewen.

3. *A Freeman* left at his Death *a Wife and ſeveral Children, one of the Children died ſeven Years old.* It was agreed, that Share ſhould ſurvive, and that it was not ſubject to the Statute of Diſtributions, but Quære, whether it ſurvived to the Mother, as well as Brothers and Siſters? The Orphanage Part is not due till 21, ſo that an Orphan cannot diſpoſe of it ſooner. Mich. 7 Geo. Canc. Maſter of the Rolls Knipe v. Wale.

4. *Deviſe of Lands* to Truſtees in Fee, *in Truſt within ſix Years after the Teſtator's Death, to raiſe and pay* 1500 *l. to his Daughter A. A. dies within the ſix Years*; the 15 l. ſhall go to her Adminiſtrator, here being no certain Time limited when, but only the ultimate Time, within which it ſhall be raiſed. 3 Wms's Rep. 119. pl. 27. Hill. 1731. Cowper v. Scot, & al'.

(B. 8) Of Bringing into Hotch-pot.

1. AN Orphan who was advanced with 200 l. being the *only Child*, is not to bring it into Hotch-pot. 2 Vern. 629. cites 17 Jac. 1. Wood v. Fettyplace.

2. Sum of Money given by a Freeman of London to a Daughter, if *not given as a Marriage-Portion*, or *in purſuance of a Marriage-Agreement* is no Advancement, As Monies *given at Chriſtenings and Lyings-In*; but however muſt be caſt into Hotch-pot. Vern. R. 61. Mich. 34 Car. 2. Jenks v. Holford.

3. *Heireſs* has Lands given her in *Frank-marriage*; Thoſe muſt be caſt into Hotch-pot; Otherwiſe of Lands convey'd or given to her by her Father, or other Anceſtor *after the Marriage*. Per Counſel. Ibid.

4. Where an *Heir* or *Co-heir had a Real Eſtate ſettled on him by the Father*, it is out of the Cuſtom of the City of London, and though the Father ſhould after declare the ſame to be a full Advancement for ſuch Child, yet, it is no Bar to his Orphanage Part, neither is it to be brought into Hotch-pot. Vern. R. 216. Hill. 1683. Civil v. Rich.

Chan. Caſes, 309. S. C. but S. P. does not appear.—— 2 Chan. Rep. 141. S. C. but S. P. does not appear.

5. Where a Child is marry'd with the Father's Conſent, and there is a *Portion given in Marriage*, ſuch Child is debarr'd from claiming any Benefit of the Orphanage Part, unleſs the Father ſhall by Writing under his Hand and Seal, not only declare that ſuch Child was not fully advanc'd, but likewiſe *mention in certain, how much* the Portion given in Marriage did amount unto, that ſo it may appear what Sum is to be brought into Hotch-pot. Vern. 216. Hill. 1683. Civil v. Rich.

But if the Sum certain mention'd by the Father, *is leſs* than her Cuſtomary Part will amount to, this will let her into her Share by the Cuſtom. 2 Vern R. 630. Hill. 1708. cites Turner v. Longland.—— For otherwiſe

otherwiſe it ſhall be intended a full and compleat Advancement. 2 Wms's Rep. 527. Trin. 1729, by the Maſter of the Rolls. Cleaver v. Spurling.

2 Vern. 274. S. C. cited.— Ibid 281. Mich. 1692. S. C & S. P. ——2 Chan. Rep. 359. S. C.——2 Vern. 754. Mich. 1717. Stanton v. Platt. S. P.

6. Money to be brought into Hotch-potch by an Orphan, ſhall be brought *into the Orphanage Part only*, and not into the Perſonal Eſtate in general, ſo as the Widow to come in for Part of it. Vern. 343. Mich. 1685. Beckford v. Beckford.

2 Chan. Caſes. 117. S. C.

7. Money given by a Freeman of London, *to be laid out in Land and ſettled* on his eldeſt Son for Life, Remainder to his firſt and other Sons in Tail, ſhall not be reckoned any Part of his Advancement, and be brought into the Hotch-potch. Vern. R. 345. Mich. 1685. Annand v. Honeywood.

See Equ. Abr. 155. in the Note to pl. 4. of the S. C. the Certificate recited Verbatim, viz. We the Ld. Mayor and Aldermen of the City of London, having heard the ſaid Parties and their Counſel Learned in the Law, do humbly certify your Lordſhip, that by the Laws and Cuſtoms of the City, if any Freeman's Child, Male or Female be married in the Life-time of his or her Father, by his Conſent, and not fully advanced to his or her full Part or Portion of his or her Father's Perſonal or Cuſtomary Eſtate, as he ſhall be worth at the Time of his Deceaſe, then every ſuch Freeman's Child ſo Married as aforeſaid, ſhall be excluded and debarred from having any other Part or Portion of his or her ſaid Father's Perſonal or Cuſtomary Eſtate, to be had at the Time of his Deceaſe, except ſuch Father by his laſt Will and Teſtament, or ſome other Writing by him written, and ſigned with his Name or Mark, ſhall declare or expreſs the Value of ſuch Advancement; and then every ſuch Child, after the Deceaſe of his or her ſaid Father, producing ſuch Will or other Writiug, and bringing ſuch Portion ſo had of his or her Father, or the Value thereof into Hotch-potch, ſhall have as much as will make up the ſame a full Child's Part or Portion of the Cuſtomary Eſtate, his or her ſaid Father had at the Time of his Deceaſe; notwithſtanding ſuch Father ſhall, by any Writing under his Hand and Seal, declare ſuch Child was by him fully advanced.

8. Upon a Reference to the Recorder of London, by Ld. Chancellor, to certify what is the Cuſtom in London, concerning the Advancement of Children by their Fathers &c. which would exclude them from having Shares of the Perſonal Eſtates of their Fathers after their Death; Serjeant Lovell Recorder of London, certified the Cuſtom to be thus, viz. If the *Father gives to the Child* 1500 *l. and in his Will declares, that he has advanced him, and afterwards dies, the Child ſhall have no Part of the Reſidue* of the Perſonal Eſtate of his Father. *But if he had ſaid by his Will, that he had given* 1500 *l. (which was a ſufficient Advancement) yet, upon putting it in Hotch-potch after the Death of his Father, he ſhall have his Share of the Perſonal Eſtate of his Father &c.* And if a *Man marries his Daughter, and gives her a Portion*, if he *does not take any Notice of it in his Will, this will be a ſufficient Advancement*, and ſhe ſhall have no Share of her Father's Perſonal Eſtate after his Death. Ex relatione m'ri Selby. Note, Mr. Cheſhire was alſo preſent in Chancery, when Mr. Recorder made this Certificate; but he did not entirely agree with Mr. Selby about the Certificate Ut ſupra. Ld. Raym. Rep. 484. Trin. 11 W. 3. Chaſe v. Box.

2 Vern. 234. Trin. 1691. Fane v. Bence. S. P. agreed. S. P. —— Ibid. 629. Hill. 1708. Dean & Ux' v. Lord Delaware, S. P. ——Ibid. 754. Mich. 1717. Stanton v. Platt S. P.—— S. P adjudged after ſolemn Debate. 2 Wms's Rep. 527. Trin. 1729. by the Maſter of the Rolls. Cleaver v. Spurling.

9. If a Free-man has *one Child only, which has receiv'd ſome Portion* from his Father, and the Father dies, leaving this Child and a Wife, the Child ſhall have his full Orphan's Part, without any Regard to what he has already receiv'd, for that Advancement in Part is only to be brought into Hotch-potch with Children, and not with others; Per Sir Edward Northey. 2 Salk. 426.

10. If any *Child has any Thing by the Will more than the reſt, which is declared as a Satisfaction for her Advancement*, if ſhe will claim the Benefit of the Cuſtom, ſhe muſt wave this; Per Ld. Cowper. Hill. Vac. 5 Ann.

11. A Free-man of London willing to preſer two Daughters beyond others, bequeathed to them a Bond of 3000l. Afterwards by Advice the Clauſe was raſed out, and the Will re-publiſhed, and a new *Bond given in the Name of J. B. in Truſt for the two Daughters.* Ld. Cowper held, that this Bond muſt be brought into Hotch-pot to intitle them to a further Share. Ch. Prec. 269. Mich. 1708. Hedges v. Hedges.

Gilb. Equ. Rep. 12, 13. S. C. in totidem Verbis —— 2 Vern. 615. Hodges v. Moor. S. C. but contains only ſhort Notes thereof. —— Though in this Caſe ſome of the other Children had given Receipts, but knew nothing of their Equitable Right; Ld. K. Cowper declared, that this was but Evidence, and that he would, notwithſtanding, let them into their Right, though otherwiſe, if there had been a Receipt under Seal. MS. Rep.

12. A. on his Son B's *Marriage with C. covenanted* in Caſe of a ſecond Marriage *to pay the firſt Son* by the firſt Wife 500l. There was a Son and ſeveral Children beſides, of the firſt Marriage; Per Cur. the Heir muſt bring in the 500l. into a Hotch-potch, though in Nature of a Purchaſor under a Marriage Settlement. 2 Vern. 638. Hill. 1708. Phiney v. Phiney.

S. C. cited 2 Vern. R. 710. Hill. 1715. in Caſe of Blandy v. Widmore.

13. Bill by the Plaintiff as *only Child* of her Father, a Free-man of London, for her Share of her Father's Eſtate, according to the Cuſtom of the City of London. The Caſe was, the Plaintiff at ſeveral Times had *receiv'd ſeveral Sums of her Father in his Life-time*, and her *Father tranſferr'd* 1700*l. Bank-Stock in Truſt for himſelf, in order to diſpoſe of it by his Will to the Defendants* &c.

MS. Rep. Trin. 3 Geo. in Canc. Stanley v. Smith and Norcliff;

Quære, If the Plaintiff ſhall put the Money given her by her Father in his Lifetime into Hotch-potch, with the Reſidue of the Teſtator's Eſtate, or whether ſhe ſhall retain the Money ſo given to her by her Father, and have a Moiety of the Reſidue of her Father's Perſonal Eſtate, (being an only Child, and the *Teſtator having no Wife*) according to the Cuſtom.

Mr. Vernon for the Plaintiff, inſiſted, that the Plaintiff is intitled to a Moiety of her Father's Perſonal Eſtate by the Cuſtom, without putting in Hotch-potch, what was given her by her Father in his Life-time, ſhe being an only Child, and not fully advanced by her Father in his Life-time.

He cited the Caſe of **Turner v. Jennings**, lately in this Court, where it was reſolv'd, that a Child of a Free-man of London ſhall not put in Hotch-potch what was given to her by her Father in his Life-time, and unleſs there be other Children, and ſo it was reſolv'd in Chancery, in the Caſe of **Dean v. Lord Delawere**, that an only Child ſhall not put in Hotch-potch where there is a Widow, but ſhall have her Cuſtomary Share beſides what her Father gave her in his Lifetime. If the Child be fully advanc'd in the Father's Life-time, the Father may diſpoſe of all his Eſtate by Will; So if the Father marries his Daughter in his Life-time, and declares her fully advanc'd, without expreſſing what Sum he gave with her in Marriage, this is a full Advancement by the Cuſtom, though not ſo in reality, and will bar her of her Cuſtomary Share, but if the certainty of the Sum appears ſo given in advancement of the Child, and it falls ſhort of her Proportion of her Father's Eſtate, then it ſhall be put into Hotch-potch, and ſhe ſhall have her Cuſtomary Share. Declaration of a full Advancement by the Father, is not a Bar of the Cuſtomary Share in no Caſe but that of Marriage.

If a Free-man of London *has ten Children, and fully advances nine of them in his Life-time*, the *tenth Child ſhall have the whole Cuſtomary Share belonging to the Children.* If it appears that *an only Child* has *receiv'd from his Father in his Life-time, as much as his Cuſtomary Share amounts to*, this ſhall be taken as a full Satisfaction of his Cuſtomary Share,

Share, *but if it fall never ſo little ſhort thereof*, then it ſhall be taken as a *Giſt* from the Father, and the Child ſhall have his whole Cuſtomary Share, without any Regard to it.

Note, Tracy J. who ſat for Ld. Chancellor, order'd an Account to be taken what Money the Plaintiff had receiv'd from her Father in his Life-time, and on what Account, and reſerv'd the Conſideration, whether Money given to her by her Father in his Lifetime, ſhould be taken in Part of her Cuſtomary Share, or whether ſhe ſhould have a Moiety of her Father's Eſtate over and beſides what he had given her in his Lifetime, there being no other Child. *Curia Aviſare vult.* MS. Rep. Trin. 3 Geo. in Canc. Stanley v. Smith and Norcliff.

14. A. *having ſeven Children makes an Executor in Truſt, and deviſes to each Child one ſeventh of his Perſonal Eſtate*; *one* of the Children *dies in his Life-time*, and *one of the ſix ſurviving* Children *has been advanced by the Father in his Life-time*; yet this Child ſhall take his full Share of the ſeventh Part, without bringing, what he had before received, into Hotch-potch. 3 Wms's Rep. 124. Hill. 1731. Cowper v. Scot, & al'.

(B. 9) As to the Legatory Part, or Dead-Man's Share, whereof he may diſpoſe as he pleaſes.

1. THAT the *Cuſtomary Part, belonging to the Adminiſtrator of a Citizen of London dying Inteſtate, is not within the Act* of Diſtribution of Inteſtate's Eſtates; becauſe the Cuſtom of London being ſaved by the Act, the Cuſtomary Part *ſhall go wholly to the Adminiſtrator*, as it did before; and ſo it hath been reſolved at Common Law, and in Chancery. 2 Freem. Rep. 85. pl. 94 cites it as reſolved by Lord Keeper North. Hill. 1682. Anon.

2. An Inhabitant of the Province of York made a Will, and *deviſed a Moiety* of his Eſtate *to his Wife*; adjudged, that the Widow ſhould have three Fourths. 2 Vern. 111. Mich. 1689. cites the Caſe of North v. North.

MS. Rep. Tin. 1 Geo. in Canc. Readſhaw v. Duck, & al'.

3. Where a Citizen of London, by Will, had *deviſed* 700 *l. for Mourning*, the Queſtion was, whether this 700 l. ſhould come out of the whole Eſtate, or only out of the Legatory Part? For it was inſiſted, if there had been no Direction to the Will, or if the Will had only directed, that the Expences of the Funeral ſhould not exceed ſuch a Sum, there the Deduction muſt have been out of the whole Eſtate. Per Cur. Mourning deviſed by the Will, muſt come out of the Legatory Part, and not to leſſen the Orphanage and Cuſtomary Share. 2 Vern. 240. Mich. 1691. Deakins v. Buckley.

4. Upon hearing this Cauſe, the Lord Chancellor ordered one of the Maſters to ſtate a Caſe, and ſend it to the Recorder of the City of London, to certify to the Court the Cuſtom of the City. The Maſter ſtated a Caſe as follows (viz.) Thomas Anderſon, a *Freeman* of London, *by his Will directed, that an Inventory ſhould be taken of his Perſonal Eſtate* by his Executors, *and that* Barbara, *his Wife, ſhould have her Widow's Chamber, and after his Debts and Funeral Charges paid, gave her a Third Part of his Perſonal Eſtate, another Third Part he gave equally amongſt his Children Juliana, Hannah, Joſeph and William, and Jane, who died in the Teſtator's Life-time, and remaining Third Part he gave as follows (viz.) 740 l. to ſaid Hannah, 40 l. in ſmall Legacies, 200 l. a Piece to the ſaid Joſeph, William and Jane, and the Overplus (if any) to be*

be equally divided amongſt four of his Children, and to be paid them by his Executors (viz.) *to his Sons at the Age of* 21 Years, and *to his Daughters at the Age of* 21 *Years, or Marriage. And if the Third Part* of his Perſonal Eſtate *in his Diſpoſe ſhould*, by bad Debts or Accidents, fall ſhort, and *not be ſufficient to pay all his ſaid Legacies, he will'd each of the ſaid Legatees ſhould bear ſuch Loſs* (whatever it amounted to) *in Proportion* according to their Legacies, and made Duck, Chandler, Samuel Greenhill, and Thomas Greenhill, Executors; Duck, Chandler, and Thomas Greenhill, only proved the Will, and exhibited an Inventory of their Teſtator's Perſonal Eſtate into the Chamber of London, and enter'd into the uſual Recognizance, and paid Barbara, the Widow, and the Plaintiff Readſhaw (who married Juliana) ſeveral Sums on Account of their Cuſtomary Shares. Thomas Greenhill died, and Duck having taken out Adminiſtration to him, a Bill was exhibited againſt Duck and Chandler, the two ſurviving acting Executors, for an Account of the Teſtator's Perſonal Eſtate, and to have a Diſtribution thereof, according to the Cuſtom and the Will. The Defendant Duck (who was become inſolvent) was indebted 163 l. 1 s. 10 d. as the Ballance of his own Account, and 279 l. 19 s. received by his Inteſtate Thomas Greenhill, out of the Teſtator's Eſtate, making together 443 l. 00 s. 10 d.

Quære, *Whether*, by the ſaid Cuſtom, *the Loſs* of the ſaid Freeman's Eſtate, *by the Inſolvency of his Executors, ought to be born out of the Teſtamentary Part of his Eſtate only, or out of the whole Perſonal Eſtate only, as well Cuſtomary as Teſtamentary.*

The ſame was certified as follows, viz.

" We the Lord Mayor and Aldermen of the City of London, whoſe " Names are ſubſcribed, do, in Obedience to the ſaid Order by Wil- " liam Thompſon, Eſq; Recorder of the ſaid City, Ore tenus humbly " certify unto your Lordſhip, That if a Freeman of London dies, " leaving a Widow and Children his Perſonal Eſtate (after his Debts " paid, and the Cuſtomary Allowances for his Funeral, and for the " Widow's Chamber, being firſt deducted thereout) is, by the Cuſtom " of the ſaid City, to be divided into three Equal Parts, and diſpoſed " of as follows (viz.) one Third Part thereof belongs to his Widow; " another Third Part belongs to his Children unadvanced in his Life- " time, and the other Third Part, ſuch Freeman, by his Laſt Will, " may deviſe as he pleaſes. But where a Loſs of a Freeman's Eſtate " doth happen by the Inſolvency of his Executors, there is not any " Cuſtom of the City of London which directs whether ſuch Loſs " ought to be born out of the Teſtamentary Part of his Eſtate only, " or out of his whole Perſonal Eſtate, as well Cuſtomary as Teſtamen- " tary. Dated the 26th Day of April 1715." This Certificate of the Lord Mayor and Aldermen, being ſent to the Lord Chancellor Cowper, he, upon hearing Counſel, was of Opinion, that the Widows and Orphans of a Freeman of London, are in the Nature of Creditors for two Thirds of the Perſonal Eſtate he ſhall die poſſeſs'd of; and that if any Loſs happen by the Inſolvency of his Executors, ſuch *Loſs ought to be born by the Legatees of a Freeman out of his Teſtamentary Part*, and the ſame was decreed. MS. Rep. Trin. 1 Geo. in Canc. Readſhaw v. Duck & al'.

5. A Man *made his Will, and by it gave all his Eſtate, according to the Cuſtom, having a Wife and Children, viz. two Thirds to his Wife, and one Third to his Children, with a Deviſe over.* Held per Maſter of the Rolls, that though this was not exactly conformable to the Cuſtom, yet his Opinion was, that the Deviſe of one Third to the Children was

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void, being what the Cuſtom gave, and ſo *the Deviſe over not good*; that as the Wife was to have two Thirds, ſhe ſhall take one Third by the Cuſtom, and the other ſhall be the Dead-Man's Part; theſe Proportions are to ariſe after a Deduction of the Widow's Chamber, and her Paraphernalia, i. e. ſuch Ornaments as ſhe uſually wore about her Body; for though this is not by the Cuſtom, and was at firſt only allowed to Citizens of the better Sort, yet it is fit to give the ſame Privilege to all Citizens Widows. Maſter of the Rolls. Trin. Vac. 1718.

6 If a Freeman *gives a Legacy to his Child, and diſpoſes of his whole Perſonal Eſtate*, the Child *ſhall not have both the Legacy and the Orphanage Part*, even *though the Legacy does not exceed the Dead-Man's Part; Secus if the Legacy be given expreſsly out of the Teſtamentary Part.* But in no Caſe ſhall the Child be obliged to make his Election, till after the Account taken. 3 Wms's Rep. 124. in the Note; cites 4 July 1718, at the Rolls, Hender v. Roſe.

7. In this Caſe it was held, that where a Freeman of London made his Will, and *deviſed Legacies to his Children more than their Orphanage Part would amount unto, without taking any Notice whatſoever of the Cuſtom*, that theſe Legacies ſhall be a Satisfaction of their Orphanage Shares, to which they were intitled by the Cuſtom in the Nature of a Debt, and that the Legacies ſhall not come out of the Teſtamentary or Dead-Man's Part, becauſe it is held in this Court, that they ſhall not take both by the Will and the Cuſtom too; but where ſuch Legacies are leſs than their Orphanage Shares, whether they ſhall be Pro tanto in Satisfaction he was in great Doubt, and ſent it to the City to certify, though he ſeem'd rather to think they ſhould in this Caſe take both, if none of the Deviſees in the Will were thereby diſappointed. Equ. Ab. 160. pl. 5. cites Trin. 1729, at the Rolls, between Nichols and Nicholls.

8. A *Freeman* of London, by his Will, *charges 1500 l. on his Real Eſtate for his Daughter, and alſo gives her 1500 l. out of his Perſonal Eſtate.* The Daughter would take the 1500 l. out of the Real Eſtate (as that is not within the Cuſtom) and alſo claim her Orphanage Part; But the Court, in regard the Teſtator had diſpoſed of all his Real and Perſonal Eſtate among his Children, and intended an equal Diviſion, would not ſuffer the Child to diſappoint her Father's Will, but *compelled her to abide intirely by the Will, or by the Cuſtom.* 3 Wms's Rep. 123. Hill. 1731. Cowper v. Scot, & al'.

(B. 10) Orphan intitled to What; and How; notwithſtanding any Thing done in Fraud of the Cuſtom.

1. A *Deed of Gift* made *to defraud* the Plaintiff of her Cuſtomary Part by the Cuſtom of the City of London was adjudged void. Toth. 113. cites 40. Eliz. Topp v. Topp.

2. A *Mortgage* made to a Citizen and *forfeited* to him ſhall be accounted Part of the Freeman's Eſtate to be diſtributed, and ſhall not go to the Heir. Toth. 131, 132. cites 7 Car. Aſh v. Wood. and Maynard v. Middleton.

3. A Citizen made a *Deed of Truſt of a Leaſe to the Uſe of his Will*, and he having Two Sons and a Daughter, directed by his Will his Executor to convey the ſame to the Two Sons. Decreed that the Deed

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is contrary to, and againſt the Cuſtom of London, and that the Daughter ought, according to the Cuſtom, to have her Part of the ſaid Leaſe and Profits thereof. Chan. R 84. 10 Car. 1. Not v. Smithies.

4. A Freeman of London *deviſed, that his Third Part ſhould make the Cuſtomary Part of his Children* 500*l. a Piece*, if their Cuſtomary Parts did not amount to ſo much; *and that if any of them died before Twenty one, his Part ſhould be divided amongſt the Survivors; all of them died before Twenty-one, except the Plaintiff's Wife*, her Brother John being the laſt that died, and the Plaintiff had received out of the Father's Part, as much as made his Wife's Part 500 l. and the Queſtion was, if ſhe ſhould be intitled by the Will if ſhe ſhould have John's Part; it was objected that ſhe ſhould not, for it is not due by the Will, but by Cuſtom, and ſhe ought to adminiſter to John to make a Title, for the Father had no Power to appoint a Survivor; But per Keeling Ch. J. though the Father has no Power to diſpoſe the Cuſtomary Part from his Children, yet he may appoint a Survivor thereof among the Children themſelves by his Will; and ſo Serjeant Wild, Recorder of London, ſaid, it was lately ſo reſolved in Chancery, in a Caſe where he was Counſel; and ſo Keeling now directed the Jury, who gave the Verdict accordingly for the Plaintiff for the whole. 1 Lev. 227. Mich. 19 Car. 2. Hammond v. Jones.

Lev. 228. the Reporter adds, Quære de ceo. —It has been much queſtioned, whether a Freeman's Will can any way operate on the Orphanage Part? Formerly it ſeems to have been held, that a Freeman had a Power to appoint by Will, that if any of his Children ſhould die within Age, then ſuch Child's Part ſhould go to the ſurviving Child or Children. 3 Wms's Rep. 318. in a Note by the Reporter, cites 1 Lev. 227. Hamond v. Jones, ruled by Kelyng Ch. J. at Niſi Prius, and ſaid by Wylde, Recorder of London, to have been ſo adjudged in Chancery. But latterly it has been admitted to be otherwiſe.

5. A *Citizen* of London *cannot deviſe over* his Child's Part to another, in Caſe the Child dies under Age. Chan. Caſes 199. Paſch. 23 Car. 2. Pate v. Hatton, als' Hutton.

S. P. becauſe it is *but a Poſſibility*, and not a Thing veſted in himſelf, Per Maynard Arg. 2 Vent. 341. Mich. 22 Car. 2. ſaid, that it was ſo reſolved in Caſe of Dr. Ent v. Adrian.

6. A *Citizen* of London *being Executor and Reſiduary Legatee dying*, whether this being but a Legacy, which till Election reſted prima facie in the Legatee, not as Legatee, but as Executor, and the firſt Teſtator's Eſtate, which remains in the Executor, as Executor ſhall not be ſubject to the Cuſtom as the Executor's own Eſtate? The Ld. Chancellor decreed the contray, and ſaid, I will make Election for him. Chan. Caſes. 310. Hill. 30 and 31 Car. 2. Civil v. Rich.

7. If a *Citizen* of London *has a Truſt of a Term attending his Inheritance*, and dies, the Truſt of the Term *ſhall not be ſubject to the Cuſtom* of London to be divided between the Wife and Children &c. as other Perſonal Eſtate and Chattles ſhall; Per Ld. Chancellor. 2 Freem. Rep. 66. pl. 77. Trin. 1681. In Caſe of Tiffin v. Tiffin.

8. Where a *Citizen* of London *dies Inteſtate, the Third Part of his Goods belonging by the Cuſtom to his Adminiſtrator is not ſubject to Diſtribution* by the Stat. 22 Car. 2. cap. 10. for Settlement of Inteſtates Eſtates. And it was granted by all, that by the Cuſtom of London the *Heir ſhall have his Share in the Diſtribution*; and Judgment accordingly. 2 Jo. 204. Paſch. 34 Car. 2. B. R. Percival v. Criſp.

Skinn. 26. pl. 2. and 42 pl. 11. S. C. adjudged accordingly, and ſays, it was afterwards decreed in Chancery, that the Adminiſtrator's Part was within the Cuſtom, and not liable to a Diſtribution upon the Statute, and they relied upon this Opinion in B R. and that Trin. 35 Car. 2. where in a like Caſe a Suit was in the Spiritual Court for a Diſtribution, a Prohibſtion was granted. —— 2 Show. 174 pl. 170. S. C. adjornatur.

9. If

Paſch 1689. 2 Vern. 98. Clerk v. Learlier-land, referred to the Recorder to certify.

9. If Goods are abſolutely given away by a *Free-man of London* in his Life. This will ſtand good againſt the *Cuſtom*. But if he has it in his Power, as by the *keeping of the Deed* &c. or if he *retains the Poſſeſſion* of the Goods, or any Part of them, this will be a Fraud upon the Cuſtom. Per Cur. 2 Vern. 277. Mich. 1692. Hall v. Hall.

10. *A. on Marriage of M. his Daughter to B a Freeman* of London, *ſettles a Term for Years in Truſt, that B. the Husband ſhould receive the Rents till* ſuch Time as *W. R. and W. S. ſhould otherwiſe appoint*, and *then to ſuch Perſon as they ſhould appoint*, and *for Want of ſuch Appointment*, then *for ſuch as B. ſhould by Will appoint*, and *for Want* of ſuch Appointment *then in Truſt for the Executors and Adminiſtrators of B.* The Truſtees made no Appointment, ſo the Queſtion was, whether this Term ſhould go according to that Appointment, or be looked upon as Part of B's Perſonal Eſtate, and ſo go according to the Cuſtom, he being a Free-man of London. And Ld. Keeper was of Opinion, that it was *not* to be looked upon as *Part of B's Perſonal Eſtate, becauſe it never was in him*; but was ſettled by the Wife's Father, and therefore not ſubject to the Cuſtom. Abr. Equ. Caſes 151. Hill. 1702. Grice v. Gooding.

11. A Freeman of London *grants the greateſt Part of his Perſonal Eſtate in Truſt for himſelf for Life, and then for his Grand-Children* by his Son, who was dead. A. has no Wife, but has a Daughter Living. Decreed the Deed to be ſet aſide (A. *not having entirely diſmiſſed himſelf* of the Eſtate in his Life-time, and being made a little before his Death, is a Donatio Cauſa Mortis) as the Moiety belonging to the Children, in this Caſe, there being no Wife, but as to the other *Moiety* of which he had Power to diſpoſe (as having *no Will)* the Deed will ſtand good; Per Cowper C. 2 Vern. R. 612. Trin. 1708. Turner v. Jennings.

9. A Freeman of London had Iſſue a *Son and a Daughter. The Son died, leaving Three Children.* The Freeman *aſſigns Leaſes in Truſt* to ſell and pay any Sum not exceeding 1000 l. as he ſhould appoint, and he by Deed and Will appointed 500 l. to his Daughter, and the Reſidue to his Grand-Children. Decreed to be ſet aſide, as to a Moiety, which the Daughter by the Cuſtom, as only *ſurviving Child*, was intitled to, as being in *Fraud of the Cuſtom.* 2 Vern. R. 685. Trin 1712. Turner and Ux v. Jenning and Longland.

13. The Children of a Freeman of London, where there is *no Wife*, are intitled to a *Moiety*, the other Moiety being the Dead-man's Part; admitted by Counſel on both Sides; and decreed, per Maſter of the Rolls. Wms's Rep. 341. Hill. 1716. Northey v. Strange.

Ibid. 323. ſays, that this Decree was afterwards affirmed in the Houſe of Lords.

14. A. a *Free-man* of London *purchaſed an Eſtate in the Names of B. and C.* and the *Conſideration Money was mentioned in the Conveyance to be paid by B.* but *no Truſt declared. A. dies*, and ſome time after *B. gave a Declaration, that the Purchaſe was made in Truſt for A.* This is a good Bar againſt the Widow of A. who claimed a Share of the Money paid for the Purchaſe, inſiſting that it ought to be looked upon as Part of the Perſonal Eſtate of A. and conſequently that a Right veſted in her by the Cuſtom to a Share of this Money in the Hands of B which could not be altered by ſuch ſubſequent Declaration of Truſt; But decreed againſt her; However conſidering all Circumſtances, the Court recommended it to the Heirs or Deviſees of A. to agree to let the Wife in for her Dower of this Truſt Eſtate. Wms's Rep. 321. pl. 82. Trin. 1716. Per Ld. C. Cowper. Ambroſe v. Ambroſe.

15. A *Leaſehold Eſtate deviſed* by a Freeman of London to a Truſtee *for the ſeparate Uſe of his Daughter* ſhall not be taken as Part of her Orphanage Part, but *out of the Legatory Part*; but if Legatory Part be not

not ſufficient, the Legatees muſt abate in Proportion. 2 Vern. R. 754. Mich. 1717. Stanton v. Plat.

16. A Freeman having *a Wife and one Child* (inter al') *deviſed the Orphanage Part to the Child, and in Caſe of the Child's Death before Twenty one, then to go over to the Teſtator's Father*; and it was held that this Deviſe over was void, for that the Father had nothing to do with the Child's Orphanage Part, which came to him by the Cuſtom, not from the Father; and were ſuch Deviſe over to be good, it would be a Prejudice to the Child (who in Caſe there were but one Child) might deviſe over ſuch Part at Fourteen, which would take Effect, were the Child to die before Twenty-one, or if he ſhould die inteſtate and unmarried, it would go all to the Mother as his next of Kin, and not according to the Father's Will; or if the Child marry and die within Age, leaving Iſſue, the Widow and Iſſue would be deſtitute, were ſuch Will to be good. 3 Wms's Rep. 319. in a Note at the Bottom cites Hill. 1718. Biddle v. Biddle.

17. *Covenanting on Marriage* by a Freeman *to add* 1500 *l. of his own* Money *to* 1500 *l. of his Wife's to be laid out in Land*, and ſettled on the Husband and Wife for Life &c. is not to be looked upon as breaking into the Cuſtom. For the Freeman might at any Time during his Life, even *in his laſt Sickneſs*, have *inveſted his Perſonal Eſtate in a Purchaſe of Land*, which would defeat the Cuſtom, and ſtand good, though the Free-man ſhould at the ſame Time have *ſaid, that he did this on Purpoſe to defeat the Cuſtom.* And this, if the Purchaſe was real, would have held good to bar the Cuſtom. Per Ld. C. Parker. Wms's Rep. 532. Hill. 1718. Babington v. Greenwood.

18. A *Freeman having no Wife and only one Daughter, deviſed all his Perſonal Eſtate to his Daughter, who was married*, for her own ſeparate Uſe, and was enjoyed accordingly. The Husband died. The *Repreſentatives of the Husband are not intitled to ſuch Part as was the Daughter's Cuſtomary Share, but the whole belongs oo the Wife.* Trin. 5 Geo. Merriweather v. Heſter.

19. A Freeman of London, *before Marriage, compounds with his Wife for her Cuſtomary Part.* The Free-man dies, leaving Children and the Widow; The Queſtion was, whether the Husband or the Children ſhould have the Benefit, ſo as that the Husband might by this Means diſpoſe of Two Third Parts, ſcilicet his own Third Teſtamentary Share and his Wife's, or that his Children would be entitled to a full Half-Part, as if the Wife were actually dead? Ld. C Parker declared his Opinion in Favour of the Husband's Right, but with a Salvo as to the Certificate, which might be made (if Occaſion ſhould be) by the Lord Mayor and Aldermen by Mouth of their Recorder. See Wms's Rep. 634 to 647. Paſch. 1723. Blunden v. Barker.

N. B. There is a Note at the End of the Caſe that the Parties came to an Agreement, ſo that theſe Points were never certified.

Wms's Rep. 644 in a Note there at the Bottom of the Page ſays, that in the Caſe of Green v. Green, heard at the Rolls Hill. 1718. Mr. Vernon obſerved, that *on this Point Precedents had been both ways*, though the moſt ſolemn ones had been againſt the Children's having the Benefit of the Compoſition, to which the Court inclined without then determining it. But ſays, that afterwards, in the Caſe of Puſey v. Sir Edward Desbouverie, heard July 1734. Ld. C. Talbot taking Notice of the contrary Determinations made by the Court in this Point, ſaid it had of late been ſettled, that it ſhould in ſuch Caſe be taken * as if there was no Wife, and conſequently that the Husband ſhould have one Moiety, and the Children the other. And ſays, that the like was held by Ld. C. Hardwick, June 18. and February 3. 1737. in the Caſes of Wedcalf v. Ives, and Morris v. Burton.

* Wms's Rep. 644 cites S. P. decreed July 8. 1714. in Caſe of Rawlinſon v. Rawlinſon. —— S. C. cited accordingly. 10 Mod. 455.

* This Point was adjudged at the Rolls after ſolemn Debate. 2 Wms's Rep. 327. Trin. 1729. Cleaver v. Spurling.

The Editor at the Bottom of the Page ſays, this was determin'd by Ld C Macclesfield in 1720 in Caſe of Ball v. Ball.

20. A *Mortgage* ſhall be paid out of the Perſonal Eſtate in *Preference* to the Cuſtomary, or Orphanage Part by the Cuſtom of London; Arg. ſaid to have been ſo determined; and the ſame was admitted by Ld. C. King, becauſe the Cuſtom of London cannot take Place till after the Debts paid. 2 Wms's Rep. 335. Hill. 1725. in the Caſe of Rider v. Wager.

21. 11. *Geo.* 1. *cap.* 18. *Sect.* 17. *It ſhall be lawful for all Perſons, who after the* 1*ſt of June* 1725, *ſhall become Free of the City, and for all who at that Day ſhall be unmarrried, and not have Iſſue by any former Marriage, to diſpoſe of their Perſonal Eſtate.*

22. *Sect.* 18. *If any Perſon who ſhall be free of the City hath agreed, or ſhall agree, by Writing, in Conſideration of his Marriage or otherwiſe, that his Perſonal Eſtate ſhall be diſtributed according to the Cuſtom of the City; or in Caſe any Perſon ſo free ſhall die inteſtate, his Perſonal Eſtate ſhall be ſubject to the Cuſtom of the City.*

(C) Foreign Attachment.

1. THIS is not a good Cuſtom. 21 Ed. 4. 67.

2. A Creditor of W. A. attaches his Debt in the Hands of W. S. who was indebted to the ſaid W. A. and this being removed into B. R. by Certiorari, a Procedendo was pray'd, but Coke Ch. J. ſaid, that where the *Party cannot have the like Remedy in B. R. as he may in London*, upon this Cuſtom of Foreign Attachment it ought to be remanded; And Doderidge ſaid, that by way of Barr we often allow ſuch Cuſtoms of London, as when a Debt is recover'd there by Force of Foreign Attachment, and afterwards the Debtee of him in whoſe Hands it was attach'd, brings Action for it, and the Foreign Attachment is *pleaded in Bar*, we ought to allow it; but upon ſuch Cuſtom by way of *Original Suit*, we cannot do Right to the Party, and therefore the Procedendo ought to be granted, and this Cuſtom has very often been pleaded in our Books; and this Diverſity was agreed by Coke Ch. J. and a Procedendo granted. Roll Rep. 268. pl. 42. Mich. 13. Jac. B. R. Croſſe's Caſe.

The Cuſtom is, that the *Sheriff returns, that the Debtor has nothing*

3. It is *called* Foreign Attachment, *becauſe* the Debt of any Perſon, though he lives out of London, may be attached for the Debt of another living in London, to whom he owes it. Arg. Cumb. 109. Paſch. 1 W. & M. in B. R. Andrewes v. Clerke.

by which he may be ſummoned, and that he is not found in the City, and that he be demanded at the next Court, and then if he does not come, Foreign Attachment ſhall be awarded; Arg. Lat. 208. in Caſe of Hern v. Stubbers.

It lies againſt Foreigners if the *Debtor be within the Juriſdiction.* Jenk. 139. pl. 84.

4. It was agreed by all, That a Foreign Attachment in London, *is to no other Purpoſe but* to compel an Appearance of the Defendant in the Action; For if he appears within a Year and a Day, and puts in *Bail* to the Action, the Garniſhee is diſcharged, but without Bail they will not accept an Appearance. Carth. 26 Paſch. 1 W. & M. in B. R. in Caſe of Andrews v. Clerke.

(D) *What*

(D) *What Perſons* ſhall be *bound* by this Cuſtom, *and in the Hands of what Perſon a Debt may be attached.* Fol. 551.

1. D. 8 Eliz. 247. 73. TOFT was indebted to Foxcroft, and A. indebted to the ſaid Toft; Toft died inteſtate. The Ordinary committed Adminiſtration, and after Foxcroft ſued the Ordinary, and upon his Default the Debt of A. was attached by the Cuſtom, and after the Adminiſtrator brought Debt againſt A. who pleaded the Attachment, and yet the Plaintiff recovered, for that no Action of Debt lay as above againſt the Ordinaty, nor by the Ordinary againſt A. Dettee of the Inteſtate, after the Adminiſtration committed by any Law; And ſome were of Opinion, that at the Common Law no Action lay againſt the Ordinary, but by the Statute of Weſtminſter 2, cap. 19. which is within the Time of Memory, and therefore the Cuſtom cannot extend to it. Cro. E. 410. in the Caſe of Suelling v. Norton, [which ſee infra pl. 2.] cites 8 Eliz. 274 [but it is miſprinted, and ſhould be as in Roll 247. pl. 73.] and denies it to be Law. ——— See the Caſe of Maſters v. Lewis infra.

2. Co. 5. Snelling 82. b. this laſt Opinion is reſolved not to be Law, and reſolved, That the Adminiſtration is within another Cuſtom, to be charged for a Contract, becauſe he was chargeable at Common Law as an Executor by his Adminiſtration; and the Name of the Charge, ſcilicet, Adminiſtrator is only charged by the Statute, and yet in Subſtance is all one; And it ſeems by the Book, this Cuſtom is all one with a Foreign Attachment. Cro. E. 409. pl. 21. Trin. 37 Eliz. C. B. Snelling v. Norton, S. C. adjudged. ——— Noy 53. S. C. adjudged accordingly. ——— S. C. cited by Coke Ch. J. as adjudged, that an Adminiſtrator may be within a Cuſtom, Quod fuit conceſſum per Doderidge that he ſhall be, but Haughton doubted of it. Roll Rep. 105. in pl. 21. Mich. 12 Jac. B. R. ——— S. C. cited per Cur. 2 Jo. 204.

3. If by this Cuſtom a Debt be attached in the Hands of B. B. may plead it in Bar againſt his Debtee. 21 Edw. 4. 67.

4. But when an Attachment is pleaded, the Plaintiff may traverſe the Cauſe thereof, ſcilicet, that the Defendant was not indebted to him who attached it. Mich. 12 Jac. B. R. by Coke, and by him there cited P. 40 El. B. R. Pain's Caſe adjudged. Old Entries, Debt in Attachment. 1. Fol. 157. b. But Note, This is upon the Cuſtom of London, within the Year and Day. Cro. E. 599. pl. 4. Paramour v. Pain, S. C. and though it was objected that the Debt is not now traverſable becauſe it is recovered in London, Et non diſtrationatur within the Year and Day, as it might be by the Cuſtom, yet it was held good per tot. Cur. For whether he was indebted or not is well iſſuable; For if he was not indebted, then they in London could not attach the Plaintiff's Debt by a Foreign Attachment for nothing; And Fenner ſaid, that it was ſo ruled 22 & 23 Eliz. C. B. in one Bray's Caſe. ——— Mo. 703. pl. 99. S. C but S. P. does not appear. ——— S. C. cited by Coke Ch. J. Roll Rep. 106. ——— Cro. E. 830. pl. 37 Paſch 43 Eliz. C. B. Coke v. Brainforth, adjudged that the Debt is well traverſable.

5. A Foreign Attachment lies in London *againſt Foreigners, if the Debtor be within the Juriſdiction.* Jenk. 139. pl. 84.

6. A Creditor of W. R. attaches Money *in the Hands of the Ordinary.* Adjudged that it could not be, for a Foreign Attachment cannot charge any other Perſon than the Debtor himſelf, which the Ordinary

is

is not, before Goods of the Inteſtate come to his Hands, for *no Creditor of the Inteſtate can ſue him till he has actual Seiſin*, and before ſuch Seiſin he has ſo little Intereſt in the Matter, that he can neither releaſe or bring the Action; *but Goods in the Hands of an Executor or Adminiſtrator, may be attached* by a Foreign Attachment, *becauſe they are Debtors*; and yet by this Means a Debt upon Simple Contract may be paid before a Debt upon Specialty. 3 Salk. 49. Trin. 7 W. 3. B. R. Maſters v. Lewis.

(E) *What Debt, or Goods*, may be attached by the Cuſtom.

Br. Debt, pl. 162. (163.) cites S. C. and was a Debt of 100 l. by Bond indorſed for Payment of 30 l. of Allom, and the Defendant pleaded Attachment by a Stranger of the Allom upon a Plaint in London, according to the Cuſtom; but the Court held this to be no Plea, becauſe it is of another Thing which was not in Demand; beſides, the Allom cannot be Attachment as Goods of the Plaintiff, becauſe he has no Property in them before they are delivered.

1. SUCH Goods **cannot be attached**, of which he had no Property **at the Time of the Attachment.** 17 Ed. 4. 7. b. per Curiam.

2. If A. be indebted to B. and J. S. a Stranger, takes by Tort certain Goods of A. as a Treſpaſſer, B. **cannot, by the Cuſtom, attach theſe Goods in the Hands of J. S. for the Debt of A. becauſe the** Property is out of A. **at the Time**, and only a Right in him. Trin. 4 Ja. B. R. **between Stamere and Amony, adjudged.**

*3 Bulſt. 243. 244. Page v. Davis, S. C. & S. P. for it muſt be a certain Debt to be within the Cuſtom, which a Legacy is not, nor is it any

3. A Legacy **cannot be attached** in the Hands of an Executor by **Foreign Attachment, becauſe it is uncertain whether, after Debts paid, the Executor hath Aſſets to pay it.** Mich. 14 Jac. B. R. **between** * *Page and Lawketon and Davis*, **per Curiam reſolved, and a Conſultation granted accordingly after a Prohibition to the Eccleſiaſtical Court, where the Suit was for a Legacy.** Mich. 4 Jac. B. R. **between** *Scurra and Mercial*, **per Curiam, for that a Legacy is not demandable nor ſuable at Common Law.**

Duty, till all the Debts are paid. —— A Legacy is not attachable by Foreign Attachment; Per Ld. K. Finch. Chan. Caſes 257. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.—— Noy. 115. S P. per Cur. becauſe it is a ſpiritual Duty. Anon.

Roll Rep. 105. pl. 21. S. C. —— Calth. Rep. of the Cuſtoms of Lond. 27. S. C.

* Fol. 552.

4. If A. be indebted to B. by Obligation, and B. is indebted by Contract to H. and B. dies, and his Adminiſtrator demands the Debt upon the Obligation of A. who promiſes him, that if he will forbear him for a Month, that he will pay him then, but he does not pay him **accordingly**; and after H. brings Debt in London againſt the Adminiſtrator upon the Contract (as he may there by the Cuſtom) the Debt **of A. due by the Obligation, may be attached in the Hands of the Adminiſtrator**; for notwithſtanding the Promiſe * broke, yet the **Debt continued due by the Obligation, and a Recovery upon the Obligation, will be a Bar of the Action upon the Promiſe, in which all ſhould be recovered in Damages.** M. 12 Ja. B. B. **between** *Spinke and Tenant*, **per Curiam.**

5. If

5. If A. lends to B. 100 l. to be repaid by B. upon the Death of his Father, and after the Death of the Father of B. this 100 l. is attached by Force of a Foreign Attachment, and after A. brings an Action upon the Caſe againſt B. for this Money; this Foreign Attachment will be a good Bar thereof, though the Cuſtom be to attach Debts, and this is an Action upon the Caſe, in which Damages only are to be given, becauſe this is a Debt, and he might have had an Action of Debt thereupon, and therefore inaſmuch as this was well attached, he ſhall not defeat it by bringing an Action upon the Caſe for it. Tr. 11 Car. B. R. between *Sir Nicholas Hals and Walker*, per Curiam, upon a Demurrer upon a Foreign Attachment in Exeter, which is of the Nature of an Attachment in London. S. C. cited Arg. 2 Show. 506. in pl. 468. Hill 2 & 3 Jac. 2. B. R.

6. If A. ſells certain Stockings to B. upon a Contract, for which B. is to give 10 l. to A. and if he ſells the Stockings again before Auguſt after, that he ſhall give 2 d. more for every Pair of ſaid Stockings; the 10 l. is attachable by Foreign Attachment, becauſe an Action of Debt lies for it, but the 2 d. for every Pair of Stockings is not attachable, becauſe this reſts only in Damages to be recovered by an Action upon the Caſe, and not by Action of Debt, becauſe it is made payable upon a Poſſibility only. P. 11 Car. B. R. between *Read and Hawkins*, per Curiam, upon a Demurrer, where an Action upon the Caſe was brought for the 10 l. only, and the Foreign Attachment pleaded in Bar; but the Judgment was given againſt the Defendant for the miſpleading the Foreign Attachment. Intratur, H. 11 Car. Rot. 78. but per Curiam, it had been a good Bar, if it had been well pleaded.

7. *Money paid to the Sheriff* of Exeter, *in ſatisfaction of an Execution in Debt* not attachable in his Hands. Le. 264. pl. 353. 19 Eliz. B. R. Anon.

8. A Man may have Money in his Hands which is attachable, though it be no Debt; As if he has *Money to keep, or* if he *finds the Money of the Debtor*. Admitted. Cro. E. 172. pl. 13. Hill. 32 Eliz. B. R.

9. A *Debt of Record* as *upon a Judgment* &c. cannot be attached by the Cuſtom of London, and ſays, that ſo it was holden in the Caſe of Sir John Parrot, in C. B. And was it ſaid by Cook, that ſuch a Debt could not be aſſigned upon the Statute of Bankrupts. 3 Le. 240. pl. 333. Trin. 32 Eliz. in the Exchequer. Sir Walter Waller's Caſe.

10. A Man indebted in *Arrearages upon an Inſimul computaverunt, in a Sum certain*, and promiſed to pay it at a certain Day, but did not, and afterwards it was attach'd in London by the Cuſtom &c. In a new Action brought for the Arrearages in B. R. it was adjudg'd a good Bar. Arg. Roll Rep. 105. cites Mich. 37 & 38 Eliz. B. R. Wandiſtone v. Humphrey.

11. Whether a *Debt upon a Recognizance* may be attach'd in London. Toth. 115. cites 38 Eliz. Skeggs v. Smith. D. 82. b. Marg. pl. 72. cites Mich. 12 & 13 Eliz. Rot. 1640. Sir Roger Manwood's Caſe, wherein it was agreed, that Debt upon a Recognizance might be attach'd; but cites 31 Eliz. Curle's Caſe, wherein it was held, that Debt upon a *Statute Merchant* cannot be attached.

12. *Part of a Debt* may be attach'd by the Cuſtom of London; Per Warburton J. Godb. 196. pl. 282. Trin. 10 Jac. C. B. Ow. 2. cites 22 H. 6 47. S. P. Sid. 317. pl. 7. Paſch. 19 Car. 2 B. R. in Caſe of Robins v. Standard the Court held, that if there had been an Attachment of 20 l. out of the Debt of 50 l. it ſeems the Defendant may plead this Record of the Attachment in London in Bar Pro tanto.

13. Attachment in London of a *Debt in Middleſex*, is good. 2 Show. 507. cites Mich. 19 Car. 2. B. R. Mallum v. Herne.

Lev. 306 Horſey v. Turges, S. C. adjudged. —— 2 Keb. 716 pl. 110. S. C. adjornatur. And 731. pl. 20. adjornatur.

14. An *Executor ſubmitted to an Award*, and the Arbitrators *awarded, that the Plaintiff ſhould deliver to the Defendant certain Goods, and that the Defendant ſhould pay to the Executor* 350*l.* this Money is not attachable in his Hands by any Creditor of his Teſtator, it being not a Debt due to the Teſtator tempore mortis ſuæ, and ſo not attachable as the Teſtator's Debt. Vent. 111. Hill. 22 & 23 Car. 2. Horſam v. Turges.

And Ibid. 741. pl. 42. adjudged —— S. C. cited Arg. 2 Lutw. 985.

15. A. is indebted to B. B. is indebted to C. and D. *A at B's Requeſt gives a Note to C. for the Money due from A. to B.* afterwards A. let *D. attach the Money* as due to D. from B. and on that Attachment D. got a Verdict, and Judgment. Decreed the Money to C. and that D. might take his Remedy at Law, and ſhould aſſign his Judgment to the Six Clerk &c. in Truſt for A. to reimburſe him the Money. Fin. R. 235. Mich. 27 Car. 2. Corderoy v. Carpenter, & al'.

Freem. Rep. 207. pl. 211. Merchant Adventurer's Company, S. P. accordingly, and ſeems to be S. C. —— *Debt of a Corporation* is not attachable, becauſe there ought to be three Capias's and a Non eſt inventus returned &c. 2 Show. 374. Arg. Trin. 36 Car. 2. B. R. Anon.

16. On *Debt* brought *in London againſt the Hambrough Company*, and they not appearing upon Summons, and a Nihil returned, an *Attachment was granted of Debts owing to the Company in the Hands of* 14 *ſeveral Perſons.* Per Cur. We are not Judges of the Cuſtoms of London; nor do we take upon us to determine, whether a Debt owing to a Corporation be within the Cuſtom of Foreign Attachment or not. This we judge and agree in, that it is not unreaſonable that a Corporation's Debt ſhould be attached. If we had judged the Cuſtom unreaſonable, we could and would have retained the Cauſe; For we can over-rule a Cuſtom, though it be one of the Cuſtoms of London, that are confirmed by Act of Parliament, if it be againſt natural Reaſon, but becauſe in this Cuſtom we find no ſuch Thing, we will return the Cauſe. Let them proceed according to the Cuſtom at their Peril. If there be no ſuch Cuſtom, they that are aggrieved may take their Remedy at Common Law. We do not dread the Conſequences of it. It does but tend to the advancement of Juſtice; and accordingly a Procedendo was granted per North Ch. J. Windham and Ellis. (abſente Atkins.) Mod. 212. pl. 45. Paſch. 28 Car. 2. C. B. Hambrough Company's Caſe.

17. A. ow'd B. 2000 l. A. borrow'd 2000 l. of P. to pay B. which Sum A. was to receive of C. being the Purchaſe Money of Lands in Somerſetſhire ſold to D. but before A. receiv'd any of the Money, he paid the 2000 l. Debt to B. Afterwards upon executing the Conveyance by A. to D. he could not pay down ready Money, but *gave A. two Bonds of* 1000 *l. each, to be paid in half a Year. A. delivered theſe Bonds to P. which A. by P's Direction, aſſigned to M. to the Uſe of D.* Afterwards Ld. *H. attach'd this Money in the Hands of D. for ſo much due by A. to him.* M. having an Intereſt in the Bonds by the Aſſignment, refus'd to transfer that Intereſt to P. the Plaintiff, whereupon P. by Bill pray'd Relief againſt this Attachment, and to have the Money, and for M. to transfer his Intereſt in the Truſt of the ſaid Bonds &c. Decreed, that D. pay the Money to P. and P. upon Payment, to deliver up the Bonds to D. to be cancelled, and a *perpetual Injunction* againſt Ld. H. and B. to ſtay Proceedings on the Attachment, or other Proceedings at Law for the Money on the Bonds, and M. to transfer his Intereſt to the Plaintiff. Fin. Rep. 299. Paſch. 29 Car. 2. Perrier v. Ld. Halifax, & al'.

18. If *A. is indebted to B. who is indebted to* C. and *B. aſſigns the Debt of A. to C. in Satisfaction of his Debt*; now the Debt due from A. is become the Right and Property of C. and B. hath nothing but in Truſt

Truſt for C. and therefore it *ought not to be attacked for any Debt of B.* and upon the ſpecial Matter ſhewed, the Lord Mayor ought to give Relief; Per Cur. 2. Jo. 222, 223. Mich. 34 Car. 2. Lewis v. Wallis.

19. Foreign Attachment *has not of any Thing that ſounds merely in Damages*, as *Covenant* &c. It lies not really of *a Debt contracted out of the Juriſdiction*, and in **Brown's Caſe** there was pleaded a Cuſtom, in Exeter for Foreign Attachments of any Debt, and do not ſay accruing within the City, and ſo naught, and ſo adjudg'd by the Lord Hale. 2 Show. 373. pl. 359. Trin. 36 Car. 2. B. R. Anon.

20. It was always the Cuſtom in London to attach Debts upon *Bills of Exchange*, and *Goldſmith's Note &c.* if the Goldſmith that gave the Note, or the Perſon, to whom the Bill is directed, *lives within the City*, without any reſpect had to the Place where the Debt was contracted. Carth. 26. Paſch. 1 W. & M. in B R. in Caſe of Andrews v. Clerke. For the Debt always follows the Perſon of the Debtor. Ibid. —— Comb. 109. S. C. but not clearly S. P. —— Show. 9. Clerke v. Andrews, S. C. but S. P. does not appear.

21. The Arbitrators made an *award thvt W. R. ſhould pay ſo much Money on the 2d Day of January* (he having given a Bond to perform the Award) that was attached on the 1ſt of January, and the Money awarded was taken upod that Attachment on the 2d of January. And per Holt Ch. J. this would have been a good Plea in an Action of Debt brought upon the Award, but not to an Action of Debt brought upon the Bond of Submiſſion, becauſe the Bond is forfeited; and when a Bond is forfeited, it is not the Money in the Condition, but the Money in the Bond itſelf which is attached. 3 Salk. 49. Hill. 13 W. B. R. Ingram v. Bernard. Ld. Raym. Rep. 636. S. C. that the Foreign Attachment iſſued the ſame Day that the Money was payable by the Award, and that by Virtue thereof they attach'd the Money in his hands, the Day after which, was the Day after that the Money was payable, by the Award. Exception was taken, becauſe, when the Money was pleaded to be attach'd, the Day of Payment by the Award (which is now Parcel of the Condition of the Bond) was paſs'd, and the Bond forfeited, and ſo the Penalty of the Bond was due, and not the Money awarded, and therefore that ought to be attach'd and not the other; It was anſwered, That the Attachment was awarded on the very Day, though not executed till the Day after, and that it was their Cuſtom to attach Denarios in Manibus, and not the Penalty. The Court held the Plea ill. And Holt Ch. J. added, that if the Attatchment had been executed before the Bond had been forfeited, it had been well; but though it was attach'd, yet, until it was executed, the Defendant might pay the Money to whom he would, and therefore not paying it according to the Award, he forfeited his Bond; And Judgment accordingly for the Plaintiff.

(F) [Foreign Attachment] At what *Time*. In what *Caſes* it may be.

1. **IF a Man recovers Debt or Damages in B. R. this Debt cannot after be attached in London; for the Inferior Court cannot attach a Debt in a Superior Court. P. 32. El. B. R. between * *Kery and Bowyer*, per Curiam; and Tr. 32 El. after adjudged, and there is cited ‡ *Sir John Parret's* Caſe to be adjudged accordingly.** * Cro. E. 186. pl. 9. Kerry v. Bowyer. S. C. which was, that the Defendant recovered againſt the Plaintiff, and a Debt in B. R. and was indebted to the Plaintiff in another Debt which he attach'd in his own Hands in London, and thereupon brought Audita Querela; but held clearly, that it did not lie; for this Inferior Court cannot fetch this Debt out of B. R. and it is not attachable.

‡ Le. 29. pl. 35. Trin. 27 Eliz. B. R. Flood v. Perrot S. C. adjudged, that a Duty which accrues

crues by matter of Record, cannot be attach'd by the Cuſtom of London.——Cro. E. 29. pl. 9. cites S. C. adjudg'd.——3 Le. 240. pl. 333. cites S. C. as ſo held.——Cro. E 186. pl. 9. cites S. C. adjudg'd.

2. After an Iſſue in an Action of Debt in B. R. the Debt for which the Action is brought, cannot be attached in London for the Cauſe aforeſaid. M. 31. 32 El. B. R. the Caſe of *Fenner and Samuel* is cited to be adjudged.

Cro. E. 157. pl. 41. S. C. the Defendant pleaded a Foreign

3. So after Imparlance to an Action of Debt in B. R. the Debt cannot be attached in London for the Cauſe aforeſaid. M. 31. 32 El. B. R. between *Babington and Babington*, adjudged per Curiam.

Attachment in London after Appearance, and pending the Action; but after Adviſement it was ruled to be no good Plea, but no Cauſe was ſhewn, and the Defendant had a Day to plead peremptory, or a Nihil dicit to be entred.——3 Le. 232 pl. 316. S. C. adjudg'd no Plea after Imparlance.—The Garniſhee cannot plead to the Juriſdiction after Imparlance; For it is an Admiſſion of the Juriſdiction; Per Holt Ch. J. Comb. 109. Paſch. 1 W. & M. in B. R. Andrews and Clerk.——Show. 9 Clarke v. Andrews. S. C. & S. P. and Prohibition denied.——Carth. 25. S. C. & S. P. and Prohibition denied.

Debt upon a Bill obligatory. The Defendant pleaded a

4. If a Writ of Debt returnable in Banco be purchaſed before the Attachment, it cannot, by the Cuſtom, be attached. M. 5 Ja. between *Arſton and Procter*.

Foretgn Attachment in London, which was made whilſt the Suit was depending in C. B. and before he had any Notice of the Suit, it was the Opinion of the Court, that whilſt the Suit is depending, it cannot be meddled with by any other, for it is quaſi in Cuſtodia legis, and the Queen's Court is intereſted therein, and therefore the Attachment is not good. Cro. E. 691. pl. 28. Trin. 41 Eliz. C. B. Humphrey v. Barnes.

5. But otherwiſe it is, if the Writ of Debt be purchaſed after the Attachment by Covin with an Antedate. M. 5 Ja.

Ibid. 712, 713 pl. 36. Mich. 41 & 42 Eliz. B. R. the S. C. and in Error brought of the Judgment, and S. P. affirm'd there by

6. *A. is indebted to B.* and *C. is indebted to A* and *B. brings Debt in B. R. againſt A.* Pending this Action, *B. may affirm a Plaint in London againſt A.* for the ſame Debt &c. and attach the Debt in the Hands of C. For though a Debt in London, for which there is a Suit depending in B. R. cannot be attached, yet he that hath brought an Action in B. R. may notwithſtanding, according to Cuſtom, attach the Debt of the Party; For *the Debt in Queſtion in B. R. is not touched by this Attachment*. Cro. E. 593, pl. 34. Mich. 39, & 40. Eliz. R. R. Lewknor v. Huntley.

three Juſtices, (abſente Gawdy) but it being alſo moved for Error, that the Cuſtom alleged was, that the Plaintiff ſhould ſwear his Debt, whereas the Record is, that it is ſworn by another, who was the Plaintiff's Attorney, it was held incurable, and the Judgment was reverſed.——S. C. cited by Crooke. Roll Rep. 105. pl. 21. Mich. 12 Jac. B. R.

7. W. was arreſted by *Latitat* for 1000 l. on a Bond. The *Money was brought into Court*; but before the Return of the Writ, an *Attachment iſſued in London* againſt W. for divers Sums; it was moved, that the Money might be taken out of the Court to ſatisfy the Plaintiff, becauſe B. R. had the Priority of Suit, but the Court made a Rule to have it examined, and that if it appear'd he was a Debtor to thoſe in London, before he became indebted to the Plaintiff, that the Money ſhall remain in Court ſubject to the Payment of their Debts, and that the Court ſhould not be made a Means to ſtrip others of their juſt Debts; And by Williams J. In Caſe of Priority of Suit *B. R. has always had the Priviledge* and Juriſdiction, and ſo it has been oftentimes adjudged. Bulſt. 217. Trin. 10 Jac. Ingram v. Sir Ed. Waterhouſe.

8. There canot be a Cuſtom for a Foreign Attachment, before there is ſome *Default in the Defendant*. Vent. 236. Hill. 24 & 25 Car. 2. B. R. Anon.

9. *If*

9. *If a Suit be begun* in B. R. or C. B. &c. &c. *no Foreign Attachment* for a Debt &c *ſhall prevent the Judgment* of that Court, nor ſhall it prevent the Judgment of this Court &c. and therefore I confirm the Decree made, and ſet aſide the Proceedings and Judgment on the Foreign Attachment; Per Ld. Chancellor. 2 Chan. Caſes 233, 234. Mich. 29 Car. 2 Anon.

10. *Bill of Middleſex prevents* an Attachment as much as an *Original*, becauſe it is in Lieu of one, and it is the Foundation of the Suit, and if laid to be ſecundum Conſuetudinem Curiæ it will be a *Bar*. 2 Show. 374. pl. 359. Trin. 36 Car. 2. B. R. Anon.

11. A *Judgment was ſet aſide* as irregular, and the Money paid into the *Hands of the Defendant's Attorney*; before he could carry it away, it was attached at the Suit of A. on an Action entered in the Counter. Per Holt Ch. J. let the Plaintiff in the Action in the Counter attend; Tis a Trick. Cumb. 427. Trin. 9. W. 3. B. R. Hayes v. Barnaby.

(G) [Foreign Attachment] At what *Time* it may be.

Fol. 553.

1. AN Obligee before the Debt is due by Obligation, cannot, by the Cuſtom, attach a Debt for it, becauſe he cannot affirm a Plaint for the firſt Debt before it is due. Tr. 32 El. B. R. between *Dalton and Selby*, agreed.

2. But if B. is indebted to A. and C. is bound to B. but the Day of Payment is not yet come, A. may attach this Debt in the Hands of C. before it is due to B. Tr. 32 El. B. R. between *Dalton and Selby*, ſaid that the Cuſtom of London is ſo. But the Court ſaid, this is not laudable nor to be allowed. 3 Le. 236. pl. 324 S. C. held accordingly, per tot. Cur. — Cro. E. 184. pl. 2.

S. C. where the Money was attached before it was due, but the Judgment of the Attachment was not till after it was held clearly void; becauſe it was not due when attach'd.

3. But in ſuch Caſe, if it be pleaded, that ſuch Debt was attached by the Cuſtom, before the Debt was due by the Condition of the Obligation, it ought to be ſpecially pleaded, that, by the Cuſtom, ſuch Debt may be attached before the Day of Payment by the Condition of the Obligation. Mich. 10 Car. B. R. between *Adler and Clapper*, per Curiam, upon a Demurrer where the Cuſtom was alleged generally, as the Uſe is in other Caſes for Debts then due, and therefore the Court inclined it was not good. Intratur, Mich. 10 Rot. 328. Hill. 10 Car. this being moved again, the Court was of the ſame Opinion. Noy 68. 39 Eliz. C. B Rot. 1615. Minors v. Bocher, S. P.

4. If A lends Money to B. to be repaid upon the Death of the Father of B. and after, an Action is brought by C. againſt A. and after, the Father of B. dies; the Money due by B. to A. may after be attached in the Hands of B. though it was not due at the Time of the Plaint commenced againſt A. inaſmuch as it became due before the Time that, by the Cuſtom, Proceſs is to be granted againſt him to whom he is indebted, [or as Mr. Danvers has alter'd it] "in whoſe Hands it is attached". Trin. 11 Car. B. R. between *Sir Nicholas Halls and Walker*, per Curiam, upon a Demurrer upon a Foreign Attachment in Exeter, which is all one with an Attachment in London.

Jo 406. pl. 3 S. C. reſolved. —— D. 82. b pl. 72. Marg. ſays, that Debt is not attachable, Pendente Placito was twice ruled in Babington's Caſe, Mich. 31 & 32 Eliz. and Trin. 41 Eliz in C. B. and there vouch'd in the Judgment, Paſch. 43 Eliz. C. B. Rot. 2421. Powell and Mallow v. Davis of Briſtol.

5. A Debt may be attached, by the Cuſtom, before it is due, but before it is due Judgment cannot be given upon this Attachment, that he ſhall have or retain it in Satisfaction of his Debt demanded before it is due; for thereby there ſhould be an Execution of this Debt attached before it becomes due, which cannot be, for by the Judgment it is put in Execution preſently. Tr. 14 Car. B. R. between *Pierſe and Calcott*, adjudged upon a Demurrer. Intratur, Mich. 13 Car. Rot. 473. But note, it was objected on the other Side, that this was a good Cuſtom, becauſe the Judgment is not that the Debt attached ſhall be paid preſently, but only that he that is Plaintiff, ſhall have it in Satisfaction of his Debt preſently, but to be paid when it becomes due.

Foreign Attachment of a Debt cannot be *before the Day is come*. D. 82. b. Marg. pl. 72. cites Paſch. 27 Eliz. B. R. Skipwith's Caſe. —— S. P. per Cur. Cro. E. 713. pl. 36. Mich. 41 & 42 Eliz. B. R. in Caſe of Leuknor v. Huntley.

(H) [Foreign Attachment] *In what Actions* it may be.

Jo. 406 pl. 3. S. C. agreed, that Goods may be attach'd upon a Foreign Attachment, and that the Value ought to be found before Judgment.

1. In an Action of Debt for Tobacco in the Detinet, a Debt cannot be attached within the Cuſtom in Satisfaction thereof, becauſe it does not appear of what Value this Tobacco was, ſo that it might appear that the Debt is but a Satisfaction to the Value, which cannot be ſupplied by a Plea in Bar made in another Action againſt him in whoſe Hands the Debt was attached. Tr. 14 Car. B. R. between *Pearſe and Calcot*, per Curiam, adjudged upon Demurrer, Intratur, Mich. 13 Car. Rot. 473.

Fol. 554.

2. But if the Value of the Tobacco had been averred in the Record of the Attachment, the Debt might have been well attached in this Action. In the ſaid Caſe of *Pierſe and Calcot* not denied.

(I) How the *Proceedings* may be in the Foreign Attachment.

Jo. 406. pl. 3. S. C. agreed accordingly.

1. Where the Cuſtom is to ſwear the Debt, it is no good Cuſtom if it be alleged, that the Plaintiff ſwore his Debt to be true, by himſelf, or by his Attorney, for his Attorney cannot ſwear it to be a true Debt. Tr. 14 Car. B. R. between *Pearſe and Calcot*, per Curiam, adjudged upon a Demurrer, Intratur, Mich. 13 Car. Rot. 473.

Br. Privilege, pl. 6. cites S. C.

2. The Cuſtom of London is, that where the Goods of the Defendant are attach'd in other Hands, becauſe the Defendant is returned Nihil in plaint of Debt, whereby the Plaintiff, upon the Circumſtance of the Attachment recovers the Goods attach'd, and has Execution, that there, if

if the Defendant would diſſolve the Attachment, he ought to come within a Year, and put in Surety to anſwer the Action, or, if he cannot find Surety, then to *render his Body* to Priſon. Quod Nota. Br. London, pl. 1. cites 20 H. 6. 3.

3. A *Suit* was in Exeter *by M againſt H.* and the ſaid *H. was returned Nihil*; and it was *ſurmiſed that T.* the Plaintiff *had certain Monies in his Hands due to H.* whereupon *this Money was attached* in T's Hands, *T. pleaded Nihil Debet to H.* upon which *M. demurr'd*, and adjudged for him, *becauſe he ought to have pleaded, that he owed nothing to H. nor had any Money in his Hands due to H* upon which T. brought Error, becauſe it is a good Plea, and the Plaintiff was to be barred and not to recover, and that ſo is the common Pleading in London; and the Judgment was reverſed. Cro. E. 172. pl. 13. Hill. 32 Eliz. B. R. Trols v. Mitchel.

Le. 321. pl. 452. Michil v. Hore, S. C. adjudg'd, and the Judgment reverſed in Error.

4. L. brought Debt againſt H. who pleaded, that J. in London affirmed a Plaint againſt A. and by the Cuſtom there attached the Debt demanded, in the Hands of H. and alleged the Cuſtom, that the Plaintiff ſhould ſwear the Debt, but the Record is, that *the Debt was ſworn by a Stranger*; This was held incurable, and ſo a Judgment in C. B. was reverſed. Cro. E. 712. pl. 36. Mich. 41 & 42 Eliz. B. R. Leuknor v. Huntley.

5. The *Cuſtom is*, that if any one is indebted to another, if he will enter his Suit or Plaint in the Counter of the Sheriff of London, that a *Precept* ſhall be awarded *to a Serjeant at Mace, to Summon the Defendant*, and if he return Nihil, viz. that he has nothing within the City by which he may be Summoned & non eſt inventus, and if he be ſolemnly called at the next Court, and *makes default*, that then, if he can ſhew that the Defendant has Goods in the Hands of one within the Liberty of the City, that the ſaid Goods ſhall be attached, and if the Defendant makes Default *at four Court Days, being ſolemnly called, then if the Plaintiff will ſwear his Debt, and put in Bail* for the Goods, that if the Debt be diſproved within a Year and a Day, or the Judgment be revers'd, that he ſhall have Judgment for the ſaid Goods. Godb 400, 401. pl. 483. Paſch. 3 Car. B. R. Hern v. Stubbs.

Ibid. 402. ſays, the *Debt* ought to be *affirmed on Oath* of the Party in Curia Guildhall, Arg. cites it as ſo ſet forth in D. 196. b. [pl. 42. Hill. 3 Eliz. in Caſe of Harwood v. Lee.]

——The Defendant pleaded an Attachment in London, and that he had found Pledges to return the Money if it ſhould be deraigned within a Year, and becauſe *the Pledges were not put in at the Day of the laſt Default, but at another Day after*, it was holden no Plea, and Judgment was for the Plaintiff. Mo. 570. pl. 779. Hill. 33 Eliz. B. R. Anon.

6. It was ruled, That if A. brings Debt in London againſt B. and *attaches Goods of B. in the Hands of C.* from whoſe Poſſeſſion the *Goods* are *not removed*; and *B. by Certiorari brings the Cauſe into B. R. and puts in Bail*, the Attachment is at an End, and C. ought to deliver the Goods to B. which, if he does not, B. may have *Trover* or *Replevin*; but B. R. will not compel him to deliver them, becauſe he is *no Party in Court*, and all Things are as if there never had been an Attachment. 12 Mod. 213. Mich. 10 W. 3. Loveridge and Whitrow.

(K) [Foreign Attachment.]
Who ſhall have it, and *againſt Whom.*

* Cro. E. 186. pl. 9. S. C. and ſee (F) pl. 1. S. C. and the Notes there.

1. IF A. recovers Debt againſt B. **in London**, B. may attach this Debt in his own Hands for ſo much due to him **Paſch. 32 El. B. R. between** * *Kerry and Bowyer*, **admitted. Trin. 32 El. B. R. ſame Caſe admitted. Mich. 11 Jac. B. between** *Lopas and Holman.*

Roll Rep. 105. pl. 21. S. C. & S. P. per Coke Ch. J. accordingly, to which Doderidge J. agreed, but Haughton J. doubted.

2. A Debt due to an Adminiſtrator **may be attached within the Cuſtom, for an Adminiſtrator is within the Cuſtom. Mich. 12 Jac. B. R. between** *Spinke and Tenant*, **per Curiam.**

3. If in Bar of an Action a Foreign Attachment is pleaded, that the Cuſtom is, that if any Man brings his Action againſt another for any Debt, and upon a Return **made**, that he Non eſt inventus, & quod nihil unde &c. and thereupon ſurmiſes, that any other is indebted to the Defendant in ſuch a Sum, and thereupon to pray Proceſs to attach the Sum in his Hands, and to defend, ita quod the Defendant appears to anſwer the Plaintiff, and the Serjeant returns that he hath attached him to defend the Sum in his Hands, and the Defendant does not appear at Four Courts after &c. that Judgment ſhall be to recover it in his Hands &c. **this is no good Cuſtom, without a** Surmiſe that the Stranger who is indebted to the Plaintiff is within the Juriſdiction of the Court, **and the Return of the Serjeant is not ſufficient that he hath attached him to defend it in his Hands, for perhaps the Serjeant intends that he may attach the Debt in his Hands, though he be not within the Juriſdiction of the Court, and his Return ſhall not bind the Party, without an actual Surmiſe thereof by the Party himſelf. Trin. 11 Car. B. R. between** *Sir Nicholas Halſe and Walker*, **adjudged upon a Demurrer, where a Foreign Attachment in Exeter was pleaded, which was all one with the Cuſtom of London, and all Cuſtoms there confirmed by Parliament in the Time of Queen Elizabeth.**

Br. Cuſtoms, pl. 73. cites S. C. —— Br. Barre, pl. 90. (92.) cites S. C. —— Fitzh. Cuſtoms, pl. 5. cites S. C.

4. **The Cuſtom of London is, that** if any Plaint be affirmed in **London, before &c. againſt any Man,** and **it is** returned Nihil, if the Plaintiff **will** ſurmiſe, that any Man within the City is Debtor to the Defendant in any Sum, he ſhall have Garniſhment againſt him **for him to come in to anſwer, if he be indebted in the Form as the other hath alleged, and if he comes, and does not deny it, then this Debt ſhall be attached in his Hands &c. So note, that the Plaintiff ought to ſurmiſe, that the other Man who is indebted to the Defendant is within the City. 22 E. 4. 30 per Starkey, the Recorder of London, the Cuſtom ſo certified.**

5. Whether the Cuſtom **of Foreign Attachment** holds between a Citizen and Foreigner. **Quære. D. 3 El. 196. 42.**

C. was indebted to G by Bond for 100 l. and G. was

6. A *Citizen of London was indebted to a Foreigner upon Bond*, and the *Foreigner was indebted to the Citizen upon a Simple Contract*; the *Foreigner died*, and upon Oath made by *the Citizen*, that his Debt was a juſt Debt, he *levied a Plaint* in London *againſt the Executor of the Foreigner*; and

and upon four Defaults recorded, he had Judgment, and then he *attached the Debt in his own Hands, finding Sureties, that if the Debt was not diſproved by the Executor within a Year and a Day, or the Judgment reverſed, that then he ſhould be diſcharged of ſo much of the Debt which he owed on the Bond*; the Queſtion was, whether this Cuſtom did extend to Foreigners, as well as to Citizens? It was not reſolved. Dyer. 196. b. pl. 42. Hill. 3 Eliz. Harwood v. Lee.

bound to C. for 200 l. both which Bonds were forfeited, and the ſaid C. in London made Attachment of the Debt

of 100 l. in his own Hands for the ſaid Debt of G. and had Judgment thereupon accordingly, and afterwards aſſigned this Obligation to the Queen &c. D. 196. b. Marg cites Trin. 18 Eliz. Chamberlain v. Greſham. ——— Ibid. cites 43 Eliz. in C. B. that it was ſaid for Law per Cur. that a Man by the Cuſtom of London cannot attach a Debt in his own Hands; for that which is in his own Hands cannot be ſaid attach'd; And it was ſaid alſo, that the Cuſtom is good only between Citizens, and not to extend to Strangers.

7. Goods were attach'd in the Hands of the Exeter Carrier, who is then *privileged in the Common Pleas, by Reaſon of an Action there depending*; per tot. Cur. The Attachment ought to be diſſolved, and the Privilege to all Goods for which he is anſwerable to others. Le. 189. pl. 268. Mich. 31 and 32 Eliz. C. B. Edwards v. Tedbury.

(K. 2) Foreign Attachments. Pleadings in General.

1. CUSTOM *of London* was in Iſſue, and the Trial thereof there, and Exception was taken, that Allowance thereof ought to be ſhewn of Record; and the Opinion of the Juſtices was, that he is not bound to ſhew Allowance thereof another time by Record; quod nota, that of Cuſtom there *needs no Allowance*. Br. Cuſtoms, pl. 42. cites 5 E. 4. 30.

2. In *Debt* the Defendant *pleaded a Foreign Attachment*; the Plaintiff *replied, that he was not indebted to the Defendant* in any Sum; and this was held a good Replication, becauſe 'tis iſſueable, whether he was indebted or not; for if he was not indebted, then he could not be attached. Cro. E. 598. pl. 4. Hill. 40. Eliz. B. R. Paramour v. Pain.

Mo. 703. pl. 979. S. C. but not S. P.

3. In *Detinue* for Goods Plaintiff declar'd, that he deliver'd them to re-deliver quando requiſitus &c. but that Defendant had not delivered them Licet ſæpius requiſitus &c. Defendant *pleaded the Cuſtom of Foreign Attachment* in London; *whereupon they were recovered there againſt him*. Plaintiff demurred; 1ſt, Becauſe the *Cauſe of the Debt, on which the Attachment was, is not ſhewn; nor is it averred expreſsly, that there was any Debt*; to which Stone, for the Defendant, replied, that the Cauſe of the Debt ſhall not be ſhewn, becauſe it is only Inducement, and not traverſable. 2dly, Exception was, that the *Cuſtom is, if he ſwears his Debt to be true* &c. but here it is *alleged, that he ſwore his Debt, but did not ſay, that he ſwore it a true Debt*. Stone replied, that this ſhall be intended. 3dly, That it is *not ſhewn that the Debtor was within the City at the Time*. 4thly, The Cuſtom is, that if the *Sheriff returns that the Debtor Nihil habet, by which to be ſummoned, and that he cannot be found within the City, and be demanded at the next Court, that then, if he does not come, Foreign Attachment ſhall be awarded*; but in this Caſe, none of theſe Points were averr'd, viz. that the Sheriff return'd &c. Stone anſwer'd, that this was true, and therefore the Judgment is Erroneous, but that we cannot take Advantage of it, being Strangers &c. At length the Court ſeem'd of Opinion againſt Stone in

Godb. 400. pl. 483. Paſch. 3 Car. Hern v. Stubbs, S. C. adjornatur.

all Points; ſed Adjornatur. Lat. 208, 209. Mich. 2 Car. Hern v. Stubbers.

4. A Foreign Attachment, in an Inferior Court, was pleaded in this Manner; (That by Cuſtom Time out of Mind) whoever levied a Plaint pro aliquo debito againſt another upon Surmiſe; That a Stranger was indebted to the Defendant, that Proceſs iſſued forth to attach &c. The Court ſaid, That they *need not expreſs that the Debt did ariſe infra Juriſdictionem*; for perhaps it did not. And *yet if* an Action be brought in ſuch Caſe, and *the Debt be laid to be contracted infra Juriſdictionem* Curiæ, *if the Defendant will plead to it he may*; but he ſhall never be admitted to aſſign for Error in Fact, that the Debt did ariſe extra Juriſdictionem Curiæ. But if he had tendred ſuch a Plea in the Inferior Court upon Oath; then, if they had refuſed it, it would have been Error. Wherefore it is enough in this Caſe to ſay, that a Plaint were levied pro aliquo debito infra Juriſdictionem, without averring, that the Debt did ariſe within the Juriſdiction. Vent. 236. Hill. 24 and 25 Car. 2 B. R. Anon.

5. Debt on a Bond; the Defendant pleads, that the Plaintiff being indebted unto J. S. he made an Attachment of the ſaid Money in his Hands; the Plaintiff demurs; two Exceptions were taken, becauſe, 1ſt, It does *not appear that the Debt aroſe within the Juriſdiction.* 2dly, That *the Attachment pleaded was made before the Money was payable by the Bond.* It was anſwered as to the firſt, that there is a great *Difference where a Man is Plaintiff* in an Action, *and the Defendant here, who was a third Perſon, who is no ways privy*, and could not allege, that he that is Plaintiff here, was a Defendant below; and the Precedents are all without it, as may be ſeen in Coke's Entries, Tit. Debt. And as to the other Matter, it is *Debitum in Præſenti*, tho' Solvend. in futuro; and it may be attached before it is payable, though it cannot be condemned till after. 2 Show. 506. pl. 468. Hill. 2 and 3 Jac. 2. B. R. Self v. Kennicott.

Show. 9. Clarke v. Andrews, S. C. & S. P. —— Carth. 25. S. C. & S. P.

6. In Caſe of a Foreign Attachment, the Garniſhee cannot plead to the Juriſdiction *after an Imparlance*; For an Imparlance is an Admiſſion of the Juriſdiction; per Holt Ch. J. Comb. 109. Paſch. 1 W. and M. in B. R. Andrews v. Clarke.

Show. 9. Clarke v. Andrews, S. C. argu'd by the Reporter for a Prohibition, but ſays, that Dolben was angry, and ſaid, that no Man would have made ſuch a Motion but the Reporter himſelf, and wondered that he who had been concerned in the City ſhould have made ſuch a Motion; But that Holt ſaid, there was Reaſon in it, but the *Pleading of it was after Imparlance*, and ſo they *came too late*, it not being pleaded in Time; And a Prohibition was denied.

7. Upon a Foreign Attachment the *Garniſhee pleaded to the Juriſdiction of the Sheriff's Court*; but it was over-ruled. Carth. 25. Paſch. 1 W. and M. in B. R. Andrews v. Clerke.

(L) *Pleader of a Judgment in a Foreign Attachment*, in Bar of an Action in other Courts.

Fol. 555.

1. By the Cuſtom of a Foreign Attachment of London, if A. ſues B. in London &c. and C. is indebted to B. in the ſame Sum, and the ſaid C. is condemned there to A. according to the Cuſtom, and Judgment given againſt him accordingly; yet if no Execution be ſued againſt C. A. may reſort to have Judgment and Execution againſt B. his principal Debtor, and B. may ſue C. for his Debt, notwithſtanding the unexecuted Judgment. D. 7 E. 6. 82. 72. by Brook, Recorder of London, this certified to be the Cuſtom of London.

2. In Bar of an Action brought in B. R. if the Defendant pleads a Judgment in a Foreign Attachment in Bar, and alleges the Cuſtom to be, that if the Plaintiff in the Court hath Proceſs againſt the Defendant, and upon a nihil returned, makes a Surmiſe that B. is indebted in ſo much to the Defendant, and upon his Prayer to attach it in his Hands by Proceſs, and he does it accordingly, and if the Defendant makes Default at Four Courts after that, by the Cuſtom, at the laſt of the ſaid Four Courts, the Plaintiff may pray Proceſs againſt B. to come in and ſhew Cauſe wherefore the Judgment ſhould not be againſt him at the next Court after; and when he comes to apply this Cuſtom to his Caſe, he ſhews that there were four Defaults, and that at the fourth Default the Plea was continued for ſeveral Courts, and then Proceſs went againſt B. and then after Judgment againſt him; this is not warrantable by the Cuſtom, inaſmuch as he ſhews, by the Cuſtom, it ought to be at the next Court after the four Defaults. Trin. 11 Car. B. R. between *Sir Nicholas Halls and Walker*, per Curiam upon Demurrer adjudged.

3. Debt by T. C. and R. C. upon an Obligation againſt R. D. of 32 l. and as to 18 l. Parcel &c. he pleaded that M. brought Debt in London againſt the ſaid R. C. of 18 l. who was returned Nihil, by which 18 l. Parcel of the 32 l. was attach'd in the Hands of the Defendant, as the Debt of the ſaid R. C. by the Cuſtom, which is where the Defendant has divers Debtors &c. and is returned Nihil, that he ſhall attach it, and have Execution &c. See the Pleading of this Foreign Attachment, by the Cuſtom of London, Libro Intrat. For it is illy pleaded here, and becauſe he *alleges the Cuſtom to be divers Debtors*, and in the ſubſequent *ſhews but one Debtor*, therefore per Judicium, the Plaintiff recover'd, quod Nota, but it was held by the Juſtices, Serjeants, and Apprentices, that if the Cuſtom had been well pleaded, that this had been a good Barr, though the *Action* be *brought by R. and T. and the Attachment was made as of Debt due to R. only*; For in Debt to two, the one of them may diſcharge it intirely by his Releaſe, Acquittance, or Conuſance in Court of Record &c. For Bar againſt the one, of all, or of Parcel, is good againſt both; For ſuch Record againſt the one, is as ſtrong as if the one had releaſed, quod nota. Br. Dette. pl. 100. cites 22 H. 6. 47.

Br. London, pl. 9. cites S. C

4. In Debt by A. againſt B. the *Defendant ſaid, that J. S. brought* Writ of *Debt in London againſt A. the now Plaintiff*, of 108 l. which was *returned Nihil, and he made Default, whereupon after four Defaults recorded, J. S. ſurmiſed, that B. the now Defendant was indebted to A. the now Plaintiff*,

Fitzh. Cuſtom, pl. 5. cites S. C. — Jenk. 138 pl. 84. S. C.

by the Name of Bowſer v. Collins, ſays, that a Cuſtom ought to be preciſely purſued, and that though Judgment was given in this Caſe, there was no Occaſion of a Writ of Error; for the Cuſtom not being purſued by the Pleading, the Judgment was void; for there is no ſuch Cuſtom, and London has no Juriſdiction in ſuch Caſe but by Cuſtom. This Suit of Bowſer v. Collins was in C. B. if the Cuſtom had been well pleaded, the Judges of C. B ought to allow it for a good Bar; but if B had ſued C. in London this Judgment would have barr'd him, until it was reverſed by Error in London, before the Mayor and Aldermen in the Huſtings.

Plaintiff, in the like Sum now in Demand, and pray'd Garniſhment againſt the now Defendant, and had it, and pleaded the Cuſtom of London *of Foreign Attachment* certain; whereupon it was awarded, that J. S. recover the Sum againſt this Defendant, and that he be diſcharged thereof againſt the now Plaintiff, and that ſuch Recovery and Judgment ſhall be a Bar againſt the firſt Debtor, as this Plaintiff then was, Judgment Si Actio. The Plaintiff replied, that there was no ſuch Cuſtom in London, and thereupon it was wrote to the *Mayor and Aldermen* to certify the Cuſtom, who *certified as above and further* viz. *that after Judgment and Execution had of the Sum attach'd, the Defendant ſhall be diſcharged of this Sum againſt the firſt Debtor*; whereupon the Plaintiff demanded Judgment, it being now certified in Effect, that there was no ſuch Cuſtom, that Judgment only ſhall bind without Execution. Vaviſor alleg'd, that this was a Jeofail, and that No ſuch Cuſtom is no Plea, inaſmuch as the Plaintiff does not deny but that ſuch Judgment was given in London, and conſequently the Record being in Force, he ſhall be bound by it, and ſhall not avoid it by Plea, but ſhall be put to his *Writ of Error*; And Brian ſaid, that he has failed of his Record here; And by him and Choke, and Huſſey, the Plea of the Recovery is not good without the Cuſtom, and therefore the Plaintiff may *traverſe the Cuſtom*, and the rather becauſe it ariſes upon Cuſtom, and not on the Common Law, and divers Caſes put there, that if the Matter had paſſed upon Matter at Common Law, and erroneouſly, that in ſuch Caſe the Record is good and pleadable ſo long as it ſtands in Force, and the Party ſhall not avoid it by Plea, but by Writ of Error, but e contra where it ariſes upon Cuſtom, there he may avoid it by Plea, that No ſuch Cuſtom; but Catesby and Townſend held e contra. But Brook ſays, that the beſt Opinion ſeems againſt them, and cites 21 E. 4. 67. Br. Barre pl. 90. (92.) cites 22 E. 4. 30.

5. *After Debt brought*, the *Plaintiff attached in London a Debt due by another Man to the Defendant, and had Judgment to recover*; adjudged a good Bar to the Action for ſo much. Mo. 598. pl. 820. Paſch. 36 Eliz. May v. Middleton.

6. Whether an Attachment made of a Debt in London may be pleaded *in Bar of a Scire Facias upon a Recognizance in this Court*, it hath been over-ruled in Law it cannot. Toth. 115. cites 38 Eliz. Skeggs v. Smith.

7. *Debt by an Adminiſtratrix upon a Bond of* 26 *l. made to the Inteſtate.* The Defendant *pleaded, that he brought Debt of* 30 *l. againſt the Plaintiff by the Name of Adminiſtratrix to her Husband in London, and that upon Nihil returned the Debt was attached in his own Hands.* It was adjudged no Plea, becauſe *Non conſtat by the Bar that the Debt recovered in London was the Teſtator's Debt, but only that ſhe was ſued by the Name of Adminiſtrator*, which ſhe might be for her own Debt, and then the Inteſtate's Debt cannot be attach'd for her proper Debt, and it is *not ſhewed that the Debt in London was by Specialty*, otherwiſe it is not demandable againſt an Adminiſtrator; Beſides, the *Judgment in London was, De bonis propriis*, which cannot extend to Goods of the Inteſtate's. Adjudged for the Plaintiff. Cro. E. 843. pl. 25. Trin. 43 Eliz. C. B. Hodges v. Cox.

8. Debt upon an Obligation; The Defendant pleads a Foreign Attachment in London, and the Plaintiff demurs, and the Exceptions were, firſt, that the Defendant had *attached the Monies in his own Hands by way of Retainer*, and ſo the Cuſtom unwarrantable. 2dly, It appeared

appeared that *Judgment was given in the Mayor's Court, by the Default of him in whoſe Hands the Money was attached*; and it appeared that *the Defendant, which brought the Action in London, and he in whoſe Hands the Attachment was made, and that made Default, was the ſame Perſon*; and it is a Contrariety, that the ſame Perſon ſhould appear and not appear, and a Preſcription for that is naught; and the Cuſtom is in London, that the Recoveror in London ought to find Sureties, that if the Debt be diſcharged within a Year and a Day, then to pay the Money, and it did *not appear by the Record that he found Sureties*, which was an incurable Fault and ſo adjudged by the Court. Brownl. 60. Mich. 10 Jac. Hope v. Holman.

8. Debt upon Bond conditioned to pay 50 l. before ſuch a Day; the Defendant pleaded the Cuſtom of London of Foreign Attachment, (viz.) that where a Man is indebted to another, and that *Debtor hath Money due to him from one in London*, that the Creditor may attach it before it is due to him, and that ſuch a Creditor of the now Plaintiff did attach 50 l. in the Defendant's Hands before it was due to the Plaintiff, and gave Security, according to the Cuſtom, to repay the Debt, if it ſhould be diſproved within the Year and a Day &c. and that on ſuch a Day (which was after the Day in the Bond) he paid the 50 l. to the Creditor upon a Scire Facias brought againſt him according to the Cuſtom &c. and upon a Demurrer it was inſiſted that it is not a good Cuſtom to attach Money before it was due; but adjudged, that it was; for *though it might be attached as a Debt, it could not be levied before it was due*; and ſo the Cuſtom was laid. Sid. 327. pl. 7. Paſch. 19. Car. 2. B. R. Robbins v. Standard.

2 Keb. 132. pl. 93. S. C. adjornatur. Ibid. 174. pl. 59. S. C. it was mov'd for the Defendant, that the Cuſtom of London is ſpecially alleged to attach any Debt due to a Perſon ſued, and this is a Duty, when attached, tho' not payable till after, to which the Court inclined; ſed adjornatur. —— Ibid. 202. pl. 36. S. C. all the Court conceived the Cuſtom ſufficient, and well alleged; and Judgment for the Defendant, Niſi. —— S. C. cited Arg. 2 Show. 506.

9. *Aſſumpſit by Adminiſtrator* upon Indebitatus for 30 l. for Wares, ſold by the Inteſtate, the Defendant *pleaded that after Inteſtate's Death, and before Adminiſtration granted, he affirmed a Plaint in London againſt the Archbiſhop of Canterbury (to whom the granting the Adminiſtration belong'd) in Treſpaſs on the Caſe, on Aſſumpſit of the Inteſtate to the Defendant for 30 l. mutuo dat' by the Defendant to the Inteſtate, and upon Proceſs againſt the Archbiſhop the Return was, that Nihil habet nec eſt inventus* &c. and then ſhewed the Cuſtom of London of Foreign Attachment, and that himſelf owed the Inteſtate 30 l. which he had in his Hands, *and prayed Attachment of the ſaid Monies in his Hands according to the ſaid Cuſtom*, and alleged the Condition, Proceedings, and Judgment in good Form, as uſual in ſuch Caſe, and then *concluded Judgment Si Actio.* But it being ſhewn, that the Cuſtom is alledged, that if the Debtor dies inteſtate, and a Plaint be affirmed againſt the Adminiſtrator, and if Proceſs againſt him be returned, that Nihil habet Nec eſt inventus &c. that this Cuſtom is not purſued in the Plaint affirmed againſt the Archbiſhop, and then the Judgment founded upon this Cuſtom is void; Quod fuit conceſſum Per tot. Cur. Raymond Abſente. And reſolved that the Defendant's Plea was inſufficient, and that the Judgment upon *the Foreign Attachment was not not any Eſtoppel to the Plaintiff here, he not being a Party thereto.* And Judgment for the Plaintiff. 2 Jo. 166. Mich. 33 Car. 2. B. R. Smith v. Ridges.

10. If *Money be attach'd and paid* thereon, and afterwards the *Original Creditors ſue* for the ſame, if the Attachment happens to be *ill pleaded*, or otherwiſe avoided, the Party muſt *pay the Money over again*, and has no Remedy neither in Law, or Equity. 2 Show. 374. Trin. 36 Car. 2. B. R. Anon.

11. In Aſſumpſit, Evidence was given that the Debt was attached by the Cuſtom of London before the Action brought, and Condemnation had there before Plea pleaded. It was urged that this ſhould relate to defeat the Action; but it was ruled that if an Attachment and Condemnation be before the Writ purchaſed, it may be *given in Evidence* on the general Iſſue, becauſe that is an *Alteration of the Property* before the Action brought; but if the Attachment only be before the Writ purchaſed, it ought to be pleaded in Abatement of the Writ, and if the *Condemnation* be after the Action commenced and before the Plea pleaded, then it may be pleaded in Bar, but ſhall not be given in Evidence on Non aſſumpſit; for the Property is not altered by the Condemnation. Coram Holt Ch. J. in Middleſex, 1 Salk. 280 Paſch. 5 W. 3. Brook v. Smith.

12. In *pleading* a foreign Attachment, it *muſt be that the Defendant* (in the Action in London) *was attached* by the Money in the Garniſhee's Hands, and not that the Garniſhee was attached by the ſaid Money. Carth. 282. Trin. 5 W. & M. in B. R. Lawrence v. Atherton.

13. We cannot take Notice of a Judgment upon the Cuſtom of Foreign Attachment in London, without the Cuſtom be *ſpecially ſhewn*; Per Holt Ch. J. 12 Mod. 407. Trin. 12 W. 3. Anon.

(L. 2) Defendant arreſted. In what Caſes; and when He may be.

[1.] 3. Co. 9. Bachally 68. b. reſolved by all the Juſtices and Barons, that after the Plaint entered in the Book of the Porter of London, and before the Entry thereof in the Court before the Sheriff, the Defendant may be arreſted by the Cuſtom of London.

[2.] 4. By the Cuſtom of London, after the Plaint entered as in the ſaid Caſe before, or before the Plaint entered, if it be afterwards entered, any Serjeant ex Officio, at the Requeſt of the Plaintiff, may arreſt the Defendant abſq; aliquo præcepto Ore tenus vel aliter, and this Cuſtom was allowed to be good by all the Juſtices and Barons. Co. 9. Bachally 67, 69. b.

[3.] 5. By the Cuſtom of London, after a Plaint entered as before, the Defendant may be arreſted by his Body, by a Precept in Na- of a Capias ut ſupra, before any Summons, and yet it is allowed to be a good Cuſtom by all the Juſtices and Barons, inaſmuch as it is eſtabliſhed and confirmed by Parliament. Co. 9. Bachally 68.

[4.] 6. Co. 9. Bachally 69. b. it was objected, that the Cuſtom of London is not good, in that the Entry of the Plaint, upon which the Party was arreſted ut ſupra, was without Form, and ſo ſhort and obſcure, that Opus eſt Interprete. But by all the Juſtices and Barons the Cuſtom is allowed, for that this was but a ſhort Remembrance to draw the Declaration at large afterwards in the Court of Pleas, which, by the Cuſtom, is ſufficient to arreſt him.

(M) What

(M) What *Perſons* ſhall be *within the Cuſtom* [Of London in General.]

1. C. D. 5. Snelling 82. b. adjudged, that when the Cuſtom is that if two Citizens of London makes a Contract, and that he that ought to pay the Money dies, his Adminiſtrator ſhall be bound to pay it as well * as if it were by Obligation, that this is a good Cuſtom, becauſe the Adminiſtrator was chargeable at common Law; and by the Statute the Name of Charge is only changed, but the Subſtance remains all one; and reſolved alſo, that the Stranger, which is no Citizen, after ſuch Debt recovered againſt the Adminiſtrator by a Citizen, ſhall be bound by this Cuſtom. Cro. E. 409 pl. 21. Trin. 37 Eliz. * Fol. 556. C. B. Snelling v. Norton, S. C. adjudged. —— Noy 53. S. C adjudged accordingly. —— S. C cited by Coke Ch. J. as adjudged, that an Adminiſtrator may be within a Cuſtom; Quod fuit conceſſum per Doderidge that he ſhall be, but Haughton J. doubted. Roll Rep. 105. pl. 21. Mich. 12 Jac. B. R. —— S.C. cited per Cur. 2 Jo. 204.

2. * 11 H. 7. 21. cited in D. 8. 9 El. 255. 3. Fitzwilliams, Recorder, certified, that by the Cuſtom of London, a Foreigner, as well as a Citizen and Freeman of London, may deviſe his Lands or Tenements in Fee. 5 H. 7. † 10. and ‡ 19. per Brian. * Br. Deviſe, pl. 51. cites S. C. for it is a Cuſtom which goes with the Land. —— Fitzh. Cuſtom, pl. 7 cites S. C. † S. P. ſo that it be *to Laymen*, as appears in the Caſe of John Ernley of Grays-Inn; for it ſeems that the Cuſtom is annexed to the Land, and not to the Perſon of the Owner. Br. Cuſtoms, pl. 41. cites 5 H. 7. 10. —— Fitzh. Cuſtom, pl. 8. cites S. C. ‡ Br. Deviſe, pl 22. cites S. C. —— Fitzh. Cuſtom, pl. 8. cites S. C. —— 3 Bulſt. 16. Doderidge J. cited 5 H. 7. 10. and 19.

3. Doctor and Student 21. there is a Cuſtom in London, that Freemen there may, by their Teſtament enroll'd, deviſe the Lands of which they are ſeiſed to any, except in Mortmain; but 30 H. 8. S. 132. in London a Man may by Teſtament deviſe to a common Perſon, though the Teſtament be not enroll'd. Br. Deviſe, pl. 22. cites 5 H. 7. 19. S. P. by Brian —— Ibid. pl. 28. cites 30 H. 8. S. P.

4. * 5 H. 7. 10 and † 19. b. per Brian, none may deviſe to Guilds and Corporations in London, unleſs he be a Citizen and Freeman, and [then] he may. D. 8. 9 Eliz. 255. 3. intended, that this Deviſe is to be made to a Corporation within the City only, and not out, and made a Quære. * Br. Cuſtoms, pl. 41. cites S. C. —— Fitzh. Cuſtom, pl. 7 cites S. C. † Br. Deviſe, pl. 22. cites S. C. —— Fitzh Cuſtom, pl. 8. cites S. C.

5. Vid. D. 8. 9 El. 255. 7. Deviſe of Lands in London to Trinity College in Cambridge, and by all the Juſtices 'tis good by the Statute of 1 and 2 P. M. and nothing is ſaid of the Cuſtom.

6. Doctor and Student 21. Citizen and Freeman may deviſe in Mortmain. 30 H. 8. S. 132. And he that makes ſuch Deviſe, ought to be a Citizen and Freeman, and ought to be reſiant. Br. Cuſtoms, pl. 35. cites 28 Aſſ. 25. that this Power in London to deviſe in Mortmain was by Grant of 1 E 3. —— But though they may deviſe in Mortmain, yet they cannot alien in Mortmain. Br. London, pl. 13. cites 24 E. 3. 71.

Br. Cuſtoms, pl. 7. S P but is miſprinted in the large Edition, and there cited as 46 E. 3. 13 which ſhould have been at pl. 8. in that Edition, and pl. 8. there is cited as 45 E. 3. 26 which ſhould be Vice Verſa.

7. 45 Ed. 3. 26. b. adjudged, that a Citizen not reſiant, taxable, or inheritable, cannot deviſe to St. Mary-Overy in Mortmain; and there it is ſaid, that ſo it had been adjudged before this Time. * 38. Aſſ. 18. adjudged.

* Br. Cuſtoms, pl. 36. cites 38 Aſſ. 17. a Man impeached for Mortmain in London *ſaid, that* the Cuſtom of London is, that *every Citizen may deviſe* his Land in London *as well in Mortmain as otherwiſe, and that every one who has Land in Fee in the ſame City is a Citizen*, and C. was ſeiſed in Fee, and was a Citizen, and devis'd &c but becauſe he *did not deny that he was not reſiant in the City, or taxable to Scot or Lot, or inherited there by Succeſſion of Deſcent*, and is not in the ſame City, and ſo no Citizen, and then out of the Caſe of the Cuſtom, therefore *it was awarded that the King have the Land for Mortmain.*

Br. Cuſtoms, pl. 7. cites S. C. and S. P. admitted, but nothing is cited there as ſaid by Finchden, and the Word (Demiſe) is mentioned in three ſeveral Places in all the Editions, inſtead of (Deviſe) and which is the only Word in the Year Book. ——— Br. Mortmain, pl. 35. cites 38 Aſſ. 18. and 45 E. 3. 26 and Brooke ſays, Vide that none can deviſe in Mortmain in London but he that is a Citizen born, and inhabiting in Londou; Quære inde, & Vide Librum London of their Cuſtoms; for Brooke ſays, that thoſe Books here do not know the Truth, as he believes; for it was otherwiſe uſed in London after this, as it is ſaid, but every Owner may deviſe there to a Layman, but none can give in Mortmain there, for this is out of the Cuſtom, but may deviſe in Mortmain.

8. But there it is agreed by Finchden, that Citizens born and inheriting in London, by way of Heritage or Reſiants, and taxable to Scot and Lot, may deviſe in Mortmain Lands of which they are ſeiſed in Fee. But D. 8, 9 El. 255. 3. cited the 45 E. 3. to be that ſuch Deviſe cannot be made in Mortmain, unleſs by a Citizen or Freeman; but the Book is contrary. 38 Aſſ. 18. agreed.

Br. London, pl. 20. cites 29 Aſſ. 31.

9. 30 H. 8. S. 132. Such Teſtament ought to be enroll'd ad proximam Huſtings.

that ſuch Teſtaments are inrolled in London within the Year; but Brooke makes a Quære, if it be of Neceſſity or not. ——— Br. Office devant &c. pl. 19. cites S. C. ——— Br. London, pl. 31. cites F. N. B. 199. that ſuch Teſtaments ſhall be inrolled before the Mayor in the Huſtings; but Brooke makes a Quære, if it be of Neceſſity, unleſs where the Deviſe is in Mortmain; for by ſeveral it need not otherwiſe to be inrolled.

10. Doctor and Student 21. puts the Deviſe in Mortmain by Teſtament enroll'd, but none of the other Books makes any Mention thereof.

Fitzh. Cuſtom, pl. 8. cites S. C.

11. 5 H. 7. 19. b. per Brian, this Cuſtom came by Grant of the King.

The Cuſtom of London is, that a *Freeman may deviſe Land to a Corporation in London*; and that a *Citizen may deviſe to any Man*; and that a *Citizen and Freeman may deviſe in Mortmain*; Per Fleetwood Recorder of London. Mo. 136 in pl. 280. Trin. 25 Eliz.

12. Co. 8. 129. Caſe of the City of London, it is ſaid, that in London, Citizens and Freemen, by their Cuſtom, may deviſe in Mortmain, notwithſtanding the Statute of Mortmain be to the contrary, for the Cuſtoms are confirmed by Act of Parliament.

13. D. 28, 29 H. 8. 33. 12. the Cuſtom of London is, that a Man may deviſe his purchaſed Lands in Mortmain.

Jenk. 238. pl. 17. cites S. C. —— A Recovery in C. B. of Land in London is void. Jenk. 231. pl. 2. cites 2 E. 4. 19. and 9 H. 7. 13.

14. 12 El. D. 290. 61. admitted and adjudged, that a Recovery ſuffered by Baron and Feme, of the Lands of the Feme, is as ſtrong to bind the Right of the Feme-Covert by the Cuſtom of London, as a Fine at Common Law. Vide ſuch Cuſtom in Wales 21 El. D. 363. 26.

15. The *Wife of a Merchant* in London *may ſue and be ſued by Cuſtom*, becauſe London being the chief Place of Trade and Merchandiſe, it is intended, that Merchants cannot be always reſident there, but ſometimes beyond Sea, and in other Places, about their Affairs; and therefore it is reaſonable, that the Wife ſhould ſue and be ſued *in the Abſence of her Husband*; Arg. 2 Brownl. 218. cites 39 H. 6. Bulſt. 14. Arg. S. P.

16. A Feme Covert ſhall ſue an Action alone, without her Husband, for ſhe is a Sole Merchant; alſo they do certify Recognizances Ore Tenus; Per Wray and per Gawdy, a Feme Covert may have an Action within the City, but not here. Le 131. pl. 178. Paſch. 31 Eliz. B. R. Chamberlain v. Thorp.

17. Citizens, who are to be *diſcharged of Priſage of Wines*, ought to be Citizens, Freemen, and Commorant, not in a Chamber, but to *keep a ſettled Houſe there*; Per Doderidge J. 3 Bulſt. 16. Hill. 12 Jac. and Ibid. 23. per Coke Ch. J. S. P.

18. A Free-Woman of London is with the Charter as to *Priſage*; Per Doderidge J. and Coke Ch. J. ſaid, that ſo it is for *Apprentice* in London. And that Homo includes both Sexes. And therefore the Cuſtom of London being, that if a Freeman deviſe a Legacy to an Orphan, the Executor muſt find Surety to pay it, or be impriſon'd; a Legacy left by a Free-Woman is within the Cuſtom. Roll. Rep. 316. Hill. 13 Jac. B. R. Spencer's Caſe.

(N) Cuſtoms of *Things*.

Fol. 557.

1. CD. 5. Snelling 82. admitted by Judgment a good Cuſtom, that if a Contract be made by two Citizens, and he that ought to pay the Money dies Inteſtate, his Adminiſtrator ſhall be bound to pay it, as well as if it were by Obligation. Cro. E. 409. pl. 21. Snelling v. Norton, S. C. & S. P. per tot. Cur. —— Noy 53. S. C. accordingly.

2. *Feme Covert* in London, *ſole Merchant*, *ſhall have Action* here within her Baron. Br. Cuſtoms, pl. 43. cites 1 E. 4, 5.

3. *And Debt againſt Pledges* lies in London *without Specialty*. Ibid.

4. *So* where *a Man counts upon a Conceſſit Solvere by Cuſtom* of London. Ibid.

(O) Cuſtoms of London.

See Feme ſole Merchant at Feme (B).

1. THERE is a Cuſtom in London, that when a Chaplain keeps any Woman in his Chamber ſuſpiciouſly, a Man may come to his Chamber with the Beadle of the Ward, and enter the Chamber and ſearch. 2 H. 4. 12. b. Br. Cuſtoms, pl 10. cites S. C. & S. P. and ſo of Conſtables. Br. Treſpaſs, pl. 74. cites S. C.

Hob. 175. pl. 196 Topſall v. Ferrers, S. C. adjudged. —— Mod 48. pl. 103 Twiſden J. cites S. C. as a bad Cuſtom.

2. **It is no good Cuſtom in London, that if any** Perſon dies within any Pariſh in London, and is carried out **of the Pariſh** to be buried in any other Pariſh, **if he is buried in the Chancel or otherways**, he ſhall pay ſo much to the Parſon of the Pariſh where he died, as he ſhould have paid if he had been buried there **in the Chancel or otherways, as where he was buried; for this Cuſtom is againſt Reaſon, that he that is not any Pariſhioner, but paſſing through the Pariſh lies at an Inn for a Night, ſhould be forced to be buried there, or to pay as if he had been buried there. Hobert's Reports. 238. between** *Topſal and Ferrers.*

Cott. held that this is no good Cuſtom; for London can not preſcribe to bind all

3. **The Cuſtom of London is good**, that if a Villein abides in London for a Year and a Day, **that** he ſhall not be taken nor put out by Writ de nativo habendo, nor by any Proceſs thereupon **iſſuing.** 7 H. 6. 32. **dubitatur.** 8 H. 6. 3. **b. for this is not more than is in ancient Demeſn.**

the Realm, but themſelves only; But Godred contra. However, the beſt Opinion was, that the Return and Cuſtom was good; For the Abbot of C. preſcribed in Sanctuary to ſave Thieves, and it was admitted that he well might, and therefore a Fortiori may retain Villain or Nief. Br. Cuſtoms, pl. 23. cites 7 H. 6. 31, 32 and 8 H. 6 3. —— Br. London, pl. 6. cites S. C. —— Mo. 2. pl. 4 Hill. 12 H. 8. the Sheriffs of London's Caſe, S. P. if no Claim is made of him in that Time. —— Bendl. 2. pl. 2. S. C. and the Pleadings.

Br Cuſtoms, pl 23. cites S. C. ——

4. **By the Cuſtom of London,** no Attaint lies for a falſe Verdict given in London. 7. H. 6. 32. **b.**

Br. London, pl. 6. cites S. C. ſays it was agreed that it was admitted that they have ſuch Cuſtom, and that the Cuſtom was allowed.

Cro. E. 186. pl. 11. S. C. the Declaration was, that the Mayor had uſed to take

5. **It is a good Cuſtom in London,** that the Mayor of London may take Recognizances of any Perſon being of full Age, or Woman unmarried, **for he is a Judge of Record, and though perhaps the Debt grew due out of London. Dubitatur, Tr. 32. El. B. R. between** *Chamberlain and Thorp.*

Recognizances by Cuſtom of all except Infants and Feme Coverts, unleſs upon ſuch certain excepted Days, and that this Recognizance was taken before the Mayor there. It was moved in Arreſt of Judgment, 1ſt. That the Cuſtom is unreaſonable, viz. to take Recognizances of all Perſons except Feme Coverts and Infants, and doth not except Men Non ſanæ Memoriæ; ſed non allocatur; for ſuch may acknowledge a Recognizance and have no Remedy to avoid them, and therefore they are excepted which may. 2dly, That it is not averr'd that the Defendant was not an Infant &c. or that the Day upon which it was taken was none of the excepted Days; ſed non allocatur; for it ſhall be intended if the contrary be not ſhewn by the Defendant; and ſo the Juſtices ſaid the Law is clearly taken at this Day upon the Statute of 1 R. 3. to plead a Feoffment by Ceſtuy que Uſe. 3dly, That none can take Recognizances but Juſtices of Record which had Authority by Patent &c. As the Juſtices of the Benches, and Juſtices of Peace by Commiſſion, and the Mayor is not a Judge of Record but by Cuſtom; ſed non allocatur; for the Cuſtom is good, and the Cuſtoms of London are confirmed by Parliament, and are good though ſtrange, and ſo it was adjudged in this Court between Mabbe and Frying. 4thly, The Cuſtom extends as well to Recognizances taken of Strangers as Citizens, or for Matters within the City; and for this Cauſe Gawdy held it was not good.

6. **It is a good Cuſtom of London,** that they, Time out of Mind, have uſed to have a meaſuring of Coals infra Portum London, **which extends from Staines-Bridge to London-Bridge, and from thence to Gravesend, and from thence to Yenland, or Yendale, and all this is the Port of London. Mich. 11. Ja. B. between the** *City of London and Manly.* **Per Curiam.**

7. London preſcrib'd, *that their Guilds and Fraternities might make other Guilds and Fraternities by Uſage*; but Judgment was given againſt them, for none can do it but by Charter of the King, making expreſs mention thereof; and where they preſcrib'd to make Laws and Statutes; Belk ſaid, they *cannot alter the Eſtate and Inheritance*, as to make Land deſcendable to the eldeſt Son, to be departable between the Males;

Males; For the King cannot do this by Grant without an Act of Parliament, nor make Tenements deviſable by his Charter, Quod Candiſh conceſſit. Br. London, pl. 22. cites 49 Aſſ. 8.

8. Cuſtom of London *to examine Cauſes by the Mayor, at the Suggeſtion of the Plaintiff or Defendant, pending a Plaint before the Sheriff of London* and upon Examination and Satisfaction found to bar the Plaintiff, it is a good Cuſtom; Contra if it be preſcribed after Judgment given; For it is not reaſonable to avoid a Judgment by Examination. Br. Cuſtoms, pl. 60. cites 10. H. 6. 14.

9. By the Cuſtom of London, *Lands and Houſes* there might be *bought and ſold by Word only*, without any Deed or Enrollment; and this is a good Cuſtom notwithſtanding the Statute 27 H. 8. of Inrollments; By the Opinion of the Juſtices of both Benches. D. 229. a. pl. 50. Paſch. 6 Eliz. Chibborn's Caſe.

10. There is a Cuſtom in London, *that Apothecaries who ſell unwholſome Drugs, ſhall forfeit a certain Penalty*; Debt was brought in London by the Chamberlain againſt W. for this Penalty. Upon a Habeas Corpus & Cauſam brought by W. the Court awarded a Procedendo, becauſe the Plea in London is maintainable by the By Laws and Cuſtoms there. Mo. 403. pl. 538. Paſch. 37 Eliz. Wilford v. Maſham.

11. Error of a Judgment in C. B. by Confeſſion in an Action of Debt, brought by the Succeſſor of the late Chamberlain of London; the Error aſſigned was, That the Action was brought by the Defendant in Error, as Succeſſor of B. Chamberlain of London, *upon a Bond made to him ſolvendum to him and his Succeſſors*, and alleged the *Cuſtom of London, that the Chamberlain there had uſed Time out of Mind &c. to take Bonds payable to him and his Succeſſors, that their Succeſſors ſhall ſue thoſe Bonds in any Court*, and that all their Cuſtoms were confirmed by Parliament 7 R. 2. and that the Plaintiff had Judgment upon this Bond; whereas by Law a Bond, being but a Chattle, cannot go to a Succeſſor, but in regard it is alleged to be a Corporation for that Purpoſe, the Court held the Cuſtom to be lawful and reaſonable, and ſhall go to the Succeſſor and not to the Executor, and affirm'd the Judgment. Cro. E. 464. (bis) pl. 16. Paſch. 38 Eliz. B. R. Bird v. Wilſon.

Ibid. cites S. P. as ruled accordingly, Paſch. 21 Elin. in Mayb's Caſe, and that it was ruled accordingly in one Taylor's Caſe, and in Error brought before Manwood, and

other ſpecial Commiſſioners for this Purpoſe, the Judgment was affirmed. —— And in a Note ibid. at the End of the Caſes, cites 43 & 44 Eliz. B. R. Milford v. Hutton, where Debt was brought on ſuch a Recognizance made to B. his Predeceſſor alleging the Cuſtom of London, for the Chamberlain to take Obligations or Recognizances to them and their Succeſſors for Orphans Portions; and after Judgment for the Plaintiff, Error was brought thereof in the Exchequer Chamber, where the Judgment was affirmed.

12. Cuſtom, that if any Free-man *devis'd any Legacy to an Orphan*, that the Executor ſhould be conſtrain'd to *find Sureties to pay* the Legacy according to the Law; in this Caſe Regard ought to be had to Aſſets, and Conditions, and the Will of the Party; Per Cur. Roll R. 316. pl. 27. Hill. 13 Jac. B. R. Spencer's Caſe.

13. A Cuſtom for the Mayor of London *to appoint a Place for Taverns* &c. and to Impriſon for erecting one in a Place againſt their Wills, is good. Mar. 15. pl. 34 Paſch. 15 Car. Anon.

14. By the Cuſtom of London, a *Tenant at Will under* 40 *s. Rent, ſhall not be turn'd out without a Quarter's Warning*, and *if* the Rent be *above* 40 *s.* he muſt have *half a Year's Warning*. 2 Sid. 20. Mich. 1657. B. R. Dethick v. Sanders.

15. On a Certiorari, the Return was of a Cuſtom *for the Company of Merchant-Taylors to choſe Livery-Men, and to commit the Refuſers*, and that was elected, without reaſonable Cauſe, refuſed, and therefore they committed him; it was objected, that the Cuſtom to commit, is not good, becauſe it does *not concern the Government of the City, but the State of a Company only*. 2dly, it does not appear, that he was Habilis & Idoneus, and therefore not eligible; Sed non allocatur; For as to the 1ſt, all

So upon a Habeas Corpus to the Keeper of Newgate, he returned, that in London there are Companies, ſome

all the Cuſtoms are confirm'd by Statute; And as to the 2d, the Refuſal without reaſonable Cauſe, implies Habilis & Idoneus. 2 Lev. 200. Trin. 29 Car. 2. B. R. The King v. Merchant-Taylors.

Freemen of which Companies are Livery-men, and that there is a Court of Aldermen, and *that if any Perſon duly choſen does not take upon him the Office of a Livery-man, he may, by Cuſtom, be committed by the Court of Aldermen* to any Officer of the City; and that Clerke being before that Court, and refuſing, the Court committed him by Warrant in Writing to the Keeper of Newgate, until he ſhould declare his Conſent to take upon him that Office. Reſolved, that B. R. takes Notice of a Livery-man, and of the Nature of his Office, and that he who comes into a Company agrees to Incident Charges and Duties; and it was admitted, that a Corporation might have a Power to commit by Cuſtom, though not by a Charter or By-Law, and that the Sheriff is the proper Officer to whom they ſhould commit him. 1 Salk. 349. pl. 5. Hill. 8 W. 3. B. R. King v. Clerke.

16. Upon a Habeas Corpus and Certiorari the Return was a Cuſtom &c. that *if any Freeman of the City ſpeaks contemptuous Words of an Alderman*, that in ſuch Caſe, the Common Serjeant has uſually exhibited an Information againſt him before the Mayor and Court of Aldermen, and that if the Offender be convicted by Verdict or Confeſſion, they uſed *to puniſh him by Fine or Diſfranchiſement*; that Clerke ſpoke ſcandalous Words of Alderman Lawrence, when he was ſurveying the Meaſures of Coals, (viz.) that he would undo the City, and that he was a Knave; it was objected, that a Cuſtom to try a Man for Words ſpoken of an Alderman &c. in the Court of Aldermen, is unreaſonable, becauſe he is both Judge and Party, beſides it does not appear, that Clerke is a Freeman; though in the Information, which is returned in hæc Verba he is ſaid to be a Free-man; but that is not ſufficient, for it ought to be returned in Fact, that he is a Free-man. The Court would not grant a Procedendo without further Argument, for they ſaid it might be dangerous to put it in the Power of the Aldermen to diſfranchiſe a Free-man for ſpeaking Words of an Alderman. 2 Lev. 200, 201. Trin. 29 Car. 2 B. R. The King v. City of London.

Vent. 327. Clerk's Caſe, S. C. the Court ſaid, that they *might Fine* in ſuch Caſe, but the other Cuſtom would not hold, notwithſtanding the Act of Confirmation of their Cuſtoms, which does not extend to Unreaſonable Cuſtoms. — 3 Keb. 811. pl. 27. The City of London v. Clerk, S. C. the Court held, a *Cuſtom to diſfranchiſe for Words is void*, and a Procedendo was denied. ——— S. C. cited 2 Salk. 426. Trin. 1 Ann. B. R. per Cur. and they held accordingly. ——— S. C. cited 2 Ld. Raym. Rep. 777. and agreed by Court and Counſel of both Sides, that a Cuſtom to diſfranchiſe for ſuch Words would be void. But Mr. Dee ſaid, that notwithſtanding the Report in Levinz, he had ſeen a Rule for a Procedendo in the ſaid Caſe.

17. By the Cuſtom of London any *Perſon above Fourteen and under Twenty-one unmarried may bind himſelf Apprentice* &c. according to the Cuſtom, *and the Maſter thereupon ſhall have Tale Remedium againſt him, as if he were Twenty one.* In Covenant brought on an Indenture of ſuch an Apprentice, the Court held the Cuſtom ſufficiently alleged to give and make good an Action of *Covenant*, that Tale Remedium implies it, and well as other Things; and though by Common Law or the Statute his Covenant ſhall not bind him, yet by Cuſtom it ſhall. Mod. 271. pl. 22. Trin. 29 Car. 2. B. R. Horn v. Chandler.

2 Roll Rep. 305. Paſch. 21 Jac. B. R. ſuch Cuſtom was certified by the Recorder Ore tenus, and that the Covenants in the Indenture bind the Infant though the Indenture is not inrolled within the Year before the Chamberlain; But that is with this Difference, that the Apprentice may come in before the Mayor and Aldermen, and there ſhew his Matter in Petition in French, that the Deed is not inrolled within the Year, and thereupon a Scire Facias ſhall iſſue to the Maſter, to know why the Deed was not inrolled, and if upon his Default the Deed was not inrolled, the Apprentice may ſue out his Indenture, and ſhall be diſcharged; But if the not doing it was by the Default of the Apprentice, As if he will not come before the Chamberlain, but abſents himſelf, he ſhall not be diſcharged; for the Deed cannot be inrolled unleſs the Infant is preſent in Court and acknowledges it.

18. Upon a Habeas Corpus to the Mayor &c. of London, a Cuſtom was returned *to diſfranchiſe, and commit a Free-man for ſpeaking Opprobious Words of an Alderman.* The Court ſaid *they might Fine* in ſuch Caſe, but the other Cuſtom would not hold notwithſtanding the Act of Con-

3 Keb. 764. pl. 56. The King v. Clerk, S. C. adjornatur.

Confirmation of their Cuſtoms, which does not extend to unreaſonable Cuſtoms. Vent. 327. Hill. 29 & 30 Car. 2. B. R. Clark's Caſe.

Ibid. 799. pl. 59. S. C. a Procedendo was moved for by the Recorder, to which the Counſel for the Defendant agreed; But per Cur. this is an unreaſonable Cuſtom to disfranchiſe for ſpeaking Words, being againſt Magna Charta; and by Wild J. ſuch an Act of Parliament would be unreaſonable, and a Procedendo was denied by the Court. Ibid. 811. pl. 27. S. C. and on a further Motion the Court held a Cuſtom to disfranchiſe for Words to be void, and a Procedendo was denied

19. In Treſpaſs for taking and breaking ſo many dozen of Spectacles &c. the Defendant pleads that the City of London is an Ancient City, that therein is and hath been an Ancient Cuſtom, *That if any make and expoſe to Sale ill and unſerviceable Goods, the Chief Officers of the Company have uſed to ſeize them, and carry them to the Guildhall, and impanel a Jury, and if they find them ill and unſerviceable, to break them,* and ſhew that the Plaintiff is one of the Company of Spectacle-Makers, and that the Defendants are Maſter Traders, and chief Officers of the Company; and that the Goods made by the Plaintiff, and taken ut ſupra, were unſerviceable; The Court took the Cuſtom to be good and reaſonable, and the Judgment was for the Defendant Niſi. Skin 55, 56. pl. 8. Trin. 34 Car. 2. B R. Bolton v. Throgmorton.

20. By Cuſtom in the City of London the *Lord-Mayor is Chancellor*, and may call Cauſes before him out of the Sheriff's Court, and rule them according to Equity. Skin. 67. pl. 13. Mich. 34 Car. 2. B. R. in Caſe of Barns v. Barns.

21. Cuſtom of the City of *London* ſhall be preferred to the Cuſtom of the Province of *York*, and notwithſtanding the Cuſtom of the Province of York, the Heir by the Cuſtom of London ſhall come in for a Share of the Perſonal Eſtate, for the Cuſtom of the Province of York is only *local*, and circumſcribed to a certain Place, but that of *London follows the Perſon though never ſo remote from the City.* 2 Vern. R. 82. pl. 78. Mich. 1688. Cholmly v. Cholmly.

2 Vern. 47. S. C. Referr'd to a Maſter to ſtate the Matter ſpecially.

22. Upon a Certiorari the Cuſtom of London was returned, *to puniſh by Information in the Court of Aldermen, either for an Aſſault or Contemptuous Words ſpoken of an Alderman in the Execution of his Office*, and to fine him; and that at a Wardmote held by Sir Robert Jeffries, the Defendant aſſaulted him, and ſaid, I have much to do here as you; you think ſure you are amongſt your Bridewell-Birds, but you are miſtaken; The Court held that it had been doubtful, if the Offence had been by Words only, becauſe no Indictment lay at Common-Law, but he is to be bound to Good Behaviour; yet *for Aſſault he is puniſhable*, and that may be *by Information there by the Cuſtom*, as well as in B. R. by the Courſe of the Court, though the Regular Courſe by the Common Law is Indictment. Secondly, The Court held, that the Information lay in the Court of Aldermen, though an Alderman was grieved; otherwiſe of the Mayor for he is an Integral Part, without which the Court cannot be held, but the other may be ſevered and he muſt not ſit. 2 Salk. 426. pl. 2. Trin. 1 Ann. B. R. the Queen v. Rogers.

7 Mod. 28 S. C. and as to the Aſſault the Court awarded a Procedendo; for they may have a Cuſtom to puniſh by Information ſuch as aſſault the Magiſtrate.

2 Ld. Raym. Rep. 777. S. C. reſolved accordingly, and a Procedendo was granted.

(P) Pleadings of the Cuſtom of London.

1. NOTA, that it was agreed for Law, that *in Debt in London, upon a Conceſſit Solvere*, by the Cuſtom, the *Count ſhall be, quod pro Merchandiſis ſibi prius venditis Conceſſit Solvere* 10 *l.* So that the Merchandiſe ought to be rehearſed, and yet the Merchandiſe is not traverſable, as it ſeems. Br. London pl. 15. cites 38 H. 6. 29.

2. Where the Cuſtom of London is in Iſſue at Weſtminſter, or elſewhere, if the Party will have it to be try'd by Certificate of the City, he *ought to ſurmiſe, that the City is an ancient City, and that there has been a Cuſtom Time out of Mind*, that where their Cuſtom is in Trial in any Courts of the King, that it ſhall be certify'd by the Mayor and Aldermen, by the Mouth of their Recorder now held; For if he does not make ſuch Surmiſe, it ſhall be try'd by the Country, as other Matters in Fact are. Br. Trials; pl. 96. cites 5 E. 4. 30.

3. In a Writ *of Entry ſur Diſſeiſin* brought in C. B. the Defendant *pleaded, that the Houſe in Demand is within the City of London*; and that the ſaid City is Antiqua Civitas; *and that King Hen.* 3. *Conceſſit civibus Civitatis prædict. quod non implacitentur de Terris & Tenementis ſuis &c. extra muros Civitatis prædict. and* further ſaid, *That he himſelf is Civis London* &c. and demanded Judgment of the Writ; (Note, in the Pleading before, the Tenant ſaid) Et illis rectum teneatur intra Civitatem prædictam ſecundum Conſuetudinem Civitatis prædict'. And to this Plea, Exception was taken, becauſe that the Tenant doth *not ſhew before whom, by their Cuſtom, they ought to be impleaded.* It was the Opinion of the whole Court, that the Tenant *ought to have ſhewed, that the Citizens for their Lands ought to be impleaded in the Huſtings* &c. And the general Words in the Plea, viz. Sed illis Rectum teneatur intra Civitatem prædictam ſecundum Conſuetudinem Civitatis prædict'. did not ſupply the Defect aforeſaid. After, it was awarded by the Court, that the Tenant anſwer further &c. 3 Le. 148. pl. 197. Hill. 28 Eliz. C. B. Anon.

4. The Cuſtoms of London are only *triable by the Mayor and Aldermen, by the Mouth of the Recorder*, if it be not a Matter in which the Corporation of London is a Party. The Cuſtoms of other Corporations are triable by the Country, if they be denied. Jenk. 21, 22. in pl. 40.

5. The Judges of every Place are ſuppoſed to have Knowledge of the Laws of the Place whereby they do judge, and to have Cuſtomaries among them; And therefore, in Suits of their own Courts, do determine them, as the Judges of the Common Law do in the King's Courts judge the general Cuſtoms of the whole Kingdom being the Common Law; and ſo *in London, by Special Privilege, they certify* alſo *their Cuſtoms* of this Nature *into B. R.* which other Towns do not. *And their Cuſtoms, even thoſe that are their local Laws, are triable by Jury, if they come to Iſſue in the King's Courts.* And agreeing with this was found and ſhewed a Precedent, Mich. 37. 38 Eliz. Rot. 418. in C. B. London, **Bilford v. Lowe**, in an Action upon the Caſe for certain Parcels of Plate, and the *Iſſue was, whether the Cuſtom of London was, that there was a Common Market in London, for all Goods in all open Shops, all Days, except Sundays and Holy Days, from the Sun Riſing to the Sun Set*; and concluded, Et hoc parati ſunt verificare, ubi & quando ac prout Curia conſideraverit. And then the Defendants made their Surmiſe for the Trial of their Cuſtom by the Mouth of their Recorder, and prayed a

Writ

Writ accordingly; And it was granted returnable in Trinity Term, and continued per Non miſit Breve till Octabis Mich. and then it is entred, that the Concluſion of the Defendant's Plea, ought to have been, Et de hoc ponit ſe ſuper patriam; whereupon the Plea was ſo made, and Iſſue taken, and upon Venire Facias to the Sheriff of London, found for the Plaintiff, and had Judgment; per Hobart Ch. J. Hob. 87. in Caſe of Day v. Savadge.

6. In laying the Cuſtom of London as to *taking Apprentices*, he muſt declare, that he is Civis, as well as Liber Homo. 2 Bulſt. 193. Hill. 11 Jac. Burton v. Palmer.

For more of Cuſtoms of London in General, See other Proper Titles.

Damages.

(A) *Who* ſhall recover Damages.

This in Roll begins with Letter (O) Fol. 569.

1. THE Heir **in a Plea of Land, ſhall not recover Damages** for Damages in the Time of his Anceſtors. 17 E. 3. 45. b. Fitzh. Damages, pl. 85. cites S. C. & S. P. per Stone. ——— *Entry ſur Diſſeiſin* made to the Father of the Demandant, and paſs'd for the Plaintiff, and it was awarded, that he ſhould not recover Damages; For the *Statute of Glouceſter*, which wills, that the Demandant recover Damages, againſt any who is found Tenant after the Diſſeiſin, is *intended the Diſſeiſee himſelf, and not for the Heir of the Diſſeiſee*, Quod Nota, by Award. Br. Damages, pl. 20. cites 42 E. 3. 7.

In a *Writ of Ayel*, A. *was awarded to the Sheriff to inquire of Damages*, and *he inquir'd of the Damages in the Life of the Father of the Demandant*, and well per tot Cur; the Reaſon ſeems to be inaſmuch as the *Demandant is Heir immediate to the Grandfather* now, *contra* it ſeems *if he makes himſelf Heir to the Father, as in Mortdanceſtor*. Br. Damages, pl. 37. cites 2 H. 4. 13.

2. **The** Executor **ſhall not recover Damages in Debt, for Damages in the Time of the Teſtator.** 17 E. 3. 45. b. Fitzh. Damages. pl. 85 cites S. C. & S. P. but for Damages after the Teſtator's Death he ſhall.

3. **The** Succeſſor **ſhall recover Damages in Debt, upon an Obligation for Damages in the Time of the Succeſſor.** 17 E. 3. 45. b. Fitzh. Damages, pl. 85 cites S. C. that the Succeſſor ſhall recover Damages for the whole Time, [which ſeems to intend the Time of the Predeceſſor and Succeſſor]

4. **The** Maſter of Saint-Croſs, who is Preſentative **as a Parſon, ſhall not recover Damages in a Writ of** Annuity **for the Time of his Predeceſſor.** 26 Aſſ. 4. Br. Garden &c. pl. 5. cites S. C.— Br. Damages, pl. 108. cites S. C. and ſo the Damages were ſevered.

5. But

Br Garden &c. pl. 5. cites S. C. Brooke ſays, Quod Nota, a good Diverſity between ſuch like Incorporations.——Br. Damages, pl. 108. cites S. C. and ſays, Nota Diverſitatem.

5. But otherwiſe it would have been, if he had been elective, for there he ſhould have recovered Damages for the Time of his Predeceſſor. 26 Aſſ. 4.

6 In *Debt upon an Obligation by the King*, he recover'd, and the Servants of the King dared not take Judgment of Damages, but of the Principal only; and yet the Prothonotaries ſhew'd diverſe Preſidents that the King had recover'd Damages. Br. Damages; pl. 15. cites 34 H. 6. 3.

7. *And* it was agreed there, that the *King ſhall not recover Damages in Quare Impedit for Lapſe nor Diſturbance.* Ibid.

8. *Preſentee of the King to a Corody*, made his Plaint, that the *Abbot would not admit him* to the Corody according to the Prayer of the King; and the Abbot return'd Cauſe; and by all the Juſtices the *King ſhall not recover* Damages in this Caſe, *but the Preſentee*; *for the Damage is to him*; for the *King has only the Preſentation.* Br. Damages, pl. 93. cites 39 H. 6. 49.

(A. 2) Recovered How. Not without Writ.

1. *WHERE a Man would recover Damages, he ought to take new Original*; and 'tis not a Writ Judicial. Br. Damages, pl. 36. cites 50 E. 3. 23.

2. A Man cannot recover Damages *without Original.* Br. Damages, pl. 50. cites 11 H. 4. 10. by the Reporter.

(B) *Who* ſhall recover Damages in an Action, *in reſpect of his Eſtate.*

This in Roll is (P) though it is the ſecond Letter there.

1. IF Leſſee for Years be ouſted, and he in the Reverſion diſſeiſed, and he in the Reverſion recovers in an Aſſiſe, yet he ſhall not recover Damages. D. 19 El. 354. * pl. 15. † 15 H. 7. 4. b. 5 H. 7. 10. b. Co. 9. 105. b. 3 H. 6. 33. Contra, 12 H. 6. 4.

* This ſhould be pl. 35. Ld. Cromwell v. Andrews.

† Br. Damages, pl. 81. cites S. C. and by Brian the Reaſon is, that the Damages are to the Termor only.——Br. Aſſiſe, pl. 83. cites S. C. & S. P. and for the ſame Reaſon by Brian J. Quod non negatur.——2 Inſt. 285. S. P. that he ſhall recover no Damages for the Profits of the Lands; becauſe they did not belong to him.

2. So if after the Duſter, he in the Reverſion enters upon the Diſſeiſor (as he may by the Law to ſave a Diſcent) and after the Diſſeiſor re-enters upon him, and he recovers in an Aſſiſe; yet he ſhall not have any Damages, for the Re-entry of him in Reverſion reduces the Eſtate to the Leſſee, and then the Damages, inſtead of the Profits, belong to him, and then he ſhall not be twice charged. Quære, D. 19 Eliz. 355. 15 H. 7. 5.

3. *Tenant for Life, and he in the Reverſion join in a Leaſe for Life*; it is ſaid, that they ſhall join in an Action of Waſte, and that the *Leſſee for Life ſhall recover the Place waſted, and he in Reverſion Damages.* Co. Litt. 42. a.

(C) Damages againſt the Defendant. How to be given. In what Caſes they *ſhall be joint.* [In reſpect of ſeveral Matters contained in the Declaration againſt the ſame Defendant.]

This in Roll is (Q)

1. IN an Action of Waſte, if Waſte be aſſigned in Domibus, ſcilicet, in three Meſſuages, and in Gardens ſcilicet, in cutting down ſix Apple-Trees, and ten Pear-Trees in one Garden, and ten Pear-Trees, and ſeven Apple-Trees in another Garden, Sparſim creſcent', ſhewing the Value of every Particular; and upon the Default of the Defendant, a Writ of Enquiry of Waſte is awarded, and the Jury finds the Waſte in the three Meſſuages, and in ſome of the Apples and Pear-Trees to his Damage 50 l. This is a good Verdict, though the Damages are aſſeſſed entirely, though it was objected, that the Damage of the Apple and Pear-Trees might be ſo ſmall, that the Place * waſted ſhould not be recovered; but they being alledged alſo to have been Sparſim creſcent' throughout the Garden, ſhall be recovered. But if it was ſo ſmall, yet, all being upon one Demiſe, if all the Waſte be of a conſiderable Value, though the Particulars are but ſmall, yet the Place waſted ſhall be recovered. Mich. 11 Car. B. R. between *Fitch and King*, adjudged per Curiam, as to this Point, upon a Writ of Error, upon a Judgment in Banco. Intratur, Trin. 9 Car. 213. Cro. C. 414. pl. 1. King Fitch. Mich. 11 Car. S. C. & S. P. held accordingly; For when the Sheriff and Jury have had the View, and given Damages for the Waſte, it ſhall not be intended Petit Damages in any; and the uſual Courſe is, in all Caſes, to find intire Damages.

* Fol. 570.

2. Treſpaſs of a *Cloſe broken, and Emblements taken*, it was *found by matter in Law, that the Plaintiff ought to recover for the Cloſe broken, but not for the Corn, to the Damage of* 40 *s.* and they were compell'd to ſever the Damages, and ſo they did, 20 s. for the one, and 20 s. for the other; For, for Part the Plaintiff ought to recover, and for the reſt not. Br. Damages, pl. 169. cites 42 E. 3. 25.

3. Where *Tenant for Life to the Aunt, and the Niece does waſte in their Time, and had done waſte before, in Time of the two Siſters*, the Aunt and the Niece ſhall join in Waſte, and the Damages ſhall be ſevered, quod nota. Br. Damages. pl. 31. cites 45 E. 3. 3.

4. Quare Imp. *againſt Baron and Feme in Jure Uxoris*, the *Plaintiff recover'd*, and *levied the Damages upon the Baron*, and the *Baron died*, the *Feme brought Attaint, and aſſigned the falſe Oath in the Principal*, and good by Judgment, and Attaint was brought *againſt him who firſt recovered, and againſt another who pleaded Nontenure, and it was found againſt him, and the falſe Oath found in the other Points alſo*, and the *Plaintiff was reſtored to her firſt Damages loſt.* And the Judgment was of this *againſt him who firſt recovered only*, and not againſt both the Defendants. *But* the Judgment of *Damages in the Attaint was againſt both*, ſo the Damages ſevered in Judgment. Br. Damages, pl. 162. cites 46 Aſſ. 8.

So Præmunire against 3, one as Procurator, another as Counſellor, and the third as Attorney, who were found guilty, and the Damages were ſevered, Quære Cauſum, whether becauſe they are ſeveral Torts, or becauſe they are Principal and Acceſſory, as in Felony. Br. Damages, pl. 197. cites 36 H. 6. 32.

5. Præmunire *againſt two, one was found Guilty as Principal*, and *the other as Acceſſory*, and *Damages ſevered*, and the *Plaintiff pray'd Judgment againſt them in common*, and had it, notwithſtanding that Hales ſaid, there may be Principal and Acceſſory in Præmunire, and this, becauſe it was found, that the two were Coadjutors, Procurers, and Abettors to the Third, to ſue the Bull. Br. Damages, pl. 46. cites 8 H. 4. 6.

6. In *Aſſiſe by Baron and Feme of Diſſeiſin and Goods carried away*, the *Plaintiffs recover'd the Land and Damages of Iſſues in common*, and the *Baron alone Damages for his Goods*. Br. Judgment, pl. 20. cites 11 H. 4. 16.

7. In *Appeal againſt ſeveral who are acquitted*, every one of them ſhall recover Damages againſt the Plaintiff ſeverally, and not jointly; contrary of the Plaintiffs. Br. Judgment, pl. 93. cites 11 H. 4. 16.

8. Where *a Man has two Daughters and dies ſeiſed, and N. abates*, and the *one Daughter has Iſſue and dies*, the Iſſue and the other ſhall have *Mortdanceſtor*, and the other ſhall recover Damages for her own Time, and ſhe, and the Iſſue ſhall recover Damages in Common for the Time after the Death of the Mother. Br. Damages, pl. 51. cites 11 H. 4 16.

9. *So in Waſte*, where the Daughter has Iſſue and dies, the other and the Niece ſhall join and recover Damages as above, quod Hank conceſſit; For they cannot do otherwiſe than to join, and cannot otherwiſe recover their Damages; For an Entry upon the Abator determines the Damages, but in diſſeiſin of Land, and taking of Goods, Treſpaſs lies of the Goods. Ibid.

Br. Privilege, pl. 12. cites S. C.

10. If *two do* to me a *Treſpaſs*, and I after have *ſeveral Actions* againſt them, *and recover the entire Damages againſt each*, and have Execution, the one cannot plead that the Plaintiff has recover'd againſt the other for the ſame Treſpaſs, his Damages, and had Execution; for it is no Plea. Br. Judgment, pl. 98. cites 14. H. 4. 22.

11. *Contra, where the Plaintiff joins them in Action*, there he ſhall have only Damages againſt both, and if they join themſelves in Action, he cannot ſever them in Action after, As after Nonſuit, Diſcontinuance &c. Per Hank, quod fuit conceſſum arguendo. Br. Judgment, pl. 98. cites 14 H. 4. 22.

Br. Verdict, pl. 2. cites S. C.

12. Detinue of diverſe Goods, and *counted the Value and Price of every Thing certain by itſelf*, and the Inqueſt gave *a Verdict Quod detinet ad Damnum* 10 *l. in Groſs*; and by the Opinion of the Court they *ought to ſever the Damages of every Thing by itſelf*; for the Plaintiff ſhall recover the Thing, and if the Thing be loſt then the Value thereof, which cannot appear if the Damages are not ſever'd, quod nota. Br. Detinue de biens pl. 4. cites 3 H. 6. 43.

13. Forcible Entry *was found for the Plaintiff to the Damage of* 10 *l. and Coſts* 5 *l.* Per Straunge, if the Damages be not *ſever'd* in every Action where a Man ſhall recover Damages, the Juſtices ought not to give Judgment, and if they do, it is an Error, which was denied, per tot. Cur. Brook ſays it ſeems that his Intent is, that the Damages ſhall be *ſevered from the Coſts*. Br. Damages pl. 88, cites 14 H. 6. 13.

14. *In Treſpaſs in a Park and Seven Acres adjoining*, the *Jury ought to ſever the Damages*, quod nota. Br. Treſpaſs pl. 145. cites 21 H. 6. 39. and 22 H. 6, 7.

15. *Damages may* well be ſevered, *but Coſts* are intire, and *cannot be ſevered*; Per Priſot. Br. Damages. pl. 89. cites 36 H. 6. 13.

15. Damages cannot be ſevered in *Treſpaſs*. Br. Damages pl. 78. cites 15 E. 4. 25.

17. Treſ

17. Treſpaſs *of Goods taken* they were *at Iſſue upon the Property*, and *for the Plaintiff to the Damage and Coſts of* 6 *l.* and the Defendant prayed that the Damages ſhould be ſevered from the Coſts, and per Choeke, and Littleton, it is *at the Election of the Plaintiff* if he will have them ſevered, or in Groſs; by which they were not ſevered. Br. Damages. pl. 128. cites 18 E. 4. 23.

18. Treſpaſs *againſt Four*, the *one pleaded that De ſon aſſault Demeſne* &c. and the *others pleaded Not Guilty*; there per Cur. if the *Plea of the* Treſpaſs is confeſſed by his Plea, unleſs he ſays that the Plaintiff made the Aſſault, but of the other, it ſhall be inquired, if they did the Treſpaſs, and how they did it, and if it be found that the Three made the Aſſault, but did not maim the Plaintiff, then the Judgment of the Damages ſhall be for the Aſſault againſt all in Common; and of the Maim, againſt him who juſtified. Br. Damages, pl. 168. cites 6 H. 7.

19. *Reſcous*; the *Plaintiff counted, that the Defendant held of him by Fealty, and* 10*s. Rent due at Eaſter and Michaelmas, and for Rent he diſtrained, and the Defendant made Reſcous* where *it appeared in the Declaration, that the one Feaſt was paſt and the other not*, and the Defendant *pleaded Not Guilty*, and the *Jury found that there was no ſuch Reſcous, but that the Plaintiff leaſed to the Defendant at Will, rendering Rent at thoſe Feaſts, and that this was Arrear and the Plaintiff diſtrained, and the Defendant made Reſcous*, and per Brian the Plaintiff ſhall not recover; for the Damages ought to have bee ſevered here, and they aſſeſſed in Common for the Day paſt and the Day to come. Br. Verdict pl. 56. cites 9. H. 7. 3.

20. *Treſpaſs againſt Two of Trees cut*, the *one juſtified for himſelf of Common there*, and *the other for Common there for himſelf*, and they are found Guilty and Damages taxed intirely, and by the beſt Opinion it is well, for it *is only one and the ſame Treſpaſs*, though the Anſwers are ſeveral. Br. Damages, pl. 202. cites 11 H. 7. 19, 20.

21. *Contra* in Treſpaſs *againſt Two, of Two Horſes taken*; for this is a ſeveral Treſpaſs. Ibid.

22. If Treſpaſs be brought againſt Two, the Damages ought not to be ſevered, if they be *not found Guilty at ſeveral Times*. But if ſo, ſeveral Damages and entire Coſts ſhall be given. Jenk. 269. pl. 86.

23. *Treſpaſs againſt Three*, they *plead ſeveral Pleas*, and *ſeveral Iſſues* are joined, and all tried by One Jury; and entire Damages and not ſeveral given, judged good, and affirmed in Error, for they are all found Guilty, as the Plaintiff has declared, and that was jointly againſt them, and of a joint Treſpaſs. Jenk. 317. pl. 10.

24. Treſpaſs of *Battery and Wounding againſt Two*; *one pleads to all, except the Wounding, that it it was in his own Defence, and to the Wounding, Not Guilty.* The *other juſtifies* all *in his own Defence.* Iſſue was upon both Pleas. The Jury *found the Firſt Guilty of the wounding, and alſo of the Battery*, and aſſeſs'd *Damages* 20*l.* and finds the *Iſſue againſt the other, and Damages* 100 *l.* and gave *entire Coſts againſt both*, and Judgment was accordingly. Error was brought and aſſigned, that there *ought to have been but one Judgment for Damages*, and he ought to have made his *Election* againſt whom he would take his Judgment; And the Court was of the ſame Opinion; for this Action is for one joint Treſpaſs, and therefore one joint Damage ought to have been given againſt both, though they ſevered in pleading, they being both found Guilty of the ſame Battery; And therefore the Judgment was reverſed. Cro. J. 118. pl. 7. Paſch 4 Jac. in B. R. Crane v. Humberſtone.

25. *Battery* brought *againſt Three*, *Two of them pleaded Not Guilty*, and *Judgment by Non ſum informat' againſt the Third*, and *the Two were found*

found Guilty for all; and the *Jury gave Damages ſeverally, againſt one* 100 *l. and againſt the other* 100 *s.* It was reſolved that the Damages that were given by the firſt Jury, to wit, 100 *l. ſhall be recovered againſt all* the Defendants in that Writ named; and that in *Treſpaſs* the *Firſt Jury taxes the Damages for the whole Treſpaſs*, that ſhall bind all the Defendants, and therefore Execution was given againſt all the Defendants for the 100 l. Brownl. 233. Mich. 8 Jac. Heydon v. Styles.

This in Roll is Letter (R)

(D) How to be given. In what Caſes they *may be joint.*

Roll Rep. 423. pl. 14. S. C adjudged, and ſo is the Courſe of the Court, to give joint Damages at the Election of the Jury,

1. IF an Action upon the Caſe be brought upon Two Promiſes, and both are found for the Plaintiff, the Jury may give intire Damages for both, for this is at the Peril of the Plaintiff; for if the Action does not lie for either of them, the Plaintiff ſhall not have Judgment for the other; but it is not any Inconvenience of the other Part, if the Action lies for both. Mich. 14 Jac. B. R. *Payne and Selby*, adjudged.

Quod fuit conceſſum per Cur. and the Clerks; And Doderidge ſaid, that ſo it is where the Action is brought for two Treſpaſſes, or the like, where both Cauſes of Action are of the ſame Nature. —— 3 Bulſt. 258. S. C. ſays, that Judgment was given for the Plaintiff upon a Demurrer, and upon a Writ of Inquiry the Jury gave Intire Damages; Doderidge J. ſaid, that the Things joined are of one and the ſame Nature, and therefore Damages ought to be given Jointly; But in a Declaration for ſeveral Things, there to ſet down ſeveral Sums; and the whole Court agreed thereto, and Judgment for the Plaintiff.

2. The Law is the ſame in a Trover and Converſion for ſeveral Matters, and Iſſue taken ſeverally, yet the Damages may be joint.

3. In an Action of Aſſault and Battery againſt four for two Treſpaſſes, ſuppoſed to be done at two ſeveral Days, if one Defendant pleads Not Guilty to both Treſpaſſes, and another Defendant pleads Not Guilty to the firſt Treſpaſs, and juſtifies the ſecond Treſpaſs of the Plaintiff's own Aſſault, and the other two Defendants plead Not Guilty to the firſt Treſpaſs, and Judgment is given againſt them by Non ſum informatus for the ſecond Treſpaſs, and upon theſe ſeveral Pleas, ſeveral Iſſues being joined, all are found for the Plaintiff, Though there are two ſeveral Treſpaſſes, and divers ſeveral Pleas, yet the Jury may aſſeſs one intire Damage againſt all, and for both Treſpaſſes; but it is at the Peril of the Plaintiff, if he have no Cauſe of Action for any Part of his Damages being intire. Mich. 9 Car. B. R. between *Eaſtcot* & alios againſt *Edwards*, adjudged in a Writ of Error, and the Judgment in Banco affirmed accordingly. Intratur, Paſch. 9 Car. Rot. ultimo.

Br Decies tantum, pl. 8 [7.] cites S. C. and it was againſt

4. In a Decies tantum againſt ſeveral, if they are attainted, the Damages ſhall be given againſt them ſeverally, and not jointly, for there were ſeveral Takings. 44 E. 3. 36. b.

one for taking 10 s. and againſt another for taking 6 s. 8 d. and the third a Coat, Price 3 s. 4 d. ad Damnum 10 Marks, and they were thereof attainted, but becauſe the Plaintiff had not ſevered the Damages, the Court were of Opinion to take the Iuqueſt De Novo, whereupon the Plaintiff releaſed the Damages. —— Br. Damages, pl. 30. cites S. C. —— Ibid. pl. 91. cites 35 H. 5. [6.] 28. S. P.

5. In

5. In Debt upon one Obligation against two by several Præcipes, the Damages against them shall be several, according to the Writ, scilicet, that the Plaintiff shall recover all the Damages assessed against each. 14 H. 4. 19. b.

Br. Damages, pl. 71. cites S. C. the Plaintiff shall have several Judgments, and Damages severally, viz. against each of them the Sum found by the Jury, and the Court shall increase the Damages beyond the Verdict to a Mark; Quod Nota; but it is said elsewhere, that he shall have but one Execution. ——— Br. Dette, pl. 21. cites S. C. Fitzh. Damage, pl. 60. cites S. C. ——— Br. Several Præcipe, pl. 8. cites S. C. and 5 E. 4. 4. ——— Br. Execution, pl. 40. cites S. C.

6. In Trespass for a Battery, and carrying away his Goods, upon Not Guilty pleaded, if one be found guilty only of the Battery, and the other of carrying away the Goods, the Damages shall be given severally, and not in common. Contra, 22 E. 3. 20. b. adjudged.

Fitzh. Judgment, pl. 188. cites S. C. & S. P. admitted, where the Battery and the carrying away the Goods were done at several Days, but where they are done at one and the same Time, the Judgment and Damages shall be in Common, and so it was done in this Case

7. *Assise against several; one alleged Jointenancy by Deed with a Stranger*, who upon Process did not come, by which the Assise was awarded, where *the other* had *pleaded Misnomer of the Plaintiff*, and *all found for the Plaintiff*; and against him, who pleaded Jointenancy, Double Damages were awarded, and single Damages against the other; and the *Double Damages* shall be *levied of him who pleaded Jointenancy only, and the other Damages shall be levied of him and the other in Common.* Br. Damages pl. 104. cites 22. Ass. 1.

8. *In Appeal against Two* they shall recover Damages severally; Per Hank; And per Westbery if *Three Join-tenants* are, and *one releases to one of the* [*other*] *Two*, and they are disseised, there the Damages recover'd shall be severed for the Third Part. Br. Damages pl. 51. cites 11 H. 4 * 16.

* It should be 17. a pl. 38.

9. *Debt against Two upon an Obligation by several Præcipes*, who *pleaded Non est Factum*, and the *Damages were severed*, and the Plaintiff had *Judgment against every one of them of the several Damages*; for the Judgment ought to accord with the Writ, and so it did, but there *shall be only one Execution*, and shall not have Execution against both. Br. several Precipe pl. 8. cites 14 H. 4. 19. and 5 E. 4. 4.

10. Trespass of *trampling his Grass in the Park of C. and in Seven Acres adjoining*, and found for the Plaintiff to the Damage of 40 d. and Costs 20 s. there it is good to sever the Damages, and so they did, viz. 20 d. for the one and 20 d. for the other, where the Defendant had justified for Default of Fence and Hedge of the Plaintiff Br. Damages, pl. 72. cites 21 H. 6. 33. and 22 H. 6. 7.

11. *Trespass of a Villein taken* into his Service from another &c. the *Defendant said that the Villein was Frank*, and of Frank Estate, and the other e contra, *and to the being in his Service said, that he was not retained, and* to the Frank e contra, and *found that he was Villein* to the Plaintiff *but was retained*, and gave Damages to 30 l. and at the Prayer of the Plaintiff they severed them, and gave 28 l. for the Price of the Villein, and 40 s. for the Loss of the Service, and after the Plaintiff released the Demands of the Service, and had Judgment for the Residue. Br. Damages pl. 76. cites 22 H. 6. 30.

12. *Maintenance against Two*; the *on justified as Attorney for certain Counsel*, and gave 40 d. and the *Plaintiff said, that he gave 6 s. of his proper Money to a Juror* in this Action, and the *other pleaded Not Guilty*, and *all found for the Plaintiff to the Damage of* 10 *l.* This is no good Verdict, for they ought to have severed the Damages; for it appears several Torts Br. Damages pl. 91. cites 36 H. 5. [6.] 28.

S. P. Br. Damages, pl. 101. cites 17 Aſſ. 22. S. P.

13. *So* in *Treſpaſs againſt Two* the *one is found guilty of Part* and acquitted of the reſt, and the *other found Guilty of the reſt* and acquitted of the Firſt Part, the Damages ſhall be ſevered. Br. Damages pl. 91. cites 36 H. 5. [6.] 28.

Br. Verdict, pl. 97. cites S. C.

14. Detinue *of certain Rings of Gold with Precious Stones, viz. a Rubie and a Diamond, and of twelve Pieces of Violet coloured Cloth, and* 10*l. in Money, in a Bag ſealed,* and *counted of ſeveral Damages for each Thing by itſelf, except the Money,* and the *Jury found Damages of* 30*l. for all, except the Money, and if the Stuff cannot be rendered, then* 20*l. for the Stuff, and* 10*l. for the Money*; and the beſt Opinion was that the Damages ſhall be ſevered for each Ring and Piece of Cloth by itſelf. But ſee in Mich. 1 R. 3. fo. 1. that it is admitted that [where] the *Declaration was to a Sum in Groſs,* and the *Plea Non Detinet,* and the Jury gave Damages in Groſs in like Manner, and therefore Judgment was given for the Plaintiff againſt the Opinion of ſeveral, Quære if it ſhall not be Error. Br. Damages pl. 141. cites 1 E. 5. 5.

Br. Verdict, pl. 97. cites S. C.

15. *And,* by the beſt Opinion, *In Quare Imp. and* Writ of *Darrein Preſentment,* the *Jury ſhall ſay, whether the Church be full for Six Months or not, by Reaſon of the Damages of Half a Year in the One Caſe,* and of Damages to the Value of the Church for Two Years in the other Caſe. by the Statute. Ibid.

Br. Verdict, pl. 97. cites S. C.

16. *And* in Writ of *Raviſhment of Ward,* the Jury *ſhall give Damages to* 100*l. if the Heir be married, and if not* 20*l. or ſuch like.* Ibid.

S. C. cited Arg. Mo. 142. —— 10 Rep 130. cites S. C.

17. In Reſcous, the *Plaintiff counted that the Defendant held of him by Fealty and* 10*s. payable at Michaelmas and Eaſter, and for the Rent Arrear the Plaintiff diſtrained, and the Defendant made Reſcous ad Damnum* &c. and the *Defendant pleaded Not Guilty.* It appeared by the Declaration, that the *one Day of Payment was paſt and the other not,* and the Damages are not ſevered, and ſo the Plaintiff cannot recover, by the beſt Opinion; But per Brian the Action lies for Part, and for Part not, Quære inde; for nothing ſhall be recovered in this Action but Damages which are intire, as here. Br. Reſcous pl. 28. cites 9 H. 7 3

Br. Damages, pl. 201. cites 1 H. 7. 23. S P. and ſo are all the Editions, but no ſuch Point appearing there, they all ſeem miſprinted, and that it ſhould be 10 H. 7. 23. a. b. pl. 27.

18. Error on a Judgment *in Aſſiſe,* where the *Plaintiff* had *made Title to the Land, and to a Rent in Groſs,* and Damages entirely aſſeſs'd, where the *Title to the Rent was inſufficient,* and therefore the Judgment was reverſed Quoad the Damages. Mo. 142. pl. 283. Arg. cites 10 H. 7. 23. Pennington's Caſe.

19. In *Debt* on a Leaſe for a Year, made in London, of Lands in Wandsworth in Surry, the Defendant *pleaded four Pleas* triable in Surry; *one Iſſue was found for the Plaintiff to the Damage of* 12*d.* and *another for him, to the Value of* 10*d. and a third for him to the Damage of* 6*s.* 8*d.* and the *fourth Iſſue againſt the Plaintiff,* and would have aſſeſs'd the Coſts of every Iſſue found for the Plaintiff by itſelf, as they had found the Damages; but the Court ordered them to tax the Coſts intire, and ſo they did, viz. to 18 d. &c. Keilw. 48. a. pl. 1. Hill. 18 H. 7. Collet v. Hall.

5 Rep. 108. a. cites S.C.

20. Treſpaſs brought for *breaking of his Cloſe, and beating of his Servants,* and in his Declaration he did *not lay per quod ſervitium ſuum amiſit:* Damages intire were given, and for this Omiſſion in the Declaration the Judgment was arreſted. 2 Bulſt. 102. cites 10 Rep. 130. a. Mich. 14 and 15 Eliz. B. R. Pooley v. Osborn.

21. In a *Replevin* the Parties were at *Iſſue upon the Property,* and it was *found for the Plaintiff, and Damages intire were aſſeſſed*; and not for the taking by it ſelf, and for the Value of the Cattle by themſelves; for the Judgment upon that is abſolute, and not conditional; and alſo, if the Plaintiff had the Cattle, the Defendant might have given the ſame in Evidence to the Jury, and then they would have aſſeſſed Damages

mages accordingly, viz. for the taking only. Godb. 98. pl. 110. Mich. 28 & 29 Eliz. C. B. Anon.

22. Error; the Plaintiff counts in *Replevin Quod adhuc detinet*; and the *Jury aſſeſſed the Value of the Beaſts, and Damages intirely*; whereas they ought to ſever them; for he may have the one, and not the other; and the Judgment for this Cauſe was reverſed. Cro. E. 59. pl. 4. Trin. 29 Eliz. B. R. Aſh v. Wood.

Le. 42. pl. 54. Wood v. Foſter, Mich. 28 & 29 Eliz. ſeems to be S. C. Upon this Writ of Error was brought, and the Plaint was of 1000 Cattle, but the Proof extended but to 865. and notwithſtanding the Number ſet down in the Plaint be by Plea of the Defendant, quodam Modo admitted, and the leſſer Number furniſed, and the contrary not proved ſhall go in Mitigation of the Damages, and the Jury ſhall conform their Verdict in the Right of Damages according to the Proof of their Number, notwithſtanding that Number ſet forth in the Plaint be not denied by the Defendant's Plea, and ſo it was put in Ure in this Caſe. ——— Godb. 112. pl. 135. Wood v. Aſh, S. C. but S. P. does not appear. ——— Ow 139 S. C. but S. P. does not appear.

23. The Defendant *promiſed to do ſeveral Things*, and the Plaintiff *alleged two Breaches, one* whereof was *inſufficient*, and the Defendant *pleaded Non Aſſumpſit*; Reſolv'd, that it ſhall be intended that they gave Damages for both; and 2dly, That inaſmuch as the Plaintiff had no Cauſe of Damage for the one, therefore Judgment given for the Plaintiff in B. R. was reverſed in the Exchequer Chamber. 5 Rep. 108. a. b. cites it as adjudged Mich. 30 & 31 Eliz. Moor v. Bedle.

Le. 170. pl. 238. Bedel v. Moor, S. C. and Judgment was ſtaid. ——— In Covenant the *Breach* aſſigned was *in two Covenants*, and it appeared, that *for the one he had no Cauſe of Action*, and for the other a good Cauſe, and Iſſue was joined upon both, and found for the Plaintiff in both, and Damages intirely aſſeſſed. The Plaintiff could not have Judgment. Cro. E. 685. pl. 19. Trin. 41 Eliz. C. B. Anon.

24. In Treſpaſs for *breaking his Cloſe and ſpoiling his Graſs*, the Jury gave Damages intire as well for breaking the Cloſe as ſpoiling the Graſs whereas the *Plaintiff had only the Ear-Graſs, in which Caſe, Treſpaſs Quare Clauſum fregit would not lie for him*, and therefore could not recover the Damages. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. Hitchcock v. Harvey.

25. Error was brought of a Judgment, and aſſigned, Firſt, becauſe the Action is an Action upon the *Caſe for diſturbing him to exerciſe the Office of the Keeper of a Walk in the Foreſt of F. and ſuppoſing that he was ſeiſed of the Manor of S. to which Manor the Office of the Cuſtody of the ſaid Foreſt appertained; and that he and all thoſe, whoſe &c. Time whereof &c. by Reaſon of the ſaid Office, had had &c. Omnia bona & Catalla forisfacta within the ſaid Foreſt, except bona, & catalla forisfacta ſecundum aſſiſam Foreſtæ* &c. whereas there cannot be a Preſcription to have Omnia Catalla forisfacta &c. and then there be Damages demanded, and given for a Profit, which he could not have. A Third Error aſſigned was, becauſe the Diſturbance is alleged 23 December Per quod a Prædicta 23 Decem. 35 uſq; 10 Feb. next following, he loſt the Profits of the Office; and he ſhews not any Cauſe whereby he loſt the Profits from the 23d of Decem. And yet Damages are given for that Time alſo, where Damages are not to be given. For it is not alleged, that he was kept out from the exerciſing of the Office, nor any Diſturbance after the 23d of Decem. nor with a Continuando. Wherefore for theſe Errors and Imperfections in the Declaration, and divers others, without regarding any any Matter in Law, it was awarded, that the firſt Judgment ſhould be reverſed. Cro. E. 560. pl. 17. Paſch. 39 Eliz. B. R. Pembroke (Earl of) v. Sir Henry Barkley.

Mo. 706. pl. 987. Berkley v. Ld. Pembroke, S. C. and Judgment reverſed.

26. *Treſpaſs* of Battery. Two of the Defendants plead *de ſon Aſſault Demeſn*. The Third pleaded *Not-Guilty*. Both Iſſues were found for the Plaintiff, and ſeveral Damages found againſt them who pleaded ſeverally, and ruled to be ill: For it is one joint and entire Offence by the Plaintiff's Action; and when all are found equally guilty, the Damages

S. C. cited 11 Rep. 7. a.

Damages ought to have been entire. But if in Treſpaſs againſt divers, the *one be found guilty in Part, and the others in all*, there the Damages ſhall be ſeveral. Cro. E. 860. pl. 32. Mich. 43 & 44 Eliz. C. B. Auſten v. Willward.

27. In *Battery* the Baron *juſtifies, for that the Plaintiff aſſaulted his Feme, in Aid of whom* &c. *The Feme by herſelf pleads and juſtifies de ſon Aſſault Demeſne*; The *Plaintiff ſays, de Injuria ſua Propria abſque tan Cauſa*; and *both Iſſues found for the Plaintiff, and Damages entirely* given, and now alleged in arreſt of Judgment, that the Trial was ill; For the Feme by herſelf cannot plead, and the Damages being entirely aſſeſſed, all was ill; and of that Opinion was the Court; and awarded that they ſhould replead. Cro. J. 239. pl. 3. Paſch. 8. Jac. B. Watſon v. Thorpe.

28. Error of Judgment *in Aſſault, Battery, and Wounding*. Error was, that the Defendant *Quoad the Battery and Wounding was not Guilty*; & *Quoad the Aſſault, juſtifies*. The Iſſue was joined, De ſon tort Demeſn. *Both Iſſues were found againſt the Defendant, and for the Firſt Battery and Wounding 6 d. Damages, and for the Aſſault 1 d. Damages.* Per Cur. The Jury ought not to have given Damages for the *Aſſault*, for it *was included in the Firſt Iſſue*, and that being tried, this Iſſue needed not, and they having found Damages ſeveral, it is double Damages for one and the ſame Thing, which ought not to be, and therefore the Judgment was reverſed. Cro. J. 251. pl. 5. Mich. 8. Jac. in B. R. Candiſhe's Caſe.

11 Rep. 7. a. b. Miles v. Prat, S. C. cited, and the Verdict quaſh'd, becauſe the Damages were aſſeſſed ſeverally, and a Venire Facias de novo was awarded, and all the Iſſues found for the Plaintiff, and intire Damages aſſeſſed, but by reaſon of Diſcontinuances the Judgment was reverſed. ——— Cro. J. 303 pl. 5. S. C. and Judgment reverſed for want of Continuances.

29. In an Action of *Treſpaſs againſt Three* Defendants, the *firſt pleads generally Non Culp. to the whole*; the *Second pleads as to Part, Non Culp.* and the *Third, as to another Part, pleads Non Culp.* Iſſues joined againſt them all. The Jury *found the firſt Defendant guilty of the whole, and the other Defendants guilty of the ſeveral Parcels*, and did aſſeſs *Intire Damages* for the Plaintiff, and Judgment given accordingly in C. B. for the Plaintiff, and a Writ of Error brought to reverſe the Judgment, and this only aſſigned for Error, Quia Juratores ſe male geſſerunt in veredicto dando Curiæ, this is a clear Error, and for this Error Judgment was reverſed per Curiam, and a new Trial to be had. Bulſt. 50. Mich. 8 Jac. Mills v. ———

30. If an Action of *Debt* be brought *upon Two Contracts* and *both found for the Plaintiff*, in that Caſe the Jury may tax Damages intire; but the ſafer and better Way is to ſever the Damages; for it may come to paſs that an *Action will not lie for one* of the Two, and if it will not lie, then your Labour and Charge is loſt. Brownl. 70. Hill. 9 Jac. Anon.

But otherwiſe in Treſpaſs *for cutting and carrying away his Trees* &c.

31. *Treſpaſs of Aſſault and Battery* againſt Two, who plead Not Guilty, and Verdict for the Plaintiff againſt both. The Jury aſſeſſed ſeveral Damages to the Plaintiff, and Coſts to the Plaintiff entirely againſt both and held good. Bulſt. 157. Trin. 9 Jac. Sampſon v. Cranfield.

For it is a joint Act, and the Damages are to be intire; But in the Caſe of Battery it is not *a joint Act*, for the Battery of the one cannot be the Battery of the other, and the Battery of one may be greater than of the other. Bulſt. 157. in Caſe of Sampſon v. Cranfield. ——— S. C. cited as to the firſt Point, Arg. and ſaid, that every Treſpaſs is Joint and Several both, and Not Guilty is the ſeveral Plea of them all; for one may be found Guilty, and the other Not, and conſequently there is no Difference where the Pleas are Joint and where Several, and Heydon's Caſe is expreſsly ſo. 2 Show. 470. Paſch. 2 Jac. 2. B. R. in Caſe of Radney v. Strode. ——— Carth. 19. Mich. 3 Jac Rodney v. Strode, S C. adjudged and affirmed in the Exchequer Chamber, and in Parliament, which was Treſpaſs againſt Three, and the Jury found them all jointly Guilty, but ſevered the Damages which ought to have been joint, but by the Plaintiff's entring a Noli Proſequi as to two of the Defendants, the Fault in the Verdict

Verdict was cured ——— 3 Mod. 101. S. C. and admitted that the Damages ſhould be intire where the Action is Joint; but where the Facts are Several, Damages ſhould be aſſeſſed ſeverally; but per Cur. when ſeveral are found Guilty Criminally, the Damages may be ſevered in Proportion to their Guilt; and Judgment for the Plaintiff.

32. Where an Action of *Battery* is brought *againſt ſeveral*, and the Defendants are all charged with one Battery, though *the Declarations are ſeveral*, yet they being with a *ſimul cum &c.* ſhew that they are joint Treſpaſſers there, though Damages are ſeverally given and very different, as 200 l. againſt one, and 25 l. againſt another &c. yet what are given againſt one, ſhall ſerve, and may be taken againſt the other; And if the *Damages* are *too great*, any of the Defendants may have an *Attaint*, though he be not the ſame Party againſt whom the Verdict was found, and ſo a Judgment in C. B. was affirmed in B. R. Cro. J. 348. pl. 2. Trin. 12 Jac. B. R. R. Cobb. v. Heydon.

11 Rep. 5. Sir John Heydon's Caſe, S. C. reſolved accordingly, becauſe ſuch other Defendants are privy in Charge, and ſays, that with this accords 44 E. 3. 7. b. adjudg'd in Point, and F. N. B 107. (E) accordingly. ——— Brownl. 233. Heydon v. Stiles, S. C. that Execution was given againſt all the Defendants for the greateſt Damages.

33. In *Treſpaſs for breaking his Houſe and beating him*, if it be *againſt Joint Treſpaſſors, there can be but one Satisfaction*, and therefore if they are ſued in one Action, though they may *ſever in Pleas and Iſſues*, yet one Jury ſhall aſſeſs Damages for all; and as to the Damages he that is no Party to the Iſſue ſhall have an Attaint, as well as his Fellows, and if they are ſued in ſeveral Actions, though the Plaintiff makes choice of the beſt Damage, yet, when he hath taken one Satisfaction, he can take no more, and if he requires Two, an Audita Querela will lie. Hob. 66. pl. 69. Trin. 12 Jac. Cocke v. Jennor.

Brownl. 196. Cook v. Jenman, S. C. the Plaintiff cannot have ſeveral Damages, but (as in Heydon's Caſe) he may chuſe the beſt.

34. In *Caſe for not grinding at Plaintiff's Mill*, a Fault was, that he *aſſigned, the Breach Anno* 12, *& diverſis Vicibus between that and Anno* 2, *which was long before the Plaintiff's had Intereſt* and the *Damages were given intire upon Not Guilty to the whole*, which Damages ſhall be underſtood to be given not according to the Law, but according to the Allegation of the Plaintiff, who lays his Damages for all, and the Verdict of Laymen, who find him Guilty de Præmiſſis to the Damage of &c. and makes no Difference that the Special Breach is Right Anno. 12. and the reſt comes by diverſis Diebus, like a Treſpaſs with a Continuando, for which Damage is alſo given. Hob. 189. pl. 233. Trin 14 Jac. Harbin & Ux v. Green.

Mo. 887. pl. 1247. S. C. the Damages being intirely aſſeſſed for the Default of Grinding from the 2 Jac. to the 12 Jac. whereas the Leaſe of the Plaintiff was made but in the 11 Jac. the Judgment was arreſted. ——— Brownl. 18. S. C. and upon Motion in Arreſt of Judgment it was adjudged naught.

34. In *Aſſumpſit* the Plaintiff counted *of two ſeveral Aſſumpſits*, whereof *one* was an *expreſs* Aſſumpſit for 137 *l.* and *the other* was an *implied* Aſſumpſit for 48 l. the Defendant *pleaded Non Aſſumpſit generally*; This extends to both the Aſſumpſits, and entire Damages being given was held good. Jenk. 331. pl. 63. cites Cro. J. 544. [Mich.] 17 Jac. Heath v. Dauntley.

35. Action upon the *Caſe*. The Plaintiff declared *that he at L.* ſuch a Day &c. *lent to the Defendant a Gelding to ride from L. to the City of E. and ſafely to re-deliver it back to the Plaintiff; and that the Defedannt to deceive the Plaintiff rid the Gelding from L. to E. and from E. to L. and ſo abuſed him thereby, that he became of little Worth, and notwithſtanding at E. he required him to re-deliver him ſuch a Day, he refuſed to redeliver him.* Intire Damages being given for all theſe Torts, all the Court delivered their Opinions ſeriatim, that the Trial was good and the Damages well aſſeſſed.

aſſeſſed, Firſt, becauſe the principal Tort was, the not delivering upon Requeſt at Exon, according to the Contract. And then when he denied the Re-delivery, and after converted him to his own Uſe, the Plaintiff may well have an Action for both, and together. And although perhaps the Defendent might have demurred (as the Lord Herbet conceived) for the Doubleneſs of the Declaration; yet when he demurred not to it, but pleaded Not Guilty of the Premiſſes, and is found Guilty, that makes the Declaration good, and there is not any Cauſe to ſtay the Plaintiff's Judgment. Cro. C. 20. pl. 13. Mich. 1 Car. C. B. Whyte v. Ryſden.

37. *Trover* and Converſion of 200 Loads of Coals; upon Non Guilty, the *Defendants were found ſeverally guilty for ſeveral Loads, and* were found *ſeverally Not Guilty for the Reſidue*, and intire Coſts; Reſolved, by all the Juſtices and Barons on Error brought in the Exchequer Chamber, that the Plaintiff ſhould have *ſeveral Damages*; for being found ſeverally Guilty of ſeveral Parcels converted, he ſhall have Judgment accordingly. Cro. C. 54. pl. 13. Mich. 2 Car. Player v. Warn and Dewes.

38. Treſpaſs. Plaintiff declares, that the Defendant did *break his Cloſe, and eat his Graſs* &c. *cum averiis ſuis*, viz. *Oxen, Sheep, Hogs, avibus Anglice Turkies*; and the Judge in this Caſe did hold, that *Turkies* are *not comprized within the general Word Averia*, which is an old Law Word, and theſe Fowls came but lately into England, and upon this it was *directed to ſever the Damages*; for otherwiſe, if the Damages ſhall be jointly given, and it be ill for this of the Turkies, for the Reaſon aboveſaid, it will overthrow all the Verdict. Clayt. 50, 51. pl. 88. Auguſt 13 Car. before Barkley, Judge of Aſſiſe. Uſley's Caſe.

39. W. brought an Action of *Treſpaſs, for aſſaulting, beating, and wounding him, againſt four ſeveral Perſons; three of them plead Not Guilty*, and are *found Guilty*; and the *fourth pleads Not Guilty to part, and juſtifies for the reſt, viz. the Wounding only*; yet the *Verdict was found generally for the Plaintiff, and intire Damages aſſeſſed*, and Judgment given, and a Writ of Error was brought, and the Error aſſigned was, that the Damages ought not to be intire againſt all, becauſe that the fourth Perſon was only found Guilty of part of the Treſpaſs, viz. the wounding, and therefore, as to him, the Damages ought to have been ſevered, in relation only to the wounding, and not as it is; for ſo Damages ſhould be given twice for the ſame Thing; firſt againſt the three, and then againſt the fourth, which the Court granted, and *reverſed* the Judgment. Sty. 5. Hill. 21 Car. Whitwell v. Short.

40. B. brought an Action of *Treſpaſs* againſt D. in C. B. *for taking away three Cows*, and had *Judgment* againſt him *upon a Nil dicit.* The Defendant brought a Writ of Error in this Court to reverſe the Judgment. The Error aſſigned was, that *for two of the Cows there was no Value declared, and yet intire Damages were given for them all*, which was not good. Roll Ch. J. ſaid, this is a Judgment upon a Nil dicit, and ſo there is no Verdict to help it. Sty. 174, 175. Mich. 1649. B. R. Dell v. Brown.

41. In an Action of *Treſpaſs for fiſhing, and cutting down two Acres of Oziers*, the Damages ought to be ſeveral, as the Treſpaſs is; Per Cur. Keb. 18. pl. 51. Paſch. 13 Car. 2. B. R. in Evidence to a Jury in Caſe of Rich v. Hall.

42. If *any Part of the Declaration* be *uncertain, and intire Damages are given*, the Plaintiff can have no Judgment; but in the Certainty of the Allegation, the Court requires no more than the Nature of the Thing required. Gilb. Hiſt. of C. B. 98. cites 2 Saund. 319. Paſch. 23 Car. 2. Bennet v. Holcomb.

43. Treſ-

43. Treſpaſs for entring his Cloſe, and moving and carrying away his Corn and Graſs there &c. with a Continuando of the ſame cutting and carrying away from the 16 Auguſt 21 of the King now to 30 Sept. 22 of the King. It was moved in Arreſt of Judgment, that it was impoſſible that when he had cut the Corn there growing the 16th Auguſt 21. that he ſhould continue cutting till 30 September 22. But, per Vaughan Ch. J. there is a *Difference between Things legally impoſſible*, as in the Caſe of Aſſumpſits, there, though one be bad, yet it ſhall be preſumed that the Jury gave Damages for it, becauſe it is only legally impoſſible; and non conſtat to the Jurors, whether by Law it were good or not; but where a Thing is *naturally impoſſible*, as it is here, it cannot be preſumed that the Jurors gave any Damages for that which they might, by Preſumption, know to be impoſſible. Sed adjornatur. Freem. Rep. 83. Paſch 1673. C. B. Nicholls v. Reeve.

44. In the Declaration there was an *Indebitatus Aſſumpſit*, and *intire Damages were given*; and it was *not ſaid for what he was indebted*; ſo that it might be for a Bond, or Rent &c. And it being bad for that Part, quod Conſilium non negavit, it was bad for the whole; and ſo Judgment arreſted. Freem. Rep. 162. pl. 177. Trin. 1674. Gadbury v. Day.

45. *Treſpaſs againſt A. B. and C. for an Aſſault and Battery and Impriſonment*, and *taking two Silver Buttons* &c. *B. and C. plead Not Guilty to the Whole*, upon which they were at Iſſue, and *A. as to the Force and Arms, pleads Not Guilty; and as to the Reſidue of the Treſpaſs, Actio non* &c. *for that the Plaintiff aſſaulted them*, and ſo to Iſſue (but *ſay nothing of the Impriſonment, and taking the Buttons.)* The Plaintiff had a Verdict, and intire Damages; adjudged, that the Plaintiff, having charged them all jointly with the whole Matter, though one of them had committed the Battery, another had been guilty of the Impriſonment, and the third of taking of the Buttons, yet being all done at one time, they were all guilty of the Whole, and ſhall be *charged all of them with the whole Damages*. 3 Lev. 324. Hill. 3 W. and M. in C. B. Smithſon v. Garth.

46 An *Action* was *for Words ſpoken at ſeveral times*, viz. He got a Witneſs to forſwear himſelf in ſuch a Cauſe, you or he (innuendo the Plaintiff) hired one B. to forſwear himſelf. And for theſe following Words ſpoken at another time; Two Dyers are gone off (innuendo become Bankrupt) and, for ought I know, H. will be ſo too within this Time Twelve-month; Verdict for the Plaintiff, and Joint-damages given. Judgment for the Plaintiff. 10 Mod. 196. Hill. 12 Ann. B. R. Harriſon v. Thornborough.

(E) *How* to be given.
In what Caſes *jointly* to the Plaintiffs.
To *Baron and Feme*.

This in Roll is Letter (S) See tit. Baron and Feme (E. b)

1. IN an Aſſiſe by Baron and Feme, if it be found they were diſſeiſed, they ſhall recover Damages of the Iſſues in common. 11 H. 4. 16. b. 17. adjudged.

Br. Joinder en Action, pl. 98. cites S. C. &. S. P. accordingly.——Br. Judgment, pl 20. cites S. C. & S. P.——Br. Damages, pl. 51. cites S. C. & S. P.——Fitzh. Judgment, pl. 70. cites S. C.——2 Inſt. 336 cites Trin. 4 H. 4. Rot. 24. Coram Reg. Burcheſter's Caſe.

2. But

Fol. 571. Br. Damages, pl 51. cites S. C ——— Br. Joinder en Action, pl. 98. cites S. C. ——— Br. Judgment, pl. 20. cites S. C —— Fitzh. Judgment, pl 70 cites S C ——— 2 Inſt. 236. Ld. Coke cites S. C and 7 H 6. 30. b. and ſays, that in Aſſiſe brought by the Baron and Feme, he and his Feme ſhall recover Seiſin of the Land, and he alone, upon that Original brought by him and her, ſhall have Damages, which is worthy of Obſervation. [But it ſeems, this is to be underſtood only of Damages, as to the Goods.] ——— Ibid cites Trin 4 H. 4 Rot. 24. Burcheſter's Caſe, where Damages for the Goods were to both, and for that Reaſon the Judgment was reverſed, becauſe the Wife had nothing in them.

2. But if it be found that certain Goods of the Baron were taken upon the Land, **the Baron only ſhall have Judgment for the Damages for them.** 11 H. 4. 17. adjudged.

Br. Damages, pl. 51. cites S. C.— Fitzh. Judgment, pl 70. cites S. C.

3. In Treſpaſs by **Baron and Feme**, for impriſoning the Feme till a Fine paid; **for all the Treſpaſs but the Fine they ſhall recover Damages in common.** 11 H. 4. 16. b.

Br. Damages, pl. 57. cites S. C.— Fitzh. Judgment, pl. 70. cites S. C.

4. But for the Fine **the Baron ſhall recover Damages only.** 11 H. 4. 16. b. **becauſe it was his Chattel.**

5. If *Baron and Feme recover in Writ of Ward*, and the *Baron dies*, the Execution of Damages ſhall ſurvive to the Feme, and not to the Executors of the Baron. Br. Jointenants, pl. 61. cites 19 E. 3. and Fitzh. Scire Facias, 119.

6. In *Quare Impedit againſt Baron and Feme*, the *Plaintiff recover'd by falſe Oath*; the *Baron died*, and the *Feme brought Attaint for the Damages levied of the Goods of the Baron*, and yet the Feme by the Attaint was reſtored to the Damages loſt, and to the Advowſon, and recovered other Damages by the Attaint; becauſe if the firſt Damages had not been levied of the Goods of the Baron, they ſhould be levied of the Goods of the Feme, who was Party to the Judgment, and therefore *the Attaint ſurviv'd as well for Damages as for the Principal.* Br. Jointenants, pl. 46. cites 46 Aſſ. 8.

Br. Treſpaſs, pl. 190. cites S. C.

7. In Treſpaſs of the *Battery of the Baron and Feme*, the Jury ſhall ſever the Damages; But for the one Part the Writ was abated; For the Baron and Feme ſhall not Join in Battery of the Baron. Br. Damages, pl. 85. cites 9 E. 4. 51.

8. In *Debt* on a *Bond made to K. a Feme dum ſola*, who afterwards married, and the *Action was brought by K. and her Husband*, and the Jury aſſeſſed the *Damages to the Baron and Feme Ratione Detentionis Debiti*, and held good; for the Damages ſhall be to both. Cro. E. 259. pl. 42. Mich. 33 and 34 Eliz. B. R. Gurney v. Cleere.

(F) To Joint-Tenants. [Given jointly in what Caſes.]

Fitzh. Judgment, pl. 70. cites S. C —— Br. Damages, pl. 51. cites S. C that if three Jointenant are, and one of them releaſes to one of the others, and they are diſſeiſed, the Damages ſhall be ſever'd for the third Part; Per Weſtbury — 2 Inſt. 236. S. P. ——.

1. If **Two** Joint-Tenants bring an Aſſiſe, **and the** one is ſevered, if **it be** found that the other had Goods taken upon the Land, **he ſhall recover ſole Damages for them.** 11 H. 4. 17.

2. If

2. If *two bring Aſſiſe of Mortdanceſter, and recover*, and *one dies before Execution*, the Damages ſhall not ſurvive; *contrary after Execution of the Land*: But *in Debt and Treſpaſs*, the Damages ſhall ſurvive, and herewith agrees Fitzh. Execution 255. The Reaſon ſeems to be, becauſe before Execution of the Land, the Damages ſhall be of the Nature of the Land; contrary after Execution. Br. Jointenants, pl. 56. cites 14 E. 3. and Fitzh. Execution 75.

3. In *Aſſiſe by ſeveral*, if *one is nonſuited*, this is not [* the Nonſuit of the others] but only for the Quantity of Damages [for himſelf] and he ſhall be ſummoned and ſevered, and the others ſhall proceed and recover their Parts of the Land and of the Damages, and ſo Damages ſevered, Quod Nota. Br. Damages pl. 100. cites 16 Aſſ. 14.

* This is according to the Year-Book, which cites M. 15. and M. 14 E. 3.

(F. 2) Recover'd. By Parceners; and How. Jointly, or not.

1. TENANT *for Life, the Reverſion to two Coparceners*, did *waſt*, the *one Parcener had Iſſue and died*, the *Tenant did Waſt again*, the other and the Niece joined in Waſt, and this Matter was found, and they recovered the Place waſted and treble Damages, Viz. each recovered for the laſt Waſt, and the other Damages only for the firſt Waſt, and ſo ſee that Damages ſurvived. Br. Jointenants pl. 48. cites cites 45 E. 3. 3.

2. If Abatement, or *Waſt*, be done againſt two Coparceners, and the *one has Iſſue, and dies*; and the *Iſſue and the other join* and recover the Land; yet the Damages ſhall be ſevered. Br. Joinder in Action, pl. 98. cites 11 H. 4. 16.

Br. Judgment, pl. 20. cites S. C. & S. P. —— Br. Damages, pl. 51. cites S. C. & S. P.

3. If three Coparceners *recover Land and Damages in an Aſſize of Mortdanceſter*, albeit the Judgment be joint, that they ſhall recover the Land and Damages, yet *the Damages being acceſſary, though* they be *perſonal, do in Judgment of Law, depend upon the Freehold, being the Principal which is ſeveral.* And though the Words of the Judgment be joint, yet ſhall it be taken for Diſtributive. And therefore *if two of them die, the intire Damages do not ſurvive*, but the third ſhall have Execution according to her Portion; and this is another Exception out of our Author's Rule. *But if all three had ſued Execution by Force of an Elegit, and two of them had died*, the third ſhould have had the whole by Survivor, till the whole Damages be paid. Co. Litt. 198. a.

4. If the *Aunt and Niece join in* an Action of *Waſte, for Waſte done in the Life of the other Siſter*, the Aunt ſhall recover the Damages only, becauſe the ſame belongs not by Law to the Niece. And ſome hold the Damages in that Caſe to be the Principal. Co. Litt. 198. a.

As to giving Damages Jointly, See Judgment (E).

(G) *Againſt Whom* they ſhall be given.

Fitzh. Damage, pl. 20. cites S. C.

1. IF the Lord join himſelf to his Bailiff in an Avowry, **the Plaintiff ſhall not recover Damages againſt the Lord, but only againſt the Bailiff; for the Bailiff only continued Party to the Iſſue.** 8 H. 6. 5. Curia. Brook Damages 68.

Fitzh. Damage, pl. 103 cites S. C. that in ſuch Caſe no Damages ſhall be given againſt them. ——— See (O) pl. 5. infra S. C.

2. In Detinue for a Writing againſt Executors, ſuppoſing it come into their Hands after the Death of the Teſtator, **if the Executors have been at all Times ready to render it after it came into their Hands &c.** 22 E. 3. 9. b.

Damages were not given in Aſſiſe, *againſt any but againſt the Diſſeiſor*, Per Littleton, Pool, and Spilman quod verum eſt. Br. Damages, pl. 153. cites 37 H. 6. 35. ——— Before this Statute the Diſſeiſſee had no Damages againſt any but the Diſſeiſor himſelf, by reaſon whereof the Statute gave Damages *againſt the Meſne Occupiers for the Non-ſufficiency of the Diſſeiſors*, and this Remedy is given to the Diſſeiſee *by Aſſiſe only*, and not in Treſpaſs; For it is againſt the ſame Perſon that did the Diſſeiſin, and he ſhall anſwer for all the Damages; For if one diſſeiſes me, and infeoffs B. who cuts Wood on the Land, and C. diſſeiſes B. and does Treſpaſs on the Land, or J. S. cuts the Trees, the Poſſeſſion of the Fee of B being in B. my Diſſeiſor, yet, when I re-enter, B. is chargeable to me in Treſpaſs, for the whole Treſpaſs done by any Perſon in the mean Time, and he has Remedy over againſt any Perſon that was Treſpaſſor to him; Per Cur. Keilw. 1. b. pl. 2. Mich. 12 H. 7. in Ld. Brooks's Caſe.

3. *Stat. Glouc.* 6. *E.* 1. *cap.* 1. *Whereas heretofore Damages were not awarded in Aſſiſes of Novel Diſſeiſin, but only againſt the Diſſeiſors,*

* *The Letter of this Law extends only to them that came in by Title*, As by Feoffment or Fine *after the Diſſeiſin; but by Equity it extends to them that came in by Wrong, and to them alſo, whoſe Eſtate was before the Diſſeiſin*; For Example, if the Diſſeiſor were diſſeiſed, the ſecond Diſſeiſor was within this Statute; for if he that comes in by Title, ſhall be within the Remedy of this Law, a Fortiori, he that comes in by Wrong; and ſo it is of all others, that come in under the Diſſeiſor, though it be not by Alienation. 2 Inſt. 284.

4. (2) * *It is provided, that if the Diſſeiſors do alien the Lands,*

No Leſſee for Years, or *Tenant by Statute*, Staple, or Merchant, *or the like, that have but a Chattle, ſhall be accounted a mean Occupier* within this Statute, but he that has the Inheritance, or Freehold at the leaſt; otherwiſe he is not ſaid to be a Tenant of the Land; and ſo much is implied in this Word (*alien*) which cannot be intended of a Leſſee for Years &c. where he that brings the Aſſiſe, has right to the Inheritance or Freehold; *But where Tenant by Statute* Merchant, or Staple &c. *brings an Aſſiſe*, there *Leſſee for Years, or Tenant by Statute*, Merchant, or Staple &c. *may be a mean Occupier*, becauſe the Plaintiff in the Aſſiſe has right but to a Chattle. 2 Inſt. 284.

‡ Hereupon do follow three Concluſions in Law; That *if the Diſſeiſor be ſufficient to yield the whole Damages, he is ſolely to be charged* therewith; for then this Statute extends not to the Tenant; And as it appears by the Preamble, he was not anſwerable by the Common Law. The ſecond Concluſion is, that *for the Inſufficiency of the Diſſeiſor, the Tenant ſhall anſwer* the Damages by this Act. The third Concluſion is, that *if the Diſſeiſor be able to yield Part, and not the whole* Damages, *both ſhall be charged*, and therefore Judgment is ever given as well againſt the Diſſeiſor (though he be found inſufficient) as againſt the Tenant. 2 Inſt. 284.

‡ *And have not whereof Damages may be levied, they to whoſe Hands ſuch Tenements ſhall come, ſhall be charged with the Damages;*

|| The Ground hereof is, Quod Bonæ Fidei Poſſeſſor in id tantum, quod ad ſe pervenerit, tenetur. Hereupon ſeven Concluſions are Grounded; 1ſt. Albeit the *mean Occupiers* are *neither Diſſeiſors nor Tenants*, yet if they are *not named in the Aſſiſe*, no Judgment can be given againſt them, neither can they be charged for the Time they take the Profit. 2 Inſt. 285.

|| *So that every one ſhall anſwer for his Time.*

2dly,

2dly, *Though* they be *named*, yet as hath been ſaid, *the Diſſeiſor muſt be found* by the Aſſiſe to be *inſufficient, and the mean Occupiers muſt be found to take the Profits*; for if they be omitted, and none but the Diſſeiſor and Tenant named, and the Diſſeiſor is found inſufficient, and no further inquired of, the Tenant ſhall be charged for the Whole. 2 Inſt. 285.

3dly, If the *Aſſiſe* be brought *againſt the Diſſeiſor and the Tenant*, and it is found by the Aſſiſe, that the *Diſſeiſor is ſufficient, and* that the Diſſeiſor *infeoffed A. who infeoffed B. who infeoffed the Tenant*, and *that A. had it one Year, and B. half a Year, and the Tenant two Years*; Upon this ſpecial Finding, the Tenant ſhall anſwer Damages but for his Time, for "Every one ſhall anſwer for his Time." And the Plaintiff has loſt his Damages againſt *A. and B.* for that they were *not named in the Writ.* 2 Inſt. 285.

4thly, *If* the Diſſeiſor A. and B. and the Tenant in the Caſe before, be *all named, and the Diſſeiſor A. and B. are all found inſufficient*, the *Tenant ſhall anſwer for the Whole*; for although the Letter of this Law is, where the Diſſeiſors have nothing &c. yet theſe Words, "Every one ſhall *anſwer* &c." do *imply*, (*If they have ſufficient*,) for otherwiſe they cannot anſwer, that is, they cannot *ſatisfy*; for in that Senſe (Anſwer) is here taken. 2 Inſt. 285.

5thly, It ſhall never be inquired of the *Tenants Inſufficiency*, for againſt the Diſſeiſor and him, muſt the Aſſiſe of Neceſſity be brought. 2 Inſt. 285.

6thly, Upon theſe Words, "Every one ſhall anſwer for his Time," ſeveral Judgments ſhall not be given, but *one Judgment is to be given intirely againſt all*, and ſo was it ever uſed ſince this Statute; but the Sheriff upon the Execution may uſe ſuch indifferency as Juſtice requires. 2 Inſt. 285.

And it is ſaid, if the *Aſſiſe* be brought *againſt the Diſſeiſor and the Tenant*, and *Judgment* given *for the Plaintiff*, and a Writ iſſues to the *Sheriff*, and he *returns, that the Diſſeiſor is inſufficient*, the Plaintiff ſhall have Proceſs to *levy it of the Tenant*. 2 Inſt. 285.

7thly, This gives no Damages, *where none was recoverable in the Aſſiſe at Common Law*, but gives Damages againſt the Tenant for the Inſufficiency of the Diſſeiſor, as hath been ſaid. 2 Inſt. 285.

As if he in the *Reverſion upon a Term for Years, or Tenant by Statute Staple be diſſeiſed*, he ſhall have an Aſſiſe to recover the State of the Land, but ſhall recover no Damages for the Profits of the Lands, becauſe they belonged not to him. 2 Inſt. 285.

In *Aſſiſe* the Caſe was, that the *Tenant was arrear of his Rent for ſeven Years*, and the *Ld. diſtrain'd*, and a *Stranger made Reſcous*; The Ld. brought *Aſſiſe againſt both*, and all this was found, and the Arrears 17 Mark, and that the *Diſſeiſor is not ſufficient*, and yet it was agreed, that he ſhall recover Generally againſt the one and the other, without ſhewing what; And yet per Finch, the Arrearages ſhall be againſt the Tertenant, as in Caſe of Recovery of Land, but as to the Damages it ſhall be againſt the Diſſeiſor; and per Candiſh, the Statute, that every one ſhall anſwer for his own Time, is underſtood, where the Diſſeiſor aliens after the Diſſeiſin, and yet Judgment as above. Br. Aſſiſe, pl. 16. cites 40 E. 3. 24 ——— 2 Inſt. 284. S. P. cites 20 Aſſ. pl. 3. and 10 E. 3. 24. [but it ſeems miſprinted, and that it ſhould be according to Br. [viz. 40 E. 3. 24. & 40 Aſſ. pl. 3]

But in a like Caſe the Plaintiff ſurmiſed, that the *Diſſeiſor* is not ſufficient, and pray'd it might be inquir'd by Aſſiſe, and ſo it was, and he was *found not ſufficient*; and that the other was not Tenant but for half a Year, and yet Judgment ut ſupra, and that the Diſſeiſor ſhall be taken, and that the Plaintiff recover the Arrearages of a Term, pending the Writ. Br. Aſſiſe, pl. 16. cites 40 Aſſ. p. 3. Quod Nota. ——— Fitzh. Aſſiſe, pl. 339. cites S. C.

If the *Diſſeiſor* committed the Diſſeiſin *with Force*, and *infeoffed A. who infeoffed B. who infeoffs C.* an *Aſſiſe is brought againſt them all, and treble Damages for the Inſufficiency of the Diſſeiſor ſhall be levied upon all*, according to this Act, "Every one ſhall anſwer for his Time," that is, what Damages ſhould be recovered againſt the Diſſeiſor, if he were ſufficient, ſhall be recovered for his Inſufficiency againſt the mean Occupiers and the Tenant only. 2 Inſt. 285.

5. (3) *It is provided alſo, that the Diſſeiſee ſhall recover Damages in a Writ of Entry upon Novel Diſſeiſin againſt him that is found Tenant after the Diſſeiſor.*

The *Diſſeiſee* ſhall recover Damages by this Act in a Writ of Entry ſur Diſſeiſin in the Poſt; As if the Tenant comes to the Land by Diſſeiſin, Intruſion, or Abatement, or when by Alienation, it is out of the Degrees; for the Words be, "Againſt him who is found Tenant after the Diſſeiſor," within which Words, he that comes in the Poſt is included. Note, the Writ of Entry in the Poſt is given by the Statute of Marlebridge, cap. ultimo; for the Diſſeiſee was driven to his Writ of Right at the Common Law. 2 Inſt. 286

If the Diſſeiſor makes a Feoffment in Fee, and the Diſſeiſee dies, the *Heir of the Diſſeiſee ſhall not recover Damages by this Act againſt the Alience*; For this Branch of the Act provides for the Diſſeiſee, and not for the Heirs. 2 Inſt. 286.

If the *Diſſeiſor makes a Deed of Feoffment*, by the which he *infeoffed A. and B.* and makes *livery of Seiſin to A. in the Name of both, B. never agreeing* to the Feoffment, nor taking any Profit of the Land, A. dies; In this Caſe by the Law, the Freehold and Inheritance is veſted in B by Survivor; and in a Writ of Entry in the Per, brought by the Diſſeiſee againſt B. he may, as is aforeſaid, plead the Special Matter, and that he never agreed nor took any Profits, and diſcharge himſelf of the Damages for the Cauſe aforeſaid. 2 Inſt. 286, 287.

The Statute ſays, "He who is found" Tenant, and yet if a *Writ of Entry* be brought *againſt two Jointenants*, and the *one diſclaims* and the *other takes the whole* Tenancy upon him, *and pleads in Bar*, and it is found againſt him, the Demandant ſhall recover Damages for the whole againſt him, becauſe he took upon him the whole Tenancy. 2 Inſt. 287.

A *Diſſeiſor infeoffs A who infeoffs B.* The Diſſeiſee brings a Writ of Entry in the Per & Cui againſt B. who vouches A. who pleads and loſes; Judgment for the Damages ſhall be given againſt the *Vouchee*, for he is found Tenant in Law. 2 Inſt. 287.

In this ſecond Branch the *Tenant only is charged with the whole* Damages, *though there were divers mean Tenants*, for the Words "Every one ſhall anſwer for his Time," *is only in the Caſe of an Aſſiſe* upon the 1ſt Branch; neither ought the Writ of Entry to be brought againſt any, but againſt him that is the Tenant of the Land; but in ſome Caſe, another than the Diſſeiſee ſhall recover Damages by this Branch; as the *Succeſſor of an Abbot*, but otherwiſe *of Biſhops*, or other ſole ſecular Bodies politick. 2 Inſt. 286.

If the *Tenant comes to the Land by Act in Law, which he cannot withſtand*, and where there is no Act or Default in him, in that Caſe *he ſhall not be charged*: As if the Diſſeiſor aliens to A. and his Heirs, and A. dies without Heir, the Law (that there may be a Tenant to a Stranger's Præcipe) does caſt the Land upon the Lord; in this Caſe, if the Lord does not take any Profits of the Lands in a Writ of Entry in the Poſt brought againſt him for the Land, the *Lord may plead the Special Matter*, and how *that he never took any Profits of the Lands*, and ſo diſcharge himſelf of the Damages; for albeit he be a Tenant of the Land, yet he is no Tenant againſt his Will within the meaning of this Law, becauſe there is no Wrong nor Default in him. 2 Inſt 286

But if the Lord by Eſcheat does enter, and take the Profits of the Land, then ſhall he be charged as a Tenant within this Act, for albeit he could not withſtand the Eſcheat, which made him Tenant in Law, yet might he have refrained to take the Profits, which in right belong'd to the Diſſeiſee, but his Rent or valuable Servſces ſhall be recovered [recoup'd] in Damages. 2 Inſt. 286.

And *ſo* it is in all reſpects *when the Alienee of the Diſſeiſor dies ſeiſed, and the Land deſcends to His Heir*, he may refrain from the taking of the Profits and plead the like Plea, and diſcharge himſelf of the Damages. 2 Inſt. 286.

In Conſtruction of general References in Acts of Parliament, ſuch Reference muſt be made only as may ſtand with Reaſon and Right. 2 Inſt. 287.

6. (4) *It is provided alſo, that where before this Time Damages were not awarded in a Plea of Mortdanceſtor (but in Caſe where the Land was recover'd againſt the Chief Lord) that from henceforth Damages ſhall be awarded in all Caſes where a Man recovers by Aſſize of Mortdanceſtor, as before is ſaid in Aſſiſe of Novel Diſſeiſin.*

—— In a *Mortdanceſtor*, if the *Tenant vouches*, and the *Vouchee pleads and loſes*, in this Caſe the Plaintiff ſhall recover againſt the Tenant the Land, and the Tenant in Value againſt the Vouchee, and the Plaintiff ſhall recover his *Damages againſt the Vouchee*, and by this Act Damages ſhall be recovered in a *Nuper obiit*. 2 Inſt. 287, 288.

7. (5) *And likewiſe Damages ſhall be recovered in Writs of Coſinage, Aiel, and Beſaiel.*

8. In Aſſiſe, it was *inquired if the Diſſeiſor was ſufficient* to render Damages, *and of the Tertenants for the Time*, and *found the Diſſeiſor inſufficient*, and that *an Infant was Tertenant*, but was *in Ward*, and therefore he was not charged, but the Diſſeiſſor only. Br. Damages pl. 105. cites 22 Aſſ. 28.

9. It was *found that the Diſſeiſor was not ſufficient to render Damages* in Aſſiſe of Rent, and the *Tenant had not been Tenant but Half a Year*, where the Arrearages were *Arrear by Seventeen Years*, and yet Judgment of Arrears and Damages were given againſt the one and the other, and this in Aſſiſe of Rent. Br. Damages pl. 17. cites 40 E. 3. 24. and the like Caſe, 40 Aſſ. 3.

10. In *falſe Impriſonment againſt two*, the *one came and pleaded, and it is found to the Damage* &c. and after the *other came and would have pleaded, and could not by Reaſon of ſuch like Iſſue founded againſt him at the Suit of the ſame Plaintiff in Treſpaſs*, by which the Plaintiff had Judgment to recover Damages againſt the one and the other, and yet the laſt who pleaded was not Party to the firſt Iſſue, but he was *Party to the Original*, and therefore charged of Damages by Award; For he may have attaint thereof, Quod Nota. Br. Damages pl. 29. cites 44 E. 3. 7.

11. Scire Facias *againſt the Heir of Acquittal acknowledged by his Father*, he was returned warned, and did not come, by which Diſtringas iſſued, and no Judgment to recover the Acquittal and Damages, as it ſhould have been *againſt his Father*, if he had appeared and pleaded, and

and it had been found againſt him. Br. Damages pl. 175. cites 46 E. 3. 31.

12. In Waſt it was agreed, that if a Man *leaſes for Term of Life the Remainder over in Tail*, the *Remainder in Fee to the Tenant for* Term of *Life*; the *Tenant for Life did Waſt*, and he in *Remainder in Tail brought Action* of Waſt, *and recovered, and died without Iſſue before Execution*; his Executors ſhall have Execution of the Damages, and yet now the Fee is veſted in the firſt Tenant; for the Damages were veſted by the Judgment. Br. Damages pl. 177. cites 50 E. 3. 3.

13. Where the *Tenant vouches in Præcipe quod reddat*, where Damages are to be recovered, and the *Vouchee enters into the Warranty and loſes*, the the Damages ſhall be recovered againſt the Vouchee, therefore he ſhall have Writ of Error. Br. Damages pl. 45. cites 8 H. 4. 5.

14. Where *two bring ſeveral Writs of Detinue againſt one and the ſame Perſon*, ſo that that the *Plaintiffs interplead*, there the Plaintiff, if he recovers, ſhall have his Damages *againſt the other who enterpleaded with him*, and *not againſt the Defendant*; Therefore beware of Covin to make one enterplead, for it is nothing worth. Br. Damages, pl. 9. cites 9 H. 18.

15. It was ſaid that *the Heir in Writ of Error*, upon erroneous Judgment [*of Lands*] *entailed by his Anceſtor*, ſhall not render Damages *unleſs he has Aſſets per Deſcent* &c. Br. Damages pl. 10. cites 9 H. 6. 49.

16. Upon Reſceit upon which Damages ſhall be recovered, the Damages ſhall be taxed *againſt the Tenant by Reſceit*. Br. Reſceit. pl. 65. cites 22 H. 6. 52.

17. *Treſpaſs againſt two*, the *one appears and is convicted*, and the *other makes Default*, he ſhall be charged of the Damages found againſt his Companion. Br. Damages, pl. 131. cites 26 H. 6. and Fitzh. Enqueſt 16.

18. If *Diſſeitor makes Feoffment*, and the *Diſſeiſee re-enters*, he ſhall recover his Damages *by ſeveral Writs of Treſpaſs as well againſt the Feoffees, as againſt the Diſſeiſor*. Br. Damages, pl. 13. cites 33. H. 6. 46.

19. *And* in *Aſſiſe of Rent* the Plaintiff ſhall recover *all* his Damages *againſt the Tenant for Twenty Years, though he has not been Tenant but for one Month*. Ibid.

(H) Damages *Double* [or Treble. In what Caſes. And] *by Whom* the Damage ſhall be *taxed*, by the *Jury or Court*.

1. IN a Rediſſeiſin **double Damages are given** by the Statute of Weſtminſter 2. cap. 26. **the Jury ſhall give ſingle Damages, and the Court ſhall encreaſe them to double. Co. Magna Charta** 116. **the Words of the Statute are, Adjudicentur de cætero damna in duplo.**

* 2 Inſt. 416. S P and * Roll ſeems miſprinted.

2. In *Aſſiſe* the *Defendant ſued Certificate upon Deed of the Anceſtor of the Plaintiff*, and the *Plaintiff deny'd the Deed* which was *found for the Tenant* by Niſi Prius, by which Damages were awarded to the Tenant to double upon the Statute, and that the Plaintiff Capiatur. Br. Certificate de Eveſque; pl. 33. cites 23 E. 3.

See the Notes there.

3. If a Man *cuts Trees, and after ſuffers the Germens to be deſtroy'd*, this is double Waſt, and ſhall render double Damages. 2 Roll. Waſt (E) pl. 27. cites 9 H. 6. 67. 22 H. 6.

4 If *Reſcous of Diſtreſs for Rent* be made, and *not Vi & Armis*, ſingle Damages ſhall be, and for *Vi & Armis*, treble Damages. Br. Damages, pl 12. cites 33 H. 6 20.

Jo. 379 pl 10. The King v Lanferne, S C. adjudged, that the Indictment be reverſed for ſeveral Reaſons, among which this was one; And the Reporter adds a Nota, that it is to be conſidered, whether Damages are to be recovered upon an Indictment but that the Party ſhall have Action to recover them; beſides that it is not clear whether this is an Offence by the ſaid Statute whereupon treble Damages are at all to be recovered.

5. B. *Bailiff* of the Sheriff of W. *was indicted before Juſtices of the Peace in their Seſſions*, upon two ſeveral Indictments; 1ſt, *That he, as Bailiff, had received* 20*s. from J. S. Extorſive colori Officii*; and in the other, that he took 6s. 8d. and *Judgment againſt him, and treble Damages* given upon each. Reſolved, that the aſſeſſing of treble Damages to the Party was Erroneous; for although, by Colour of the Stat. of 23 H. 6. where treble Damages are given to the Party, they might aſſeſs them, yet in this Caſe it is Erroneous; for they ought firſt to have enquired of the Damages; for perhaps they may be more or leſs, according to the Circumſtances; and *they cannot aſſeſs them themſelves, without Inquiry by the Jury*; wherefore the Judgment was reverſed. Cro. C. 438. pl. 9. 448. pl. 20. Mich. 11 Car. in B. R. Brunſden's Caſe, alias, Bumpſtead's Caſe.

(H. 2) Recover'd. From what Time.

1. IN Aſſiſe, it was found that the *Plaintiff within Age was ſeiſed and diſſeiſed, and came to the Land, and put in his Foot, but did not take the Profits*, and the *other ouſted him*, and yet he ſhall recover Damamages from the firſt Diſſeiſin, and therefore it ſeems that he was not remitted by his Entry, for then he ought to recover his *firſt Damages in Treſpaſs*. Br. Damages, pl. 159. cites 26 Aſſ. 42.

*Vide tamen, for this Point does not fully appear in the Year Book.

2. If a *Man has two Sons, and dies ſeiſed*, and a *Stranger abates*, the *Eldeſt Son dies*, the *Youngeſt ſhall not recover* Damages *in Mortdanceſtor, but from the Time of his Brother's Death*. Br. Damages, pl. 160. cites * 34 Aſſ. 10.

3. *And* if the Father *has two Daughters, and dies ſeiſed*, the *one dies without Iſſue*, the *other ſhall not recover* Damage *for the one Moiety, but from the Time of her Siſter's Death*; and, it ſeems, the Reaſon is, becauſe *all the Matter appears in the Verdict, or in Pleading*; for otherwiſe it may be, that there were no more Sons than the Younger, who brought the Mortdanceſtor, and in the other Caſe, that the Father had but one Daughter in all; But *in Writ of Aiel, e contra*; For there the Son can't make himſelf Heir to the Grandfather, without making Mention of the Father, quam vide diverſitatem libro Dr. & Stud. lib. 2. fol. 81. Br. Damages, pl. 160. cites 34 Aſſ. 10.

4. A Man was *reſtored as Heir*, by Suit, *by Petition to Land, of which the King was intitled*, and the *King brought Writ of Error*, and the *firſt Judgment* of the Iſſue between the King and him, upon the Petition, *was reverſed, and other Iſſue tried for the King ad Damnum for Waſte in the Time of the Defendant's Father, and in his own Time to* 40 *l.* and the King recovered the Damages againſt the Defendant, as well for Waſte in his Father's Time, as in his own Time, and yet the Heir *had nothing by Deſcent from his Father*, and the Reaſon was becauſe *Scire Facias iſſued againſt*

againſt him generally as Heir, and he was *return'd warn'd, and made Default*, quod nota. Br. Damages, pl. 161. cites 39 Aſſ. 18.

5. If a Man be diſſeiſed, and the *Diſſeiſee dies*, his *Heir ſhall recover Damages* againſt the Diſſeiſor, but in his Writ of Entry againſt the Diſſeiſor, he ſhall recover Damages but from the Death of his Anceſtor. 2 Inſt. 286.

6. It is a Rule upon the Statute of Glouceſter, that in none of theſe Writs the Demandant ſhall recover Damages but *from the Death of his next immediate Anceſtor whoſe Heir he is*; as if there be Grandfather, Father and Son, the Grandfather dies ſeiſed, an Eſtranger abates, the Father dies, the Son, in a Writ of Aiel, muſt make his Reſort as Son and Heir of the Father, Son and Heir of the Grandfather, therefore he ſhall in that Caſe recover Damages but from the Death of his Father, becauſe he is his next immediate Anceſtor, and from him the Right deſcended; and ſo in the Writ of Beſaiel and Coſinage; but in the Caſe before, if the Grandfather had ſurvived the Father, the Son ſhall recover Damages from the Death of his Grandfather, becauſe he is his immediate Anceſtor, and the Right immediately deſcended to him; Et ſic de cæteris. 2 Inſt. 288.

7. If a *Man has two Daughters, and dies ſeiſed* of Lands, an *Eſtranger abates, one of the Daughters, has Iſſue, and dies*; the Aunt and the Niece ſhall join in an Aſſiſe of Mordaunc', and the *Aunt only ſhall recover Damages till the Death of the Siſter, and both of them from her Death*, which ſtands upon the Reaſon aforeſaid. 2 Inſt. 288.

8. If there be *Grandfather, Father, and Daughter*, the *Grandfather dies ſeiſed*, an *Eſtranger abates*, the *Father dies, his Wife being Privement enſeint with a Son*, the *Son is born, he ſhall recover* Damages in a Writ of Aiel *from the Death of the Father*, for now he is immediate Heir to the Father. 2 Inſt. 288.

9. A *Man ſues in the Spiritual Court* for a Matter which, upon the Face of the Libel, appears to be of Temporal Conuſance, and obtains a Sentence. The *Defendant appeals firſt, and then ſues out a Prohibition*. In the Declaration upon that Prohibition and Proceſs thereupon there is Judgment againſt the Defendant by Nil dicit; and Writ of Inquiry to Damages awarded. Parker Ch. J. of Opinion, that *Damages* were of be given *only for the Proceedings in the Spiritual Court, ſince the Prohibition delivered*. 10 Mod. 319. Mich. 2 Geo. 1. B. R. Leeds v. Carlton.

(H. 3) Damages recovered, or taxed. To what Time.

1. IN Aſſiſe the Plaintiff recovered Damages *for a Year*, which was *incurred after Verdict*, Quod Nota. Br. Damages, pl. 97. cites 13 Aſſ. 2.

But Trin. 15 E. 3. ſuch Judgment was revers'd, becauſe it was of Damages after Verdict. Ibid. —— S. C. cited 10 Rep. 117. a.

2. In *Aſſiſe* the Plaintiff recovered the Land and the Damages taxed by the Aſſiſe, aud Damages *pending the Writ*. Br. Damages, pl. 202. cites 18 Aſſ. 3.

S. P. Br. Damages, pl. 157. cites S. C. and *So of Arrears* incurr'd pending the Writ. —— In *Aſſiſe* a Man ſhall recover Damages to the *Value of the Iſſues of the Land*, pending the Writ *till Judgment*. Br. Damages, pl 43. cites 7 H. 4. 16.

3. An-

3. Annuity, the Plaintiff ſhall recover the Damages in Waſt, as well *for* the *Waſt done pending the Writ as before.* Br. Damages pl. 43. cites 7 H. 4. 16.

S. C. referr'd to 10 Rep. 117. a.

4. In *Aſſiſe*, and Action of *Waſte*, the Plaintiff ſhall recover Damages *pending the Writ*, and the *Arrears pending the Writ of Annuity.* Br. Damages pl 188. cites 7 H. 4. 16.

10 Rep. 117. a. S. C. cited per Cur. And if in ſuch Writ an Iſſue is joined triable by the Verdict.

5. In Writ of *Entry ſur Diſſeiſſin*, or in Nature of Aſſiſe, *Writ is awarded to inquire of the Damages*, the Demandant ſhall recover Damages *till the Award of the Writ of Inquiry* of Damages, *and not further*, nor for Time after, *notwithſtanding that the Writ of Inquiry* of Damages *is pending Seven Years.* Br. Damages pl. 14. cites 33 H. 6. 47.

Verdict, he ſhall recover Damages but from the Time of the Diſſeiſin to the Time of

6. *And in Præcipe* quod reddat, the Demandant ſhall recover Damages *till the Time of the Judgment given.* Ibid.

7. *But if the Court will be adviſed of their Judgment*, the Demandant *ſhall not recover* any Damages *for this Time, nor but till the Verdict given.* For he ſhall not recover till the Time of the Judgment, but where the Judgment is given immediately upon the Verdict. Ibid.

10. Rep 117. a. S C cited per Cur and ſays, that with this accords 7 E. 4. 5. a.

8. *But in Præcipe* quod reddat *of Rent of the Seiſin of the Demandant himſelf*, he ſhall recover Damages and Arrears all the Time pending the Writ *till the Day of the Judgment given.* Ibid.

9. *And the ſame Law in Aſſiſe of Rent.* Ibid.

10. *But* where a Man *recovers by Default in Writ of Entry*, he ſhall not recover Damages but *till the Day of Judgment*, and if Writ of Inquiry of Damages pends for Seven Years he ſhall not recover Damages for this Time. Ibid.

11. *Aſſiſe of Rent*, the Plaintiff prayed his Damages of the Rent and Damages of the Arrears pending the Writ, and could not *have but Damages of the Arrears* of the Rent *before the Writ brought*, Quod Nota. Br. Damages pl. 154. cites 37 H. 6. 38.

12. *But in Annuity*, a Man ſhall recover *the Annuity and the Arrears* pending the Writ, *and his Damages over and above*, Quod Vide in a Note. Ibid.

13. Treſpaſs *by Tenant by Statute Staple*, the Jury aſſeſſed Damages as well for the Time after the Teſte of the Writ till the Verdict, as for the Treſpaſs before the Writ, and yet well, and the Plaintiff ſhall recover, and upon the Extent of the Statute Staple the Sheriff return the Extent of the Land, and not of the Goods. Br. Treſpaſs, pl. 438. cites 16 H. 7. 6.

14. In *Aſſiſe* it was *found for the Plaintiff* and they were *adjourned to Weſtminſter for Difficulty of the Verdict*, and there it was *adjudged for the Plaintiff*, and he *recovered Seiſin of the Land and Damages, and Damages for the Adjournment*, Quod Nota for the one and for the other. Br. Damages pl 112. cites 35 Aſſ. 13. And another Aſſiſe which was adjourn'd Anno 36 Aſſ. 2. it was awarded that the Plaintiff ſhould recover Seiſin &c. and his Damages taxed, &c. the Plaintiff prayed his Damages pending the Adjournment, Chelr. ſaid, this you cannot have; for it was not at another Time enquired of the Value of the Land per Ann. which is neceſſary in all Caſes of Adjournment, Quod Nota. Br. Damages pl. 112.

15. *Patria Laboribus & Expenſis non debet fatigari*, 33 H. 6. 47. in an *Aſſiſe for Land*, the Plaintiff recovers Damages *till the Time of the Verdict*, in an Aſſiſe *for Rent*, *till the Time of the Judgment*, Pilfold's Caſe, 10 Rep. 115. *in Treſpaſs or Ejectment till the Writ* purchaſed. The Reaſon

ſon of the Diverſity is, an Aſſiſe complains of a Wrong which continues, and the other Inſtances of a Wrong done before the Plaint, and not of a Wrong which continues; For in an Aſſiſe of Rent it appears by the Plaint to the Judges, how much is arrear at the Time of the Judgment; in an Aſſiſe of Land it appears to the Jurors only. Jenk. 6. pl. 9.

16. In *Real Actions*, as *Aſſiſe* for Land where Damages are recoverable, as appears by the Principal Caſe, Damages *till the Verdict* are recoverable, and for Rent as it is ſaid before, till the Judgment in *Perſonal Actions*, for the Wrong done before the Action brought; The Reaſon is, Damages are the Principal in Perſonal Actions, and the Plaintiff till has Poſſeſſion, and knows his Damage, and the Damage is the Cauſe of his Suit. In *Waſte* the Plaintiff may eaſily ſee it, and ſix of the Jurors ought to view it before the Waſte be found. In real Actions, the Principal is the Freehold, which is deforced from him, and he cannot know his Damages, but the Jurors have the View of the Land, and may take Knowledge of it; and for *Rent* the Judges may diſcern, by Computation of the Time, how much Rent is incurred upon Conſideration of the Writ, and Count and Deed, as aforeſaid, and therefore in this Caſe he ſhall have Judgment of the Rent incurred after Verdict, till the Judgment; *Sententia non fertur de non liquidis*. Jenk. 7. pl. 9. Pilfold's Caſe, 10 Rep. 125.

17. In Action of *Battery* the *Plaintiff recovered Damages*; *afterwards Part of the Plaintiff's Skull came out*, by Reaſon of the ſame Battery; whereupon he brought a new Action for further Damages; but the Recovery in the former Action was held a good Bar and Judgment for the Defendant. 1 Salk. 11. pl. 5. Trin. 13 W. 3. B. R. Fetter v. Beale. Ld. Raym. Rep 339. Paſch. 10 W. 3. S C. adjudged accordingly Niſi ——

Ibid. 692. Trin. 13 W. 3. S C. moved again, but the Plaintiff could not obtain Judgment, the Court inclining ſtrongly againſt him.

18. In *Covenant for not repairing* good Damages ought to be given; Per Holt Ch. J. who ſaid that it had been always practiſed ſo before him, and every Body elſe that he ever knew, and that *they always conſider* in theſe Caſes, *what it will coſt to put the Premiſſes in Repair, and give ſo much Damages*, and the Plaintiff ought in Juſtice to apply the Damages to the Repair of the Premiſſes; to which &c. the Court agreed. 2 Ld. Raym. Rep. 1125, 1126. Paſch. 4 Ann. B. R. Vivian v. Champion.

19. An *Action* was brought *by the Husband for taking his Wife* away, and raviſhing her, *Per quod Conſortium* &c. per magnum Tempus, viz. *Per Spatium unius Anni amiſit* &c. Verdict pro Quer. and general Damages given. *Moved in Arreſt* of Judgment, *That a Year had not expired from the Firſt of October, the Time of the Offence, to the Time of the Verdict, and much leſs at the Time of the Action commenced*; and therefore general Damages being given, it was erroneous. On the other Side it was ſaid, that coming under a Per Quod, it was only conſequential, and laid by Way of Aggravation of Damages, and was not the Cauſe of Action; that the Per Magnum Tempus was enough, and the viz. Spatium &c. ſhould be rejected as Suppluſage, becauſe impoſſible. Parker Ch. J. ſaid this Caſe was widely different from the Common Caſes of viz. a Time that is altogether impoſſible, as the 30th of February &c. for here the whole Time is not impoſſible; and it cannot be known for how much of it the Jury gave the Damages; moſt probably to the Time of the Verdict. Adjornatur. 10 Mod. 273, 274 Hill. 1 Geo. 1. B. R. Walter v. Warren.

(I) *In what Caſes* the *Court may aſſeſs* Damages. [*Without awarding a Writ of Inquiry.*]

Br. Damages, pl. 56. cites S. C.

1. IN a Recordari for taking his Cattle, if upon Demurrer it is adjudged for the Plaintiff, **the Court may award Damages without a Writ of Enquiry of Damages.** 14 H. 4. 9. b.

2. So **for** other Things. 3 H. 6. 29. b.

Br Damages, pl 68. cites 8 H. 6 4, 5. S. C per Martin.

3. **When a Man ſhall be** condemned by Judgment, **the Juſtices may tax the Damages, without awarding a Writ of Inquiry of Damages.** 8 H. 6. 5.

Though the Juſtices uſe to award Inqueſt of Damages when they give *Judgment by Default*, yet they themſelves may tax the Damages if they will.

Firzh. Barre, pl. 283. cites S. C.

4. **In an** Audita Querela, **if the** Matter **be** found for the Plaintiff by Verdict, and they do not inquire of the Damages, **the Court may refuſe to tax the Damages; but they** may award a Venire to the ſame Inqueſt to tax them. 22 E. 3. 5.

5. In *Præmunire* by the King and J. N. againſt B. who *confeſſed the Action*, and the *Plaintiff recovered Damages as he counted*, and therefore it ſeems that it was brought by J. N. Qui tam pro Rege quam &c. and the Court would not tax the Damages. Br. Damages pl. 65. cites 21 E. 3. 4.

Br. Meſne, pl. 7. cites S. C.

6. The Defendant *pleaded Releaſe of Acquittal, which was not ſufficient*, and therefore the *Plaintiff recovered his Acquittal* by Award of the Court, *and his Damages* taxed by the Court to 100 s. And ſo ſee that in ſome Caſe the Court may tax Damages without awarding Writ of Inquiry of Damages. Br. Damages pl. 59. cites 38 E. 3. 10.

7. Treſpaſs of Battery by which the Party is *maimed*, the *Juſtices may tax the Damages themſelves* by their Diſcretion if they will, Quod Nota; Per Cur. But yet they awarded Writ of Inquiry of Damages. Br. Damages, pl. 54. cites 11 H. 4. 65.

8. In Replevin, the *Defendant juſtified*, the *Plaintiff pleaded Jointenancy* in the Land, and had Day in the ſame Term, and at the Day the *Defendant made Default* and the Plaintiff recovered Damages to 4 l. taxed by the Court, and not Damages as he counted, Quod Nota, that the Court itſelf taxed the Damages. Br. Damages, pl. 55. cites 14 H. 4. 2.

9. *Upon Demurrer in Law* the Juſtices may award Damages for the Party by their Diſcretion, or award Writ to inquire of the Damages at their Election. Br. Damages, pl. 194. cites 14 H. 4. 39, 40.

10. In a Replevin againſt O. who *avowed for Rent*; the *Plaintiff was Nonſuit*; the Queſtion was, Whether the *Court might aſſeſs Damages*, without a Writ of Inquiry of Damages? It was the Opinion that they might; for they are not in reſpect of any local Matter, but they accrue to the Avowant for the Delay in the Non-payment of the Rent; *Contrary where Judgment is given for the Plaintiff*; there the Court ſhall not aſſeſs the Damages; for he ought to recover for the taking of his Cattle, of which the Judges cannot take Notice; and the Damages may be greater or leſs, according to the Value of the Cattle, and the Circumſtances of the taking and delaying of them. 3 Le. 213. pl. 281. Paſch. 30 Eliz. C. B. Ognell's Caſe.

11. The

11. The *Conſtant Courſe* and Practice of both Courts is, *on a Judgment in Debt upon Default or Confeſſion, to tax the Coſts Occaſione detentionis debiti, as well as Coſts of Suit; and this being the Aſſent of the Party Plaintiff, which is always entered on the Record*, as it is in this very Caſe, *will conclude the Defendant*, as appears by all the Precedents in in the Books of Entries; *But if the Plaintiff will noe aſſent* to it, then *he ſhall have a Writ of Inquiry* of Damages Occaſione detentionis debiti if he will; but it is *in the Election of the Plaintiff*, and not of the Defendant; And if the Court by the Aſſent of the Plaintiff may tax 20 s. or any other ſmall Sum for Damages Occaſione detentionis debiti illius, by the ſame Reaſon they may tax 20 l. or any greater Sum for ſuch Damages, if they ſee Cauſe. 2 Saund. 107. Trin. 21 Car. 2. Holdipp v. Otway.

12. *In Debt upon an Obligation*, the *Plaintiff had Judgment*, and afterwards *brought Debt on the Judgment, and had Judgment upon it.* The Ch. Juſtice at firſt oppoſed the taxing Damages, (viz. *Intereſt*) without Writ of Inquiry; but afterwards it was *referr'd to the Secondary to tax the Damages* without Writ of Inquiry. Sid. 442. pl. 15. Hill. 21 and 22 Car. 2. B. R. Row v. Apſley.

(K) *In what Caſes* the *Court may mitigate or encreaſe* Damages.

1. DAMAGES are given at the Niſi Prius in an Action where Damages are the Principal, and the Court cannot have any certain Conuſance of the Cauſe, * neither by the Record, nor other Matter apparent, **they cannot mitigate nor encreaſe.** * Fol. 572.

2. [As] **In** Caſe for Slander, **the** Defendant juſtified in the Manner, and at the Niſi Prius Damages were given, **the Court cannot mitigate them.** D. 2. Ma. 105. 15. D. 105. a. pl. 15. Mich. 1 & 2 P. & M. Bonham v. Ld. Sturton, S. C. adjudged. ——— Palm. 314. Mich. 20 Jac. B. R. Hawkins v. Sciet, S. P. ——— Jenk. 68 pl. 29. that the Court can neither increaſe nor abridge them.

3. But in Battery pro Amputatione manus dextræ, **the Court may encreaſe the Damages, for** 'tis apparent to the Court **by the Record and View of the Perſon.** D. 2. Ma. 105. 15. **Tripeoney, 22 E. 3. 11. b. adjudged.** Fitzh. Damages, pl. 105. cites S. C.

4. So **in Battery** upon View of Mayhem in Court. 39 E. 3. 20. **b. adjudged.** S. C. cited Le. 139. pl. 191. Hill. 30 Eliz. C. B. in Caſe of Mallet v. Ferrers, where in Treſpaſs of Battery the Parties were at Iſſue upon Not Guilty, and at the Niſi Prius it appeared that the Thumb of the Right Hand of the Plaintiff was clear cut off, and ſo maimed; and it was found for the Plaintiff, and Damages taxed to 40 l. and now the Party came in Perſon into Court, and prayed in reſpect of the Heinouſneſs of the Maim, that the Court would increaſe the Damages; which Damages, upon great Conſideration had, were made 100 l. and Judgment given accordingly.

5. So **in Battery upon View** of the Wound **in Court.** 3 H. 4. 4. Br. Coſts, pl. 7. cites S. C. ——— Br. Damages, pl. 40. cites S. C. ——— Br. N. C. pl. 466. cites S. C. —— Fitzh. Damages, pl. 54 cites S. C. ——— S. C. cited Lat. 223. Mich. 3 Car. in Caſe of Hooper v. Pope, which was Treſpaſs of Aſſault, Battery and Wounding, and upon Not Guilty, Verdict was for the Plaintiff, and ſmall Damages given; and becauſe the Plaintiff had a Mayhem in his Hand by the wounding, it was moved to increaſe the Damages on view of the Mayhem; but the Court order'd, that the Wound be view'd by a Chirurgeon, and he to make Oath that it is a Mayhem, and alſo to have a Certificate of

of the Juſtice of Aſſiſe, before the Court was tried that it is the ſame Wound, upon which the Action was brought, which was done, whereupon it was moved, that Damages ſhould not be increaſed, becauſe the Action is no more Generally than for Aſſault, Battery and Wounding, and a particular Mayhem does not appear on the Declaration, nor is it indorſed on the Poſtea, nor is it according to D. 105 [See pl. 2. ſupra.] 22 E 3 11 [See pl. 3. ſupra.] 8 H 4 22. [See pl. 6. Infra] But notwithſtanding, the Court increaſed the Damages upon the Matter above.

* Fitzh. Damages, pl. 57. cites 8 H. 4. 23. S. C.——Br. Damages, pl. 47. cites S. C.

6. So in an Appeal of Mayhem, upon View of the Mayhem. * 8 H. 4. 22. † 30 Aſſ. 31.

† Br. Damages, pl. 111. 30 Aſſ. pl. 30. [and Roll is misprinted.]

7. Mich. 14 Jac. B. R. In an Appeal of Mayhem, by *Freeman againſt Trevers*, the Jury gave twenty Marks Damages, and upon View in Court, and Information of the Surgeons there preſent, the Court encreaſed the Damages to 100 l. becauſe he loſt the Uſe of his Hand.

Br. Damages, pl. 47. cites S. C.—— Fitzh. Damages, pl. 57. cites S. C.

8. But if in an Appeal of Mayhem, the Juſtices of Niſi Prius, upon View thereof, certify, That he had ſuſtained Damages to ſuch greater Sum, yet the Juſtices of the Court out of which it iſſues, cannot encreaſe Damages without their View. 8 H. 4. 23.

Br. Damages, pl. 47. cites S. C—— Fitzh. Damage, pl. 57. cites S. C.

9. But upon a View in Pais by any of the Juſtices of the Court into which the Niſi Prius is returned, they may encreaſe Damages. 8 H. 4. 23.

Br. Abridgment, pl. 6. cites S. C—

10. In Conſpiracy for indicting for a Treſpaſs, Damages may be mitigated by the Court. 7 H. 4. 31. b. Curia.

Br. Damages, Pl. 44. cites S. C. & S. P. and ſays, it is ſaid there, that they may increaſe Damages alſo. —— *But* P. 27. H. 8. 2. Per Englefield, Fitzherbert and Shelly *In Treſpaſs locall* they cannot abridge nor increaſe Damages *contra of Coſts*, and therefore it ſeems, that they *cannot* abridge nor increaſe, *but in ſuch Caſes where they may have Notice* as above, or in Caſe of Mayhem apparent and the like. Ibid.——Br. Conſpiracy, pl. 11. cites S. C. & S. P.

Br. Abridgment, pl. 35. cites S. C. —— Jenk. 68. pl. 29. cites S. C.

11. In Debt upon an Obligation, the Defendant denies the Deed, and it is found againſt him, the Court may encreaſe the Damages aſſeſſed. 14 H. 4. 19. b.

Fitzh. Judgment, pl. 10. cites S. C.

12. In Treſpaſs for entering into his Park, and taking a Doe, the Court may mitigate the Damages given by the Jury. 9 H. 6. 2. b.

——Jenk 68. pl. 29. cites S. C. —— 2 Inſt 200. Ld. Coke ſays, that the Words in the Stat. Weſtm. 1. cap. 20. that "Great and large Amends ſhall be awarded according to the Treſpaſs againſt Treſpaſſors "in Parks attainted at the Suit of the Party," if the Damages are too ſmall, the Court has Power to increaſe them; For the Word (Award) properly belongs to the Court.

Br. Coſts, pl. 7. cites S. C. —— Br. Damages, pl. 40. cites S. C.

13. In Treſpaſs for cutting his Trees, upon Not Guilty pleaded, the Court cannot encreaſe the Damages given by the Jury, becauſe it lies not in their Conuſance. 3 H. 4. 4.

—— Fitzh. Damages, pl. 54. cites S. C. —— Jenk. 68. pl. 29. cites S. C.

Jenk 68. pl. 29. cites S. C.

14. The Law is the ſame in Treſpaſs for taking his Goods. 19 H. 6. 10. b.

15. In

15. In an Appeal of Robbery, if the Defendant be acquitted, and it is enquired of the Damages, and it is found to 20 s. the Court cannot encreaſe the Damages, becauſe they know [or by Reaſon of their knowing that] the Appellee was long in Priſon, when the Inqueſt had tared the Damages before 42 Aſſ. 19. Becauſe it is the Default of the Court that the Inqueſt had not been taken ſooner.

Fr. Damages, pl. 115. cites S. C. —— S. C & S. P. per Knivet, and alſo becauſe it was taxed by the Inqueſt. Br. Abridgment, pl. 30. cites S. C.

16 In ſuch Action where the principal Demand is certain, the Court may encreaſe Damages. 10 H. 6. 24. b. Curia. Br. Coſts, pl. 28 cites S. C. ——

Fitzh. Damages, pl. 31. cites S. C.

17. As in Debt upon the Arrearages of an Account, if the Jury finds it Arrear, and gives Damages, yet the Court may encreaſe it, becauſe the Demand is certain. 10 H. 6. 24. b. adjudged. Br. Coſts, pl. 28. cites S. C. —— *So* in *Debt againſt two by ſeveral Præcipes* upon an Obligation, the Plaintiff had ſeveral Judgments, and Damages ſeverally, viz. againſt each the Sum which the Jury found, and the Court increaſed the Damages over and above the Verdict to a Mark; Quod Nota; But it is ſaid elſewhere, that he ſhall have but one Execution. Br. Damages, pl. 57. cites 14 H. 4. 19.

18. The Court may abridge Coſts of Suit by the Jury. 19 H. 6. 42. b. 43. Br. Abridgment, pl. 8. cites 19 H. 6. 42. S. C. —— Fitzh. Damages, pl. 26. cites S. C.

19. Appeal of *Maihem, the Inqueſt taxed Damages to* 100 *s.* and *Chelrington increaſed them to* 10 *Marks*; and Wilby ſaid, that it was too little, by which *Shard awarded the Damages to* 10 *l.* notwithſtanding the firſt Judgment. Br. Damages, pl. 111. cites 30 Aſſ. 30.

20. Treſpaſs for that the Defendant beat and mayhem'd him; the *Defendant pleaded Not Guilty*, and is *found Guilty* at the Niſi Prius, where the *Plaintiff gave in Evidence, that he was mayhem'd at the ſame Time*, and the *Inqueſt found accordingly, and Damages* 18 *l.* and *at the Day in Bank he ſhew'd the Maym to the Court*, and prayed Increaſe of Damages, and the Court awarded, that he recover the 18 l. taxed by the Jury, and 22 l. over, viz. 40. in all. Br. Damages, pl. 86. cites 39 E. 3. 20.

21. *Treſpaſs of Trees cut*; Iſſue was join'd, and *paſs'd for the Plaintiff, to the Damage of* 5 *l.* The Plaintiff pray'd, that they would increaſe Damages. Thirn ſaid, we will not increaſe Damages of Trees cut; for *it does not lie in our Conuſance*, by which they *increaſed Coſts, and not Damages*, quod nota * This is intended of ſuch Matter which lies not in their Conuſance, but *of ſuch Matters which lies in their Conuſance, they may increaſe after Verdict upon Iſſue*, and ſo it was agreed by the Prothonotaries of C. B. Hill. 3 M. 1. in Treſpaſs *of Battery*. Br. tit. Abridgment, pl. 36. cites 3 H. 4. 4. * See pl. 32 infra.

22. In *Attaint*, the Coſts were increaſed by the Court. See Br. Attaint. pl. 26. cites 8 H. 4. 23.

23. The Court cannot increaſe Damages *after Iſſue tried* between the Parties. Br. Abridgment, pl. 25. cites 8 H. 4. 23.

24. The Court adjudg'd Damages by the View of the Perſon, who was beaten, *to* 200 *Marks*, which was adjudg'd *by Inſpection*. Br. Damages, pl. 49. cites 9 H. 4. 1.

25. In *Replevin* the Iſſue was found for the Plaintiff to the *Damage of* 20 *l.* The Plaintiff pray'd his Judgment, and the *Court would not give Judgment, unleſs the Plaintiff would releaſe Part of his Damages*, and it was ſaid, that by the ſame Law that they may increaſe Damages, they may abridge. Quod nota. Br. Judges pl. 22. cites 11 H. 4. 10.

26. *Debt* againſt A. *upon an Obligation*, the *Defendant pleaded Non eſt factum*, and it was found againſt him to the *Damage of three Marks*. The Plaintiff demanded Judgment as the Inqueſt had found, and Increaſe of Damages at their Diſcretion, by which it was awarded, that he recover accordingly, and one Mark over *of Increaſe*. Br. tit. Abridgment, pl. 35. cites 14 H 4. 19.

Br. Abridgment, pl. 7. cites 19 H. 6. 10. S. C.

27 *Upon Inqueſt of Office to inquire of Damages*, the Court may abridge or increaſe the Damages. Br. Damages, pl. 144. cites * 9 H. 6. 10.

* It ſhould be 19 H. 6. 10.

28. *But contra, upon Iſſue tried upon the Principal between Party and Party*, quod nota Diverſity. Ibid. and cites 7 H. 4. 31. 3 H. 4. 4. and 34 H. 8.

29. Note per Cur. that *where the Demand is certain*, as in Action of Debt &c. the Court may increaſe *as well the Damages as the Coſts*, quod nota. Br. Damages, pl. 137. cites 10 H. 6. 42. 25.

30. *And if* the Jury *in Debt finds 20s. for Coſts and Damages in one and the ſame Sum*, the Court may increaſe it to 20s. more, quod nota. Ibid.

31. *Forcible Entry* found for the Plaintiff to the Damage of 20 l. and it was awarded, that he ſhould recover 20 l. taxed by the Inqueſt, and 40 l. over by the Statute, viz. 60 l. in all, and ſo ſee that the Court trebled the Damages. Br. Damages, pl. 70. cites 19 H. 6. 6.

32. In *Treſpaſs*, the *Defendant imparl'd* till another Term, *and at the Day made Default*, by which Writ was awarded to enquire of Damages, which found 20 l. Damages, and 4 l. Coſts, and therefore the Court abridg'd the Damages to 20 Marks, and the Coſts to four Marks; for where it is upon *Writ of Inquiry of Damages*, the Juſtices may increaſe or diminiſh at their Pleaſure; for it is only an Inqueſt of Office to inſtruct them, and they may aſſeſs the Damages themſelves, without awarding any Inqueſt of Office, or Writ to inquire of the Damages, if they will. Br. tit. Abridgment, pl. 7. cites 19 H. 6. 10.

33. But *where the Inqueſt paſſes upon the Principal*, viz. *upon the Iſſue between Party and Party*, there *the Court may increaſe Coſts, but not* increaſe nor diminiſh *Damages*; for there the Party is at his Attaint, but upon Inqueſt of Office, he cannot have Attaint, quod nota Differentiam, but where they give *Exceſſive Damages* upon the Iſſue, there the Court may ceaſe Judgment, till the Plaintiff will releaſe his Damages to a reaſonable Sum, quod nota. Br. tit. Abridgment, pl. 7. cites 19 H. 6. 10.

34. In *Treſpaſs by Two againſt Three* the *one appeared and pleaded to Iſſue* and the *others made Default*, and at the Day of Niſi Prius it was *found for the Plaintiff to the Damage of* 100 *l.* which they ſevered, ſcilicet 40 *l. for the Value of the Goods, and* 60 *l. for the Coſts* of the Suit; the Plaintiff prayed Judgment and the Court thought the Coſts too high; and per Cur. if it was not for the Two who made Default the Coſts ſhould be abridged; for they may as well abridge as increaſe Coſts, but by Reaſon of the Two in the Simul the Court was in Doubt; For in *Treſpaſs againſt Two*, if the *one appears*, the Plaintiff ſhall count, that he together with the other, did the Treſpaſs, and though againſt the one the Proceſs is determined, yet againſt the other Proceſs ſhall be awarded, and they could not know to what Coſts this may come. And after all was diſcontinued. Br. tit. Abridgment pl. 9. cites 21 H. 6. 10.

35. In Debt, the Jury *found the Debt and Damages to* 26 *s.* 8 *d.* and the Court increaſed the Damages to 13 s. 4 d. beyond the firſt Sum. Br. Damages pl. 139. cites 32 H. 6 1.

36. Damages were increaſed in Coſts by Reaſon that the Defendant *delayed* the Plaintiff *by Injunction*. Br. Damages pl. 165. cites 21 E. 4. 78.

37 In

37. In *Treſpaſs Local* they cannot abridge nor increaſe the Damages; contrary of the Coſts; Per Fitzherbet, Engleſield, and Shelley. And therefore *after Demurrer* when the Inqueſt and Damages were awarded and returned, the Juſtices at the Prayer of the Defendant and his Counſel would not abridge Damages, Quod Nota. Br. tit. Abridgment pl. 1. cites 27 H. 8. 2.

38. Note, it was holden for Law, that the *Juſtices may increaſe but not decreaſe Damages*, becauſe the Party may have an Attaint. But note, contrary by Anderſon and Periam. J. Godb. 135. pl. 157. Hill. 29 Eliz. C. B. Anon.

39. In an *Aſſault, Battery, and Wounding*, the Plaintiff after Verdict moved the Court for an increaſe of Damages; the Court ſaid they could not do it, if the Word *Maihemavit was not in the Declaration.* Vent. 327. Hill. 29 & 30 Eliz. B. R. Anon.

40. The Plaintiff declares in *Debt upon Obligation of* 16 *l. to his Damage of* 10 *l.* and upon Non eſt factum pleaded, the *Jury found the Damages to* 7 *l.* and 40 s. Coſts; and the *Court increaſed the Coſts* 4 *l.* So he had Judgment to recover his Debt, and Damages, and Coſts to 13 l. which is more, than in his Count, and this was aſſigned for Error. Sed non allocatur. For *although the Jury cannot give more Damages than the Plaintiff counts, yet the Court may increaſe them as they pleaſe*; Wherefore the Judgment was affirmed. Cro. E. 544. pl. 13. Hill. 39 Eliz. B. R. Wolf v. Meggs. Noy. 61. S. C. & Quaſi in totidem Verbis.

41. Treſpaſs of *Battery*; *One* of the Defendants *pleaded Not Guilty*; The *other juſtified.* The *Iſſue againſt him was, De ſon Tort Demeſne*, and *one Ven. Fac. was awarded* to try theſe Iſſues; and it was *found for the Plaintiff*, and Judgment accordingly, and Error thereof brought, becauſe the *Plaintiff declared to his Damage of* 40 *l.* and the *Damages aſſeſſed by the Jury were* 35 *l.* and the *Coſts increaſed by the Court were* 6 *l.* So the Plaintiff had Judgment to recover 41 l. which is more than whereof he declares; Sed non allocatur; For the Damages found by the Jury being leſs than he counts, although the Coſts amount to more it is not material. Cro. E. 866. pl. 47. Mich. 43 & 44 Eliz. in Cam. Scacc. Comb v. Carew.

42. *Treſpaſs for breaking his Cloſe, and cropping* 200 *Pear-Trees, and* 100 *Apple-Trees*, upon Not Guilty pleaded, the Plaintiff had a Verdict and Damages to 40 l. The Defendant moved the Court to mitigate the Damages, it appearing upon Affidavit that that the Plaintiff would have accepted 5 l. before the Action brought; but the *Court ſaid that they could not diminiſh the Damages in Treſpaſs, which is local*, and therefore it could not appear to them, and Judgment accordingly. Brownl. 204. Mich. 3 Jac. Delves v. Wyer.

43. In Treſpaſs for an *Aſſault and Battery A. and B. A. appeared* &c. *and a Verdict was given againſt him*; *the other was in the Simul cum*; *and Damages taxed againſt A. to* 30 *l.* but the *Court upon View of* the Mayhem *increaſed the Damages to* 40 *l. and afterwards a Verdict was given againſt B. and Damages taxed*; and then it was *moved, that the Court upon another View* of the Wound *would increaſe Damages againſt B. for that A. had murdered the Officer that came to ſerve the Execution upon him for the* 40 *l. ſo that poſſibly the Plaintiff might recover nothing againſt A.* But it was denied by the Court, for that they could have the View but once in the ſame Action, but if he had brought ſeveral Actions, it would have been otherwiſe. But the Court directed the Plaintiff to ſtay till A. was hanged, and then they might make the View and increaſe the Damages. Litt. Rep. 51, 52. Mich. 3 Car. C. B. Anon.

44. *In Battery, Judgment* was given *upon Non ſum informatus*, and afterwards there *was a Writ of Inquiry* of Damages; on a Motion to mitigate the Damages the Court ſaid, that in ſuch Caſes they never would alter the Damages, where the *Party had* alſo *given Evidence at the Inquiry* of Damages. Litt. Rep. 150. Paſch. 4 Car. C. B. Stanlie's Caſe. Hett 93. S. C accordingly.

Hett. 93. S. C. cited by Crooke.

45. In *Treſpaſs Pedibus ambulando* 10 *l. Damages were given.* Cited by Crooke J. as a Caſe in B. R. in which himſelf was Counſel and that he could never have any Mitigation by the Court. Litt. Rep. 150. in Stanley's Caſe. Paſch. 4 Car.

46. In *Treſpaſs* the Plaintiff *declared generally, that the Defendant maihemavit* &c. And upon Iſſue he gave in *Evidence that the Defendant diſcharged a Great Gun in a Ship without giving Notice according to Cuſtom* &c. *whereby the Plaintiff loſt an Eye and a Leg.* It appeared upon the Evidence, that it was *done without any Deſign* or Intention of the Defendant, and therefore the Jury gave but 10 l. Damages; Whereupon the Court was moved to increaſe the Damages upon View of the Maihem, (as they might) and a Day was given him to produce his Witneſſes, but their Evidence being the ſame in Effect as at the Trial, the Court would not encreaſe them; beſides *the Particulars of the Maihem being not ſet forth in this Declaration, but generally Quod Maihemavit*, the *Court ſaid that they cannot increaſe the Damages upon View of the Maihem unleſs the Judges of the Niſi Prius* &c. *before whom it was tried, certify the Particulars* of the Maihem to the Court, and that theſe were the Maihems, which the Plaintiff offered to prove upon the Evidence at the Trial; for otherwiſe it cannot appear to the Court, that they are the ſame Maihems for which the Plaintiff had declared. Sid. 108 pl. 22. Hill. 14 & 15 Car. 2. B. R. Angel v. Shatterton.

47. In Treſpaſs for Aſſault, *Battery and Maihem*, the *Jury gave only* 10 *s.* Damages; but the Court upon View of the Maihem, (which was a *Broken Leg*) and upon Affidavit of the Charges to the Surgeon, increaſed the Damages to 20 l. Niſi Cauſa &c. and now Cauſe was ſhewn (viz.) that the Plaintiff did *not ſet forth in what Part of his Body* he was maimed. But per Hale Ch. B if the Plaintiff alleges that he was maimed, that is ground enough; and afterwards it was held by Hale & tot. Cur. *the Damages may be increaſed where the Word mayhemavit is in the Declaration*; but the uſual and better Way had been to expreſs the Manner of the Maihem and that *in* an Action of *Battery the Court might increaſe the Damages upon the View*, if the Manner of the Battery was alleged in the Count. Hardr. 408. Paſch. 17 Car. 2. in the Exchequer. Auſtin v. Hilliars.

Sid. 433. pl. 26. Burford v. Dadwell S. C. mentions 8 l. Damages, and ſays the Court would not hear what the Chirurgeons might ſay, becauſe it was doubted, whether it might be increaſed upon the View, in as much as there is not any Mayhem or wounding here directly made by the Party, but that it is rather by Accident viz. the coming of the other Horſe, and How he came, and whether the Feme might have a voided him is Matter of Evidence, and ſo they denied to increaſe the Damages.

48. The Plaintiffs in an Action of *Battery* declared that that the *Defendant ſtruck the Horſe* wheron the Wife rode, *ſo that the Horſe ran away* with her, *whereby ſhe was thrown down, and another Horſe ran over her, whereby ſhe loſt the Uſe of Two of her Fingers.* The *Jury had given them* 48 *l. Damages*, and they moved the Court, upon View of the Maihem, to increaſe them; whereupon the Declaration was read; but the *Court thought the Damages given* by the Jury *ſufficient.* Mod. 24. pl. 65. Mich. 21 Car. 2. B. R. Dodwell and Ux v. Burford.

49. *Collaterall* Damages ſhall be conſidered *in Equity* on Penalty of a *Bond to ſave Harmleſs.* Sid. 442. Hill. 21 & 22 Car. 2. B. R. King v. Atkins.

50. M. brought an Action of *Aſſault and Battery, againſt J. S.* who *pleaeded, De ſon Aſſault Demeſne*; and a Verdict being for the Plaintiff, they gave him 6 *l. Damages at the Aſſiſes*; but upon view of the Mayhem, it *appearing that he had loſt two of his Fingers, and was thereby diſabled to follow his Trade of Cloth-Shearing*, the *Court increaſed the Damages to* 100 *l.* Freem. Rep. 173. pl. 185. Mich. 1674. C. B. More's Caſe.

51. Adjudged

51. Adjudged in Action of *Aſſault* &c. that where the Plaintiff *declares of a Wounding by the Word Maihemavit*, it is clear the Damages may be increaſed, though Damages are given by the Jury. 3 Salk. 115. pl. 6. Cook v. Beale.

52. *So* it is *where the Plaintiff ſets forth a Wound ſo particular in his Declaration, that by the Deſcription it appears to be a Maihem*; and *ſo* it is *were the Wound is viſible and apparent*; and this may be done, whether Damages are given by the Jury upon an Iſſue joined, or upon a Writ of Inquiry. 3 Salk. 115. pl. 7. Cook v. Beale. Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. S. C. & S. P. reſolved accordingly, though the Word Mayhemavit is not in the Declaration, and cites Raſt. Appeal 46. and 8 H. 4. 21. b.

53. *But this Increaſe* of Damages *muſt be given by the Courts a Weſtminſter upon the View* of the Wounding, *or upon Affidavits* made thereof; and *it cannot be done by the Juſtices of Niſi Prius, who, if the Wound is very great, muſt endorſe the Evidence on the Poſtea, and upon ſuch Evidence the Damages will be encreaſed, though the Wound was not ſet forth in the Maihemavit in the Declaration.* 3 Salk. 115. S. C. Ld. Raym. Rep. 177. Hill. 8 & 9 W. 3. S. C. & S P reſolv'd, and cites 39 E. 3. 20. b. 22 E. 3. 11. Sty. 314. and Hardr. 408.

54. And *ſo* it is *without ſuch Indorſement, where the Cauſe was tried before a Judge of that Court, where the Motion is made* for increaſe of Damages. 3 Salk. 115. pl. 8. Cook v. Beale. Ld. Raym. Rep 177. S. C. & S P. Per Powell J. and the Reporter adds a Nota, that this Cauſe was tried before Powell himſelf.

55. Treſpaſs, *Aſſault and Battery.* The Plaintiff *declares, that the Defendant cum manu ſua ipſum* Thomam Cook *ſuper ſiniſtrum oculum percuſſit* et violavit *ita quod*, the ſaid Thomas Cook, viz. the Plaintiff, *penitus inhabilis devenit ad ſcribendum vel legendum, being an Officer of the Exciſe* &c. Not Guilty pleaded. Verdict for the Plaintiff. And Birch, Serjeant, moved, that the Court would increaſe the Damages, upon Affidavit, that the Plaintiff had loſt his Eye. But the Court ordered the Plaintiff to appear in Court in Perſon, for otherwiſe, they could not increaſe the Damages; upon which the Plaintiff was brought into Court. And afterwards the Court, after ſeveral Motions reſolved, that the *Court may increaſe the Damages, if the Wound be apparrent, though it be not a Maim.* And ſo it was done in the Caſe of the Lord Foliot. Therefore in this Caſe, becauſe the Wound is viſible, though it be no Mayhem, (for it is not a Mayhem, becauſe the Eye is not wholly out, but the Plaintiff only declares, Quod inhabilis ad legendum vel ſcribendum devenit by the Wound,) yet Damages may be increaſed. And Powell J. ſaid, that Holt Ch. J. was of that Opinion. Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. Cook v. Beal.

56. *So* (per Powell, J.) though *the loſs of a Noſe* is not a Mayhem to bring an Action Felonice for the Loſs of it, yet the Court may in ſuch Caſe increaſe the Damages. Ibid.

57. And he ſaid, that the *Court might increaſe the Damages upon a Writ of Inquiry*, becauſe that was but a bare Inqueſt of Office. And Sty. 345. 1 Le. 139. Bend. 158. Litt. Rep. 51. Hutt. 121. 53. 1 Sid. 423. 1 Mod. 24. were cited, and a Caſe between **Swalley and Babington**, where in a general Action of Aſſault, Battery, and Wounding, upon view the Damages were increaſed about four Years ago, upon the Motion of Serjeant Lovell. Ld. Raym. Rep. 176. Hill. 8 & 9. W. 3. Cook v. Beal.

58. The *Plaintiff was arreſted at the Suit of the now Defendant, in a fictitious Action*, without any Colour of Reaſon; and afterwards *he brought an Action of falſe Impriſonment* againſt the Defendant, and the

Jury gave him 80*l. Damages*; and upon a Motion in arreſt of Judgment, becauſe the Damages were exceſſive, it was oppoſed by the Plaintiff's Counſel, and inſiſted, that he might have the Benefit of the Verdict, which was granted, and accordingly the *Plaintiff had Judgment*. 8 Mod. 296. Trin. 10 Geo. 1725. Herbert v. Morgan.

(L) [Mitigated, or Increaſed] In Reſpect of the *Plea*; [*And Circumſtances.*]

* See (R) pl. 4.

1. IN Treſpaſs for taking his Goods, to the Damage of 20*l.* if the Defendant pleads an Arbitrament made in another Country, and this is tried againſt the Defendant, and Damages aſſeſſed for the Treſpaſs, yet inaſmuch as this Foreign Jury could not have full Conuſance of the Treſpaſs, and the Defendant hath * not denied the Damage to be according to the Count, the Court, with the Aſſent of the Plaintiff, may encreaſe the Damages, and to ſo much as the Plaintiff hath counted. 13 H. 4. 7. b.

Fol. 573.

Br Damages, pl. 56. cites S. C.

2. In an Action for taking his Goods, if the Defendant avows, upon which it is demurred and adjudged for the Plaintiff, or upon Default and Damage found upon the Writ of Inquiry of Damages, the Court may increaſe them; for the Court (this being upon Demurrer) might have awarded Damages without Inquiry, therefore the Inqueſt is but for their Information. 14 H. 4. 9. b. 3 H. 6. 29. b.

3. So in this Caſe the Court may mitigate the Damages for the ſame Reaſon. 3 H. 6. 29. b.

* Br. Damages, pl. 144 cites S. C. —— Br. Abridgment, pl. 7. cites S. C. for it is only an Inqueſt of Office to inſtruct the Court. —— Fitzh Damages, pl. 24. cites S. C.

† Sty. 310. Davis v. Ld. Foliot, ſeems to be S. C. & S. P.

4. So in Treſpaſs, if Judgment be given upon Nil dicit, and a Writ of Inquiry of Damages ſerved, the Court may increaſe or diminiſh the Damages found by the Inqueſt, for that they might have awarded Damages according to their Diſcretion, without ſuch Writ, * 19 H. 6. 10. b. adjudged. Mich. 1651. between † *Ley and Lord Folliot*, in an Action of Aſſault, Battery, and Wounding, the Manner of the doing thereof being ſpecially laid in the Declaration, though the Inqueſt gave 200*l.* Damages, yet upon Examination of Surgeons, and upon View of the Wound in Court, and for the Heinouſneſs of the Fact, being done in the High-Street, in the Day-time, with a Stilletto, with an Intent to kill him, and the Surgeon, by Agreement, being to have 150*l.* for the Cure, the Plaintiff being in great Danger of Death, and having loſt a Pottle of Blood, as the Surgeons ſaid, the Court increaſed the Damages to 400*l.* in toto, and Judgment given accordingly.

admitted, but ſays nothing of the Manner of the Aſſault, Battery and Wounding being laid in the Declaration. —— S. C. cited Ld. Raym. Rep. 176. per Cur.

5. In *Treſpaſs for breaking his Cloſe* by Rawlins *with a Continuando*, it was moved by Coke, that the Plaintiff needed not to ſhew a Regreſs to have Damages for the Continuance of the firſt Entry, viz. for the mean Profits. Gawdy J. *without an Entry, he ſhall not have Damages for the Continuance, unleſs in the Caſe where the Term, or Eſtate, of the Plaintiff in the Land is determined*; and to ſuch Opinion of Gawdy, the whole Court did incline, but they did not reſolve the Point, becauſe

cauſe a Regreſs was proved. Le. 302. pl. 416. Trin. 31 Eliz. B. R. Rawlins's Caſe. Cites 20 H. 6. 15. 38 H. 6. 27.

6. In ſuch a *Præcipe* where the Demandant is to recover Damages, if the *Tenant pleads Non-Tenure, or diſclaims*, there the *Demandant may aver him to be Tenant of his Land, as his Writ ſuppoſeth for the Benefit of his Damages, which otherwiſe he ſhould loſe*, or pray Judgment and enter. Co. Litt. 362. b.

3 Lev. 330. Trin. 4 W. & M in Caſe of Hunlock v. Petre reſolved per tot. but of Non-

Cur. that Littleton and Coke are not to be underſtood of a ſimple Plea of Non-tenure, tenure with Diſclaimer, as the Pleadings uſually were in Littleton's Time.

7. In Treſpaſs of *Aſſault and Wounding*, where the Truth was, that the *Plaintiff's Arm was broke*, and he was in great Danger ſtill of loſing the Uſe of it, and the *Jury gave but 12 d. Damages*; the Court would not increaſe them, becauſe *the Manner of Wounding was not ſet forth in the Declaration*; and, per Roll Ch. J. it might be, that his Arm was broke ſince the Action. Sty. 345. Mich. 1652. Jervis v. Lucas.

(M) Damages *Increaſed, or Decreaſed. By what Court* it may be.

1. THE Juſtices of Niſi Prius have no Power **to encreaſe Damages, but only to inquire of that which is affirmed by the Inqueſt.** 8 H. 4. 23.

Br. Damages, pl. 47. cites S. C. —— Fitzh. Damage, pl. 57. cites S. C.

2. In *Treſpaſs and Battery in an Inferior Court*, the *Judge there increaſed the Damages upon View* to more than was given by the Jury. The Court ſaid, that *the proper Way to reform this is by Writ of Error*; for none but the Courts at Weſtminſter can increaſe Damages upon View. Vent. 353. Hill. 32 and 33 Car. 2. B. R. Anon.

3. *But* a Writ of *Error being brought*, and Error aſſigned, for that an Inferior Court had increaſed the Damages given by the Jury upon an Inſpection of the Mayhem made by the ſaid Battery, *the Court held, that the Inferior Court had Power to judge upon their View* of the Mayhem, *and to increaſe the Damages*, and affirmed the Judgment. 2 Jo. 183. Mich. 33 Car. 2. B. R. Anon.

(M. 2) Damages tax'd by the firſt Inqueſt, where there are more Juries than one.

1. IN *Treſpaſs againſt two*, if the *one* comes and *pleads, and is convicted to the Damage &c. and the other comes and pleads, and is convicted*, the 2d Jury ſhall not give Damages; for the 2d who pleaded ſhall be charged by the firſt Verdict. Quod Nota, Br. Damages, pl. 29. cites 41 E. 3. 7.

2. Forger of Deeds, by which he was *diſturbed of his Poſſeſſion of ſuch Tenements in D. in the County of K. and of ſuch Lands in L.* and *alleged the Forging at D. in the County of K.* and *brought the Action in the County of K.* and [as] *to the Land in the County of K. the Defendant pleaded a Plea* to the Iſſue *and to the Land in L. other Iſſue*, and the *Jury of K. appear'd and found for the Plaintiff*, and the *Jury of L. did not appear*, therefore it was order'd, that the Jury who appear'd, ſhould tax Damages for the Whole, and therefore the Inqueſt aſſeſs'd Damages for the Land in K. to 10 l and for Coſts, if he barr'd at L. to 100 s. and for the Forging, as to the Tenement in London 8 l. and for Coſts of his Suit, if it be found for him, 40 s over the 100 s. and ſo Damages and Coſts ſevered. Br. Damages, pl. 74. cites 21 H. 6. 51.

S. P. Br. Damages, pl. 92. cites S. C. *So where ſeveral plead to the Iſſue in Treſpaſs*, and after *one makes Default*, yet the firſt Inqueſt ſhall tax Damages for all. —— Br. Attaint, pl. 44. cites S. C.

3. If *two plead Not Guilty ſeverally in Treſpaſs*, and *ſeveral Venire Facias's* are awarded, the Inqueſt that firſt paſſed ſhall aſſeſs Damages againſt all, and the ſecond Jury ſhall not aſſeſs the Damages, and there the other Defendant ſhall be charged of the Damages, by the Inqueſt which paſſed upon the Iſſue, to which he was not a Party, but he was Party to the original, Quod Nota, and therefore may have Attaint alſo; Per Moile, & non negatur, and in this Caſe the *ſecond Inqueſt ſhall not aſſeſs Damages*, Quod Nota. Br. Brief. de enquire pl. 8. cites 39. H. 6. 1.

4 *After Iſſue in Treſpaſs*, the *Defendant confeſs'd the Action* by which the ſame Inqueſt enquired of the Damages, and no other. Br. Enqueſt. pl. 67. cites 18. E. 4. 7.

5. If an Action of *Treſpaſs* be brought *againſt two*, and they *plead ſeveral Pleas*, and afterwards *one* of them *is found Guilty by a ſeveral Jury, That Jury ſhall aſſeſs all the Damages; and if the other be afterwards found Guilty, he ſhall be ſubject to the ſaid Damages*, although he was not Party to the ſaid Jury; and by the ſame Reaſon that he ſhall be charged with the ſame Damages, by the ſame Reaſon he ſhall have Advantage of the Satisfaction of them made by his Companion, Per Clench. 3 Le. 122. pl. 174. Trin. 27 Eliz. B. R. Anon.

6. In a *Writ of Quare Intruſit Maritagio non ſatisfacto* it was found for the Plaintiff, but *no Damages were aſſeſſed by the Jury*, and *the Value of the Marriage was found to be* 500 *l.* And now the Queſtion was, Whether the ſame might be ſupplied by a Writ of Enquiry of Damages? and the Court prima facie, ſeemed to doubt of the Caſe; For where the Party may have an Attaint, there no Damages ſhall be aſſeſſed by the Court, if the ſame be not found by the Jury; and therefore the Court would be adviſed of it; but afterwards in the ſame Term it was adjudged, that *no Writ of Enquiry of Damages ſhould iſſue*; but a *Venire Facias de novo was granted to try the Iſſue again*. Godb. 207. pl. 294. Mich. 1. Jac. in C. B. Cook's Caſe.

(N) *For what Cauſes* they ſhall be recovered. *Not for the Delay* of the Court.

1. IF a Man appealed of Robbery continues long in Priſon, and after is acquitted, **he ſhall not have Damages for the long Continuance in Priſon, becauſe it was a Default of the Juſtices that they did not deliver him at the firſt General Delivery.** 42 Aſſ. 19. per Knivet. See [K] pl. 15. S. C. —— Br. Damages, pl. 115. cites S.C. —— Brit. Abridgment, pl. 30. cites S. C.

2. If the Conuſee of a Statute Merchant takes the Body of the Conuſor in Execution, without any Extent of the Land, after he hath releaſed the Stature, **yet in an Audita Querela the Conuſor ſhall recover Damages for the Impriſonment of his Body without Cauſe.** Quære, 47 E. 3. 1. b. Br. Audita Querela, pl. 7. cites S. C. but by Finch, the Plaintiff ſhall not recover Damages in this Action but where he is ouſted of his Land. —— Br. Damages, pl. 34. cites S. C. —— Fitzh. Audita Querela, pl. 2. cites S. C.

(O) *In what Actions* Damages ſhall be *ſaved by the Confeſſal.*

1. IN an Admeaſurement of Dower, **if the** Defendant comes the firſt Day, and ſays, **that he is** ready **to admeaſure, the Plaintiff ſhall not recover his Damages.** 42 E. 3. 19. b. Br. Admeaſurement, pl. 1. cites S. C. —— Fitzh. Damages, pl. 71. cites S. C. —— 2 Inſt. 368. on the Stat. Weſtm. 2 13 E 1. cap 7. Ld. Coke ſays, that in a Writ of Admeaſurement of Dower the Demandant ſhall recover Damages if the Tenant appears not the firſt Day and yields to Admeaſurement for the Iſſues in the mean time, but in Admeaſurement of Paſture no Damages ſhall be recovered at all, and cites S. C. —— Fitzh. Damages, pl. 2. S. P. cites 34 E 3. —— Br. Damages, pl. 24. cites S. C. —— Ibid. pl. 184. cites S. C. and 44 E. 3. 10, 11.

2. In Detinue, **if the Garniſhment be prayed, and the** Garniſhee comes, and cannot deny **the Conditions to be broke, the Plaintiff ſhall not recover any Damages againſt him.** 8 H. 6. 11.

3. So **if he** makes Default; **for Damages are given againſt the Garniſhee to Delay.** 8 H. 6. 11.

4. **If a Man will avoid the Damages, becauſe he hath been** at all * Times ready to render **the Thing in Demand, he** ought to come at the firſt Day. 17 E. 3. 71. * Fol. 574.

5. In Detinue for a Writing againſt an Executor, **ſuppoſing it to** come to his Hands after the Death of the Teſtator, **the Defendant may come** at the grand Diſtreſs, **and** ſay, that he hath at all Times been ready to deliver **the Writing** after the Time that it came to his Hands, **and thereby ſave Damages againſt him.** 22 Ed. 3. 9. b. adjudged. Fitzh. Damages, pl. 103. cites S. C. & S. P. but if he cannot ſay ſo, Damages ſhall be recovered againſt him.

In Annuity the Defendant *appeared at the Diſtreſs*, and *ſaid, that he has been at all times ready* &c. and yet the Plaintiff recovered the Annuity and the Damages; Quod Nota. Br. Damages, pl. 186. cites 2 H. 4. 3.

6. In Annuity, if the Defendant be returned ſummoned, and does not come, but afterwards comes by Attachment, he ſhall not ſave Damages by ſaying, that he hath been at all Times ready, for he ſhall not have ſuch Plea, inaſmuch as he did not come upon the Summons. 29 E. 3. 40. adjudged.

7. In a *Writ of Aiel, Coſinage* &c. where the Land and Damages are to be recovered, the Plea of *Tout temps Priſt* is not good, becauſe the Tenant of the Land there has no Title, but holds the Land by Wreng. Co. Litt. 33. a.

(O. 2) Saved. By Recouper.

* Br. Aſſiſe, pl. 141. cites S. C and the Word (diſtrains) ſeems miſprinted, and that it ſhould be (diſſeiſes) as it in Br. Aſſiſe, pl. 141.

1. THE *Leſſor* * *diſtrains his Tenant for Life*, after that a Term of Rent was Arrear, and continued ſeiſed, and the Leſſee recover'd by the Aſſiſe, and the Rent which incurr'd during the Seiſin, by Diſſeiſin was recoup'd, and becauſe a Rent-Day was arrear before the Diſſeiſin, and another Rent-Day after the Recovery by the Aſſiſe upon this Diſſeiſin, therefore in Aſſiſe of Rent, brought by the Leſſor againſt the Leſſee after the Recovery, is had by the Leſſee in the Aſſiſe againſt the Leſſor, therefore the Jury were compell'd to ſever their Damages, and ſo they did. Quod Nota. Br. Damages, pl. 94. cites 8 Aſſ. 37.

2. In Aſſiſe of Land, the Defendant had *Rent Charge, or Common, out of the ſame Land* of which the Aſſiſe is brought againſt him, and therefore the Damages were Recoup'd or Abridg'd. Br. tit. Abridgment, pl. 26. cites 3 H. 6. fol. ult'.

(P) *In what Actions* Damages ſhall be *recovered.* [And Where.] Upon a *Penal Statute.* [Or otherwiſe.]

Cro. C. 559. pl. 3. North v. Wingate, S. C. adjudged that Coſts and Damages are well given; and ſays, that ſo are all the Precedents in Co. Ent. 163, 164. —— Jo. 447 pl. 9. Muſgrave v. North, S. C and Judgment in

1. IN an Action of Debt upon the Stat. of 1 and 2 Ph. and Ma. for 5 l. by the Party grieved, for taking more than 4 d. for a Diſtreſs, by which Act it is enacted, That if any takes more than 4 d. for impounding a Diſtreſs, he ſhall forfeit 5 l. to the Party grieved, over and above the Sum that he took more than 4 d. and it is found againſt the Defendant, the Plaintiff ſhall have Damages, though it be upon a Penal Law, becauſe this is a Debt of 5 l. certain given by the Statute, and not as Damages, and the Damages are to be given for the Delay in not rendring the Debt upon the Return of the Summons, for this is not like to Penal Laws that give treble Damages, for there it appears, that they intend it for Damages, nor to the Statute of 2 E. 6. where Debt is given for the treble Value, for that there the Value is uncertain till the Recovery; but here the 5 l. is a certain Debt by the Statute, and it ſhould be a ſmall Remedy for the Party grieved to bring an Action for 5 l. without Damages or

or Costs. Mich. 15 Car. B. R. between *North and Musgrave*, per Curiam, adjudged upon a Writ of Error upon such Judgment in Banco, where Damages were given, by the Direction of the Court, upon good Advice. Intratur, Trin. 15 Car. Rot. 975. C. B. affirmed per tot. Cur. and cites Co. Ent. and said, that though there are Precedents there that no Damages were given, yet this does not prove that they were not due. —— Mar. 56. pl. 88. S. C. adjornatur —— Ibid. 61. pl. 95. S. C. Brampston and Jones conceived that the Damages were well assessed upon the Precedents cited, but Barkley doubted, and conceived upon Pilford's Case, 10 Rep. that no Costs should be given; and as to the Precedents, he said that they did not bind him, for perhaps they passed sub silentio; Et adjornatur.

2. Damages shall be given to the Party grieved, in an Action upon the Statute of the 13 El. cap. 5. of Forgery of false Deeds. New Entries 163.

3. Damages shall be given to the Party grieved, in an Action upon the Statute of 21 H. 8. cap. 6. of Mortuaries. New Entries 164.

4. If a common Informer brings an Information, or Action of Debt, tam quam &c. upon a Penal Statute, for a Sum certain given by the Statute, he shall not recover his Damages. M. 15 Car. B. R. in the said Case of *North and Musgrave*, per Curiam, and the Clerks agreed it to be the common Course and Practice. Mar. 58. pl. 88. S. C. says, Barkley J. asked Hoddesdon, if the Informer should recover Damages, and that He and Keeling, Clerk of the Crown, said No; but said, that Damages should be given against him. —— See Tit. Actions (A. 8) and see Costs [A. 4]

5. In Writs of Execution, no Damages shall be recovered. 50 E. 3. 23. b. Br. Damages, pl. 36. cites S. C. —— See the Plea next following, and the Notes, and see pl. 13. in the Notes.

6. In a Scire Facias no Damages shall be recovered, 2 H. 6. 15. Br. Damages pl. 3. cites S. C. ——

S. P. *Unless in Special Case*, and in Scire Facias *in Nature of Quare Impedit between Coparceners upon Composition* to present by Turn, a Man recovered the Presentment and Damages as admitted there. Br. Scire Facias pl. 54 cites 50 E 3 23. —— *So upon the Appearance of the Party in Scire Facias, upon a Fine* levied *of an Acquittal in Writ of Mesne upon Appearance of the Defendant*; Contrary upon his Default; Per Belknappe. Cr. Scire Facias pl. 54. cites 50 E 3. 23. ——— Br. Damages pl. 36 cites S. C. ——— Lat. 101 in a Nota. S. P. that no Costs shall be, or ought to be in a Scire Facias; Sic dictum fuit per omnes. ———

In Scire Facias *against the Heir of Acquittal acknowledged by his Father* he was returned warned, and did not come, by which Distringas issued and no Judgment to recover the Acquittal, and Damages as it should have been *against his Father*, if he had appeared aud' pleaded and it had been found against him. Br. Damages pl. 175. cites 46 E. 3. 31.

In Scire Facias upon Recovery of an Annuity the Plaintiff shall not recover Damages nor Arrears pending the Scire Facias, but he shall recover the Arrears pending the Writ of Annuity, per Judicium Curiæ. Br. Damages pl. 145 cites 9 H. 5. 12. & 7 H. 4. 15. Per Rykhill J.

7. In a Formedon no Damages shall be recovered. 3 H. 4. 15. Br. Damages pl. 187. cites S. C that a Man shall recover Damages in Attaint founded upon a Formedon, and yet he cannot recover Damages in the Formedon upon which it is founded; but it is founded upon the false Oath; Per Hill.

8. In Detinue Damages shall be recovered. 2 H. 6. 15.

9. In an Attaint of a Freehold, Damages shall be recovered at the Common Law. 3 H. 4. 15. Fitzh. Dages pl. 55. cites S. C that at Common Law a Man might have Attaint of Frank-Tenement and Damages in the same Writ, per Hill ——— In *Attaint* if the Plaintiff recovers Restitution of the Thing lost, yet he shall recover Damages besides. Br. Damages pl. 174 cites 46 E. 2. 23.

10. In

See 18 E. 3. 42. b. pl. 47. where S. P. is made a Quære, but the Reporter ſays, Vide Supra, where Damages are recovered in Simili Caſu.

10. In a Warrantia Chartæ, if the Plaintiff recovers pro Loco & Tempore, he ſhall not recover Damages, and yet he counts of Damages. 21 E. 3. 57. b. Quære 18 E. 3. 43. b.

Br. Damages pl. 183 cites S. C. but is, that a Man ſhall recover Damages in Warrantia Chartæ, where he did not loſe the Land.——Fitzh. Damage pl. 69. cites S. C.—— S. C. cited Hob. 23.

11. In a Writ of Warrantia Chartæ, although the Defendant delays him by Iſſue, yet no Damages ſhall be recovered where no Land is loſt. 42 E. 3. 7. 6. (It ſeems this is to recover Pro Loco & Tempore.)

Fol. 575.

12. But otherwiſe where the Land is loſt. 42 E. 3. 7. b.

Fitzh. Damages pl. 69. cites S. C.

In Writ of Meſne between Ld. and Tenants, the Defendant acknowledged Acquittal by Fine, whereupon the Plaintiff afterwards ſued Sci. Fa. to ſay why he did not acquit him, and Defendant made Default, whereupon a Diſtringas ad Acquietandum iſſued, but not returned, then an Alias iſſued and the Sheriff returned Iſſues, whereupon the Plaintiff prayed a Writ to inquire of Damages, but could not have it; becauſe in Sci. Fac. and Writ Judicial, a Man ſhall not recover Damages, but in an Original Writ; But at laſt they awarded another Writ of Diſtringas ad Acquietandum, upon which if he comes and cannot excuſe himſelf, he ſhall recover Damages; Per Belke, but not upon his Default. Br. Damages pl. 56. cites 50 E. 3. 23 ——— Br. Scire facias pl. 54. cites S. C ——— In Writ of Meſne if he denies the Deed of Acquittal, and it is found againſt him he ſhall recover his Damages without inquiring whether he was diſtrained in his Diſtrained in his Default; Per Belknap. Fitzh. Damages pl. 69. cites 42 E. 3. 7.

13. A Man ſhall not recover Damages in a Writ of Meſn, if it be brought for the Acquittal before Diſtreis in his Default.

In Writ of Meſne if the *Defendant pleads, That not diſtrained in his Default*, there the Plaintiff ſhall recover by his Acquittal immediately, and Damages whon the Iſſue is tried. Br. Damages pl. 196. cites 13 E. 4. 6.

14. The Law is the ſame, though the Defendant delays him by denying his Deed. Contra, 42 E. 3. 7. b.

* Fitzh. Damages pl. 19. cites Paſch. 7 H. 6 6. 34. S. P. & S. C. —— Br. Damages pl. 66. cites S. C.—Ibid. between the Pleas 58. & 52 is a Nota that in Nuper obiit the Demandant ſhall recover Damages. 38 E. 3. 8. in a ſhort Note.

15. * In a Nuper obiit he ſhall not recover Damages. 7 H. 6. 35. b. 21 E. 3. 57. b.

Br. Damages pl. 66. cites S. C.

16. Nor in a Perambulatione facienda. H. 6. 35. b.

* Fitzh. Damages pl. 19. cites S. C. & S. P. by Martin and ſays that the Reaſon is becauſe after he is adjudged to account, it may be that he ſhall not be found in Arrear, and ſo the Court is not aſcertained, whether he be damaged or not, beſides it lies all in Arrears and ſo in Effect he ſhall recover Damages there.——— Br. Damages pl. 66. cites S. C.

17. Nor in a Writ of Account, for the Auditors give a Conſideration for it, yet he counts of Damages. * 7 H. 6. 35. b. 21 E. 3. 57. b. ‡ 10. H. 6. 18. b.

‡ Br. Damages pl. 136 cites S. C. ——— Fitzh. Damages pl. 30. cites S. C. adjudged per tot. Cur.

S. C cited 2 Le 118. pl. 160. Hill. 30 Eliz. B R. in Caſe of Collet v. Robſton, where in Account againſt a Reciever of Monies to render Account Quando ad hoc requiſitus fuerit, Damages were given in C B. and this was aſſigned for Error in B R. and notwithſtanding all Objections to the contrary the Judgment given before was affirmed. See pl. 28. and the Notes.

18. So no Damages ſhall be recovered in an Account as a Receiver &c. where the Auditors give not any Conſideration for the Profit thereof. 14 E. 3. Account 109. Adjudged. 2 R. 2. Accompt 45.

19. In a Writ of Partition by one Coparcener againſt the other no Damages ſhall be recovered, though the Defendant hath not been at all Times ready to make Partition. 21 E. 3. 57. b. adjudged. contra * 7 H. 6. 35 b.

* Br. Damages pl. 66. cites S. C. & S. P. agreed that he ſhall not recover Damages, but Strange and Martin argued that it was reaſonable that he ſhould recover Damages, but the 3 E. 3. is e contra —— Fitzh. Damages pl. 19 cites 7 H. 6. 34. b. S. C. accordingly. —— The Plaintiff ſhall not recover Damages; for this is a Writ of Right in his Nature, and ſhe has a Right per my & per tout to take the Profits. 2 Inſt. 289.——In ſuch Writ no Damages ſhall be recovered nor an Inquiry for them, and yet the Writ and Count is ad Damnum &c. Noy. 68. per Cur. Warwick (Counteſs) v. Ld. Berkley, and cites 3 E. 3. 3. 47. Partition, 11.

20. In an Appeal of Maihem he cannot count of Damages, and yet he ſhall recover Damages. 10 H. 6. 18. b.

Br. Damages pl. 136. cites S. C. ——

Fitzh. Damages pl. 30. cites S. C. & S. P. by Babington ——Damages ſhall not be given *for the Defendant in Appeal if he was indicted before*, ſo that the Appeal and the Indictment *agree in naming him Principal or Acceſſary*. Br. Damages pl. 18. cites 40 E. 3. 42.

21. In an Audita Querela Damages ſhall be recovered. 26. E. 3. 73. b. per Thorp.

Fitzh. Audita Querela pl. 36. cites S. C.

22. In an Audita Querela for ſuing Execution upon a Statute againſt his own Releaſe, Damages ſhall be recovered. 17 E. 3. 39. b.

In Audita Querela, the Plaintiff ſhall recover Damages for *Execution ſued againſt him wrongfully*, if it be found, Quod Nota. Br. Damages pl. 38. cites 2 H. 4. 17.

23. In a Writ of Deceit, upon a Recovery by Default, by which the Judgment ſhall be reverſed, and the Plaintiff reſtored to the Seiſin Iſſues, no Damages ſhall be recovered. 18 E. 3. 28.

24. In a Prohibition to the Eccleſiaſtical Court, for a Matter triable at the Common Law, if the Plaintiff declares upon a Prohibition and alleges, that the Defendant hath proſecuted the Suit in the Spiritual Court after the Prohibition granted, and the Defendant pleads thereto, and ſeveral Iſſues are joined upon ſeveral Cuſtoms, and one Iſſue alſo joined, whether he proſecuted in the Court Chriſtian after the Prohibition granted, and at the Niſi Prius this Iſſue is found for the Plaintiff, viz. that the Defendant had proſecuted there after the Prohibition granted, the Plaintiff ſhall have Damages to be tared by the Jury, as well upon this Declaration, as upon an Attachment upon a Prohibition. Mich. 15 Car. B. R. between *Fary and Lang*, adjudged per Curiam, and then was vouched a Precedent in Banco, between *Ball and Berry*, Tr. 7 Car. where it was ſo reſolved per Curiam, upon the View of many ancient Precedents.

Jo. 447. pl. 11. S. C. adjudged. —— Cro. C. 559. pl. 1. S. C. adjudged —— See tit. Coſts (B) pl. 1. S. C and the Notes.

25. [So] In a Prohibition, Quare ſecutus eſt in Curia Chriſtianitatis de laico feodo, as for Tythe-Hay of Black-Acre, where he had White-Acre in Satisfaction of Tythes Time out of Mind &c. if this be found againſt the Defendant, the Plaintiff ſhall have Damages, Co. Magna Charta. 490.

26. In a Writ of Ward of the Body and Land, Damages ſhall be recovered. 27 E. 3. 79. b.

Fitzh Gard, pl. 22 cites S. C.

27. In a Writ of Account, as Receiver to Merchandize, he ſhall render Damages for the Profit that he had, or might have made of the Money.

In *Account againſt a Receiver or Bailiff*, Damages are not recoverable, for it is founded upon a Faith and Truſt, and is *not brought for a Wrong*. Jenk. 288. pl. 22.

3 Le. 230. pl. 311. Trin. 31 Eliz. B. R. Collet v. Robſton, cites S. C. and 2 H. 7. 13 and it was aſſigned for Error, that the Jury had aſſeſſed Damages, which ought not to be done in Action of Account; But the Book of Entries 22. was cited, where in a Writ of Account againſt one as Receiver for to render Account, Dnmages were given by the Jury for the Plaintiff; And in the Caſe of an Account againſt one as Bailiff, Damages ſhall be given; For if my Bailiff, by the Employment of my Monies, whereof he was Receiver, might have procured Profit and Gain unto me, but he neglects the ſame, he ſhall be chargeable to me to anſwer the ſame; And here in our Caſe, Damages ſhall be given Ratione Implicationis; And afterwards, notwithſtanding the Exceptions, the Judgment was affirmed.

28. [But] **In Writ of Account, as Receiver** to deliver over to another, **or to re-deliver, and not to Merchandize, there no Profit ſhall be given in Nature of Damages. 2 R. 2. Accompt 45.**

* Fitzh. Account, pl. 72. cites S.C.

29. [So] **In a Writ of Account,** as Receiver of 20 l. **if the Defendant** comes the firſt Day, and is ready **to account, and accounts, and is found in Arrearages, yet he ſhall not pay any Damages nor Coſts. Tr. 4 Ja. B. R. in a Nota per Curiam.** * 14 E. 3.

* Fol. 576.

30. But **if he pleads** Never his Receiver, **and after accounts, and is found in Arrearages *, he ſhall render Damages. Tr. 4 Ja. B. R. in a Nota adjudged.** 5 E. 3. 160. b.

31. [But] **In an Account as Receiver (as it ſeems) if the Defendant be** adjudged to Account, and he will not Account, but lies in the Fleet for two or three Years, **and then the Plaintiff prays his Judgment according to what he has counted, and has it, yet he ſhall recover nothing of the Profits, for the mean Time he was in Priſon, and this proves, he ſhall not recover Damages in an Account. 14 E. 3. Accompts 109.**

32. *Weſt. 2. cap. 36. 13 E. 1. None ſhall procure any to diſtrain another to make him appear at the County Court, or any other Inferior Court, on purpoſe to vex him and put him to Charge and Trouble, in Pain to make Fine to the King, and to pay to the Party grieved, treble Damages.*

33. A Man *loſt his Land in Court Baron*, and brought Writ of *Falſe Judgment* and recover'd, and his Damages. Br. Damages, pl. 134. cites 20 E. 3. & Fitzh. Scire Facias 123.

34. In *Ceſſavit*, the Demandant ſhall recover Damages upon the Arrears and Surety tender'd after Verdict, and before Judgment. Br. Damages, pl. 147. cites 21 E. 3. 23.

* This was Trin. 21 E. 3. 28. a. pl. 26. —— Fitzh. Treſpaſs, pl. 213. cites Trin. 21 E. 3. 28. but not 10 Aſſ. 3. which is not the S. P. and ſo Jenk. ſeems miſprinted.

35. *Treſpaſs* is brought by A. againſt B. *Vi & Armis & contra pacem, for the taking and detaining of Charters*; and he doth not ſhew in the Count, what Lands the Charters concern; the Defendant pleads Not Guilty; a Verdict is found for the Plaintiff. He has Judgment for 100 l. Damages; It is affirmed in Error, becauſe that *this Action is Treſpaſs, in which Damages only are recoverable, and not the Charters*; and alſo becauſe no Exception was taken to the Declaration before Verdict. Jenk. 20. pl. 39. cites in Marg. * 21 E. 3. 28. and Fitzh. Treſpaſs, 213. 10 Aſſ. 3.

36. In *Ejectment of Ward* the *Proclamation was returned*, and the Plaintiff recover'd the Ward, and had Writ to in-quire of the Damages, ubi per Statutum non dantur in hujuſmodi caſu. Br. Ejectione &c. pl. 6 cites 24 E. 3. 33.

37. In *Replevin* the *Defendant avow'd upon J. N. who came Gratis, and join'd to the Plaintiff, for that he had leas'd to the Plaintiff for Years, which yet continues*, and *they diſclaim'd*, and well, and the *Termor*, who was Plaintiff, *recovered the Damages only*; for he was diſtrain'd, and was Sole Plaintiff, and *had all the Loſs by the taking of his Beaſts*. Br. Damages, pl. 172. cites 45 E. 3. 7.

38. Though

38. Though a Man declares of Damages in Account, yet he *ſhall not recover Damages in Action of Account, but in Appeal of Mayhem* a Man *ſhall not count of Damages, and yet he ſhall recover Damages.* Br. Challenge, pl. 192. cites 10 H. 6. 18.

39. In *Formedon of Rent*, the Demandant ſhall not recover Arrears; For Damages are not given in this Action. Br. Damages, pl. 14. cites 33 H. 6. 47.

40. Falſe Impriſonment *for impriſoning the Defendant till he made an Obligation of* 40 *l. by Dureſs to the Defendant and others Ignotis*, and held good; if he does not know their Names, he cannot ſhew their Names; for the Obligation is not the Effect, but the Impriſonment, and of this he ſhall recover Damages, and not for the Obligation; for he is not thereof yet damnified, and may plead Dureſs when it is ſued, but of *Impriſonment, till he makes Fine*, he ſhall recover Damages for both then; for he is grieved by the Fine preſently; contra by Obligation. Br. Faux Impriſonment, pl. 20. cites 2 E. 4. 19. Br. Damages, pl. 119. cites S. C.

40. A Man ſhall not recover Damages for the Iſſues and Profits, in an *Action on the Statute of* 5 *R.* 2. but only for the Entry; For the Action is, Quod ingreſſus eſt, ubi Ingreſſus non datur per Legem. Br. Damages, pl. 120. cites 2 E. 4. 24. *Diſſeiſee* may have an Action *upon Stat.* 5 *R.* 2. *cap.* 7. and he *ſhall recover Damages for the firſt tortious Entry, but not for the mean Profits in this Action, tho' he made a Regreſs*; And here note, that alſo he ſhall recover his Coſts of Suit, Expenſæ Litis, which Litt. doth include within theſe Words, (Damages &c.) Co. Litt. 257. a.

41. In *Account*, the Plaintiff ſhall count of Damages, and yet ſhall not Recover Damages. Br. Damages, pl. 166. cites 2 H. 7. 13. Though the Plaintiff ſhall not recover Damages, yet he *ſhall recover a Sum in Groſs for the Increaſe.* Br. Damages, pl. 178. cites 21 H. 6. 26. —— Jenk. 288. pl. 22. S. P. ad finem.

42. In *Warrantia Chartæ*, & *Curia Claudenda*, the Plaintiff ſhall recover the Warranty, and the Incloſure and Damages. Br. Damages, pl. 118. cites 16 H. 7. 9, 10.

43. Note, that where *Action Penal* is given *by Statute to Recover a great Sum by Action of Debt* for Ingroſſing &c. there the *Plaintiff ſhall not recover Coſts nor Damages* in this Action of Debt. Br. Damages, pl. 200. cites 35 H. 8. and Trin. 4 M. 1. Br. Coſts, pl. 32. cites 35 H. 8. S. P. —— Br. N. C. pl. 258. cites 35 H. 8. and Trin. 4 M. 1. S. P. —— 10 Rep. 116. b. cites Br. Damages, pl. 200.

44. *By the Common Law* a Man could *not* recover Damages *in a Real Action.* Br. Damages, pl. 143. S. P. per Cur. as in Dower, he could not before the Statute of Merton, nor in Aiel, Mortdanceſtor &c. before the Statute of Glouceſter, 6 E. 1. cap. 1. —— 10 Rep. 116. a. in Pilfold's Caſe.

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Regularly in *Perſonal and Mixt Actions* Damages were to be recovered at the Common Law, but in *Real Actions* no Damages were to be recovered at the Common Law, becauſe the Court could not give the Demandant that which he demanded not, and the Demandant in Real Actions demanded no Damages, neither by Writ nor Count; Judex non reddit plus quam quod petens ipſe requirit, and it is a Maxim in Law, Que droit ne done pluis que ſoit demaunde; and therefore in Real Actions, where Damages are given by this Act, viz. Statute of Glouceſter, the Demandant ſhall recover Damages Pendente brevi, becauſe the old Form of the Count remains The Words of the Act are, "Againſt "him who is found Tenant" He may be Tenant by Title, by Wrong, or by Act in Law. 2 Inſt 286.

47. In

3 Le. 230. pl. 311. Trin. 31 Eliz. B. R. Collet v. Robſton, cites S C. and 2 H. 7. 13 and it was aſſigned for Error, that the Jury had aſſeſſed Damages, which ought not to be done in Action of Account; But the Book of Entries 22. was cited, where in a Writ of Account againſt one as Receiver for to render Account, Damages were given by the Jury for the Plaintiff; And in the Caſe of an Account againſt one as Bailiff, Damages ſhall be given; For if my Bailiff, by the Employment of my Monies, whereof he was Receiver, might have procured Profit and Gain unto me, but he neglects the ſame, he ſhall be chargeable to me to anſwer the ſame; And here in our Caſe, Damages ſhall be given Ratione Implicationis; And afterwards, notwithſtanding the Exceptions, the Judgment was affirmed.

28. [But] **In Writ of Account, as Receiver** to deliver over to **another, or to re-deliver, and not to Merchandize, there no Profit ſhall be given in Nature of Damages. 2 R. 2. Accompt 45.**

* Fitzh. Account, pl. 72. cites S.C.

29. [So] **In a Writ of Account,** as Receiver of 20 l. **if the Defendant** comes the firſt Day, and is ready **to account, and accounts, and is found in Arrearages, yet he ſhall not pay any Damages nor Coſts. Tr. 4 Ja. B. R. in a Nota per Curiam.** * 14 E. 3.

* Fol. 576.

30. But **if he pleads** Never his Receiver, **and after accounts, and is found in Arrearages *, he ſhall render Damages. Tr. 4 Ja. B. R. in a Nota adjudged.** 5 E. 3. 160. b.

31. [But] **In an Account as Receiver (as it ſeems) if the Defendant be** adjudged to Account, and he will not Account, but lies in the Fleet for two or three Years, **and then the Plaintiff prays his Judgment according to what he has counted, and has it, yet he ſhall recover nothing of the Profits, for the mean Time he was in Priſon, and this proves, he ſhall not recover Damages in an Account. 14 E. 3. Accompts 109.**

32. *Weſt. 2. cap. 36. 13 E. 1. None ſhall procure any to diſtrain another to make him appear at the County Court, or any other Inferior Court, on purpoſe to vex him and put him to Charge and Trouble, in Pain to make Fine to the King, and to pay to the Party grieved, treble Damages.*

33. A Man *loſt his Land in Court Baron*, and brought Writ of *Falſe Judgment* and recover'd, and his Damages. Br. Damages, pl. 134. cites 20 E. 3. & Fitzh. Scire Facias 123.

34. In *Ceſſavit*, the Demandant ſhall recover Damages upon the Arrears and Surety tender'd after Verdict, and before Judgment. Br. Damages, pl. 147. cites 21 E. 3. 23.

* This was Trin. 21 E. 3. 28. a. pl. 26. —— Fitzh. Treſpaſs, pl. 213. cites Trin. 21 E. 3. 28. but not 10 Aſſ. 3. which is not the S. P. and ſo Jenk. ſeems miſprinted.

35. *Treſpaſs* is brought by A. againſt B. *Vi & Armis & contra pacem, for the taking and detaining of Charters*; and he doth not ſhew in the Count, what Lands the Charters concern; the Defendant pleads Not Guilty; a Verdict is found for the Plaintiff. He has Judgment for 100 l. Damages; It is affirmed in Error, becauſe that *this Action is Treſpaſs, in which Damages only are recoverable, and not the Charters*; and alſo becauſe no Exception was taken to the Declaration before Verdict. Jenk. 20. pl. 39. cites in Marg. * 21 E. 3. 28. and Fitzh. Treſpaſs, 213. 10 Aſſ. 3.

36. In *Ejectment of Ward* the *Proclamation was returned*, and the Plaintiff recover'd the Ward, and had Writ to in-quire of the Damages, ubi per Statutum non dantur in hujuſmodi caſu. Br. Ejectione &c. pl. 6 cites 24 E. 3. 33.

37. In *Replevin* the *Defendant avow'd upon J. N. who came Gratis, and join'd to the Plaintiff, for that he had leas'd to the Plaintiff for Years, which yet continues*, and *they diſclaim'd*, and well, and the *Termor*, who was Plaintiff, *recovered the Damages only*; for he was diſtrain'd, and was Sole Plaintiff, and *had all the Loſs by the taking of his Beaſts*. Br. Damages, pl. 172. cites 45 E. 3. 7.

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47. In

46. In a Writ of *Recaption*, Damages ſhall be recovered for the ſecond Diſtreſs taken. F. N. B. 71. (E)

47. Upon a Writ *De Securitate Pacis*, and the Plaintiff ſhall recover Damages. F. N. B. 80. (A)

But he ſhall not recover Damages as for Loſs of a Seigniory or Court;

48. If a Man recovers in a Præcipe in Capite by Default, where the Lands are not holden of the King, nor he has not the Lord's Licence to ſue in C. B. the Lord ſhall have a *Writ of Diſceit*, and recover Damages. F. N. B. 98. (M)

for the Seigniory remains, and the Loſs of the Court is only pro hac Vice. F. N. B. 98. (M) in the new Notes there (f) cites 17 E. 3. 31. 37.

49. In Forcible Entry upon the *Statute of* 8 *H.* 6. where one *entereth with Force*, or where he *entereth peaceably and detaineth it with Force*, or where he entreth by Force, and detaineth it by Force; without any regreſs the Plaintiff ſhall recover treble Damages, as well for the mean Occupation, as for the firſt, by Force of the Statute. Co. Litt. 257. b.

50. The Plaintiff in *Account* ſhall not recover Damages, for the uncertainty of his Demand; But Hales ſaid, that the Books are agreed, that if the *Defendant pleads in Diſcharge of the Account* before the Auditors, upon which they are at Iſſue, and found for the Plaintiff, in this Caſe he ſhall recover Damages; For they are at Iſſue upon a collateral Matter. Dal. 18. pl. 12. Anno. 3 & 4. P. & M. cites Trin. 14 E. 3. Fitzh. Account. 109. and Trin. 2 H. 7. 13.

Ow. 13, 14 Haſlewood's Caſe, S. C. adjudged, that no Damages ſhall be had in ſuch Caſe;

51. Error of a Judgment in Replevin, where the Defendant *avow'd for an Eſtray*, for that the *Defendant had Return awarded, with Coſts and Damages*, whereas no Coſts are given by the Statutes of 7 H. 8. or 21 H. 8. The Court doubted of it, but *conceived it was Error.* Cro. E. 257. pl. 36. Mich. 33 & 34 Eliz. and 329. Trin. 36 Eliz. B. R. Haſlip v. Chaplen.

but for another Error aſſigned the Judgment was reverſed.

52. In an Action *againſt a Reſcuer*, *upon an Alias Capias* in B. R. the *Plaintiff declar'd of a Debt due to him* &c. and had Damages given him for his Debt, becauſe by this Reſcue he loſt it, though the Writ is only in Nature of a Plea of Treſpaſs, and though it was not ſhewn, that the Reſuſer knew that the Plaintiff would declare for this Debt. But if in this Caſe the Sheriff &c. had ſuffered a negligent Eſcape, he ſhould only be charg'd with the Damages in the ſame Plea, as the Writ ſuppoſeth, and not for the Debt. Lane. 70, 71. Trin. 7 Jac. in Scacc. Kent v. Kelway.

53. In an *Account* a Man ſhall recover Damages upon the ſecond Judgment. Arg. ſaid to be clear. Mar. 99. in pl. 171. Trin. 17 Car. C. B.

54. In an Action of *Debt* for 200l. *upon the Statute* 2 *E.* 6. *for Tithes* of Land in the Pariſh of Ringſton, alias, Royſton, the Defendant *pleaded the Statute* 31 *H.* 8. *and that the Lands were diſcharged in the Hands of the Prior of Mount Bretton, at the Time of the Diſſolution*, and Iſſue joined upon the Diſcharge; and upon a Trial at Bar, *the Defendant not making good his Plea, the Court ruled the Value to be taken as confeſſed, becauſe the Iſſue is joined upon a collateral Point.* And the *Defendant took not the Value by Proteſtation*, and ſo the Verdict was given for 200l. but *neither Damages nor Coſts.* All. 88. Mich. 24 Car. B. R. Bowles v. Broadhead.

55. *Attachment upon a Prohibition*, and the Plaintiff declared, that the *Defendant ſued in the Eccleſiaſtical Court after a Prohibition* granted, *for the Profits of the Office of Regiſter*, to the Archdeacon of Huntington;

Judg-

Judgment by Default, and a Writ of Inquiry, and Damages and Coſts tax'd; it was objected, that Damages &c. could not be given in a Prohibition; But Judgment was given for the Plaintiff, for the Damages and Coſts. 3 Lev. 360. Paſch. 5 W. & M. in C. B. Heywood v. Foſter.

56. In Caſe for *reſcuing a Diſtreſs for Rent*, and Not Guilty pleaded, a Verdict was for the Plaintiff, whereupon he pray'd his treble Damages, on the Statute 2 *W. & M. Seſſ.* 1. *cap.* 5. But becauſe he did *not ſhew that the Diſtreſs was appraiſed, nor conclude contra formam Statuti*, he could not recover them, and Judgment accordingly. Ld. Raym. Rep. 342. Paſch. 10 W. 3. C. B. Anon.

57. *Action* brought in the Court of C. B. *upon ſeveral Promiſes; Judgment by Default*; Writ of Inquiry executed, and 4241. Damages given. Error brought in the Court of B. R. *Plaintiff in Error did not proceed.* The Court was moved upon 3 H. 7. cap. 10. that the Defendant in Error, ſhould, beſides the Coſts, have Intereſt allowed him, for the Sum adjudge due to him, pending the Time of the Writ of Error, from the Judgment. It was reſolved by the whole Court, that the *Defendant upon a Writ of Error, brought* into B. R. *ſhould not have* † *Intereſt allowed him by way of Damages, for the Sum adjudged due to him, from the Time of the firſt Judgment, pending the Writ of Error.* For at the Time of making the Statute 3 H. 7. cap. 10. which gives the Damages upon the Writ of Error, all Intereſt was reputed unlawful; and therefore that Statute could not give it. In Fact, when Intereſt run higheſt, as at 10 per Cent. Intereſt has not been allowed. In Writs of Error brought into the Exchequer Chamber, Intereſt is never allowed; and a Uniformity in Practice to be wiſhed and endeavoured. 10 Mod. 274. 278. Hill. 1 Geo. 1. B. R. Holroi v. Ebizſon.

† See ( ) Fanſhaw v. Morriſon.

58. By the Common Law in every Action of *Debt*, Damages are given *Occaſione Detentionis Debiti*, either by Writ of Inquiry, or by the Court. Per Parker Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

(P. 2) In what Actions nothing ſhall be recover'd beſides Damages. Or what more ſhall be recover'd.

IN *Recaption* a Man ſhall recover Damages only. Br. Recaption, pl. 3. cites 47 E. 3. 7.

2. In *Reſcous* nothing ſhall be recover'd but Damages. Br. Reſcous, pl. 28. per Brooke.

3. An *Aſſumpſit* gives only Damages and Coſts, and varies from a Judgment for *Debt*, which gives the Debt, Damages and Coſts, where a Debt is due. Jenk. 331. pl. 65. cites Cro. J. 544. 17 Jac. Heath v. Dauntley.

(Q) *For what* Things the Damages ſhall be *ſaid to be given.*

Sid. 38 pl. 8. S.P. in a Nota there.

1. IF an Action upon the Caſe be brought for ſpeaking of Words all at one Time, and upon Not Guilty pleaded, a Verdict is given for the Plaintiff; though ſome of the Words will not maintain an Action, if any of the Words will maintain the Action, the Damages may be given intirely, for it ſhall be intended that the Damages were given for the Words which will maintain the Action, and only increaſed for the other Words, and that they are mentioned only for Aggravation.

2. But if the Action be brought for ſeveral Words ſpoke at ſeveral Times, and the Action will not lie for the Words ſpoke at one Time, but will lie for the Words ſpoke at another Time, and upon Not Guilty pleaded, a Verdict is found for all the Words, and intire Damages given, this is not good.

3. In an Action upon the Caſe for Words ſpoke at one Time, if the Defendant pleads Not Guilty as to part of the Words, which Words will not maintain an Action, and he juſtifies the other Words, and the Plaintiff replies De ſon Tort Demeſne, without ſuch Cauſe, and a Verdict is found for the Plaintiff; in this Caſe intire Damages may be given, becauſe now in part, by the Confeſſion of the Party, and in part by the Jury, it is found that he ſpoke the Words as they are alleged in the Declaration, ſcilicet, at one Time, and then it ſhall be intended the Damages were given for the Words, which will maintain the Action, and that the other Words were but for Aggravation. Tr. 17 Car. B. R. between *Lambell and Hancock*, per Curiam adjudged, this being moved in Arreſt of Judgment after a Verdict, and intire Damages given for the Plaintiff.

All. 23, 24. S.C. ſays it was reſolv'd, that it ſhall not be intended in this Caſe, that the Jury have given Damages with reſpect to the Time brought in by the laſt Scilicet, after per longum Tempus, which over-reaches the Time that the Threats were made, (the Time brought in * Fol. 577. by the firſt Scilicet being taken

4. In an Action upon the Statute of Monopolies, if the Plaintiff declares, That the Defendant, colore cujuſdam Proclamationis &c. 7 Jan. 20 Car. procured the Plaintiff to be taken and impriſoned, and to be detained in Priſon for twenty Weeks next enſuing, and certain Wines of the Plaintiff, till he made a Fine for the Deliverance, and by Colour aforeſaid, after, ſcilicet, 14 Jul. 20 Car. ſupradict' tales & tantas minas de impriſonamento corporis Querentis, ad tunc & ibidem ei intulerunt, quod Querens per longum tempus, ſcilicet, a præd' 14 Julii, Anno 20 ſupradicto, uſque diem impetrationis hujus billæ, ſcilicet, 14 Junii, Anno 21 Caroli Regis, circa negotia ſua neceſſaria palam intendere non audebat, and upon Not Guilty pleaded, a Verdict is given for the Plaintiff, and intire Damages. In this Caſe the Declaration is repugnant as to the Menace of Impriſonment, if it be interpreted according to the Words, inaſmuch as it is alleg'd before that he procured him to be impriſoned 7 Jan. 20 Car. and then it is ſaid, that afterwards, ſcilicet, 14 Jul. 20 Car. he menaced &c. which was before Jan. 20 Car. and after ſays, that he durſt not go about his Buſineſs, a præd' 14 Jul. 20 Car. till the Bill exhibited, ſo in Words repugnant, yet inaſmuch as in Law, when he alleges the Day, and after ſays, that afterwards, ſcilicet, 14 Jul. 20 Car. this which comes after the ſcilicet, * being contrary to that before alleged, ſhall be void, and a void Allegation, and then the Reference thereof, as to not daring to go about his Buſineſs, having Reference

ference to the ſaid void Allegation of the 14 July till the Bill exhibited, is alſo void, and then by Law it ſhall be taken as if no more had been alleged, but that he after menaced him, by which he durſt not go about his Buſineſs for a long Time, which would be ſufficient of it ſelf without more, and then in this Caſe it ſhall be taken and intended by the Law, that the Jury gave Damages for that as it was alleged in Law materially, and not as it is alleged under the ſcilicet, and ſo that they gave Damages for menacing him, by which he durſt not go about his Buſineſs, and ſo the Damages well aſſeſſed. Mich. 23 Car. B. R. between *Sims and Gregory*, adjudged for the Plaintiff, after ſeveral Motions in Arreſt of Judgment. Intratur, Paſch. 23 Car. Rot. 274.

to be void) but that the Time mentioned in both Places being in Judgment of Law taken to be void, and as out of the Declaration, it ſhall be taken to be out of the Conſideration of the Jury in taxing the Damages; and Judgment was given for the Plaintiff.

5. In an Action upon the Caſe upon a Promiſe, if the Plaintiff declares, That whereas the Defendant was poſſeſſed of a Shop in B. and of ſeveral Goods and Chattels in the ſaid Shop, in which Shop the Defendant adtunc exercuit the Art or Myſtery of a Grocer, the Defendant, in Conſideration the Plaintiff would marry C. the Daughter of the Defendant, aſſumed and promiſed to pay ſo much Money for her Portion, and ſo much for Apparel, and that ſhe would transfer, Anglice, would turn over to the Plaintiff negotiationem ſuam Anglice, her Trade in B. præd', and the ſaid Shop of the Defendant there, and ſo much of the Goods and Chattels of the Defendant, in the ſaid Shop, which ſhould be worth 10 l. and that the would not, at any Time after, exerciſe her ſaid Trade in B. aforeſaid, and that ſhe would lend to the Plaintiff 10 l. till a certain Time, and aſſigns a Breach in all; and among other Things, that ſhe non tranſtulit, Anglice, did not turn over to the Plaintiff negotiationem ſuam præd' in B. aforeſaid, nor the Shop præd'; and all found for the Plaintiff, and intire Damages given; and though it is impoſſible to aſſign ſuam negotiationem, ſcilicet, her Trade, yet it ſhall be intended, if it be void and impoſſible, and ſignifies nothing, and it is of no Senſe or Meaning, that the Jury did not give any Damages for it Trin. 24 Car. B. R. between *Goſſe and Pragnell*, adjudged in a Writ of Error upon a Judgment in Banco, and the Judgment affirmed. Intratur, P. 24 Car. Rot. 217.

All. 67. Pragnel v. Goſſe, S. C. and Judgment in C. B. affirmed in B. R. ——Sty. 111. Pragnell v. Goff, S. C. and the Judgment affirmed. And Roll J. ſaid, that if Damages intire are given for ſome Things with others, whereof ſome are impoſſible, the Damages ſhall be intended to be given for thoſe that are poſſible, and void as to the reſt.

6. In an Action upon the Caſe, if the Plaintiff declares, That whereas the Defendant had bargained and ſold 40 Tun of Currants, at the Rate of 46 s. 8 d. for every 100 Weight, to be delivered to the Plaintiff within three Months then next enſuing, diſcomputando ex eodem pretio pro quatuor menſibus, the Defendant, in Conſideration the Plaintiff had then paid to him in Hand 400 l. in Part of Payment, and aſſumed to pay the Reſidue to be due, diſcomputando ut prætertur, for the Currants upon the Delivery of the Currants to the Plaintiff; the Defendant, in conſideratione inde, aſſumed to deliver to the Plaintiff the Currants within three Months then next enſuing, and aſſigns a Breach for the Non-delivery of the Currants at the End of three Months, according to the Promiſe, and upon Not Guilty pleaded, a Verdict is found for the Plaintiff, and Damages aſſeſſed generally. And though it was objected, that it is not known what is intended by the Words in the Bargain, to pay 46 s. 8 d. for every 100 lb. diſcomputando ex pretio pro quatuor menſibus, yet although the Court does not know what is intended thereby, yet it is well known to the Mer-

Sty. 27. Bruer v. Southwell, S. C adjornatur. ——Ibid. 58. S. C. adjornatur —— Ibid. 63 S. C ordered to be argu'd again on both Parts.

Merchants, and all is to be given in Damages, and if it be not of any Senſe, nor is known what is intended thereby, then it ſhall be intended by the Court, that the Jury did not give any Damages for it. Mich. 23 Car. B. R. between *Brewer and Southwood*, adjudged per Curiam. Intratur, Hil. 22 Car. Rot. 1372.

S P. per Cur. Cro. C. 328 in pl 11. Mich. 9 Car B. R. in Caſe of Penſon v Gooday. — S. P. Arg. Cro C. 237.

7. If an *Action* be brought *for Words ſpoken at one Time, and for other Words ſpoken at another Time*, and *for the Words ſpoken at one Time an Action lies, but not for the Words ſpoken at the other Time*, and Damages are intirely aſſeſſed, no Judgment ſhall be given, for the Action is brought for all the Words, and Damages for all; Per Popham. Cro. E. 329. pl. 2. in Caſe of Brook v. Clark, cites it ſo held 18 Eliz. in the Ld. Admiral's Caſe.

in pl. 19 where the Caſe was, that the Defendant ſaid of the Plaintiff, being a Merchant, viz. *Thou art a Rogue, and a beggarly Rogue, and I ſhall prove thee a Bankrupt before the next Term; and at another Day he ſaid* of the Plaintiff to J. S *Truſt him not, for he will be thy undoing.* Found for the Plaintiff, and *Damages intire.* It was ſaid the ſecond Words were not actionable, and then the Damages intire not well given. Reſolved, that *the Words ſpoken at the ſecond Time, as at the firſt, were actionable*, and tend to the ſame Senſe, and aggravate the firſt Words; *Adjudged for the Plaintiff.* Cro. C. 237 pl 19. Mich. 7 Car B. R. Jaxon v. Tanner.

S. P held accordingly by Bramſton J. Mar. 48 in pl. 76. Trin. 15 Car. in Caſe of Thurſton v. Ummins.

8. A Juſtice of the Peace brought an Action upon the *Caſe*, againſt the Biſhop of Coventry and Lichfield, *becauſe he wrote a Letter* to the Earl of Leiceſter one of the Privy Council, *wherein were certain ſcandalous Things of the Plaintiff*; upon Not Guilty, it was found for the Plaintiff, and 300*l.* *Damages*; Reſolved, that although *only ſome of the Words will bear Action*, yet the Damages are well aſſeſſed, becauſe they are put in only to increaſe the Damages in Circumſtance; and Judgment for the Plaintiff. Mo. 141. pl. 283. Paſch. 25 Eliz. Broughton's Caſe.

9. If the Plaintiff declare, That he *bought of the Defendant diverſa Bona & Catalla, viz unum fulcrum lecti*, Anglice a Field-Bedſtead, *with a Teſtern and Curtains of Say*; *unum Canopium*, vocat' a Canopy, &c. *and that the Defendant aſſumed to deliver Bona Præd' but had not* &c. and there is a *Verdict for the Plaintiff, and general Damages*; it *ſhall not be preſumed, that any Damage was given for the Teſtern and Curtains, which were not alleged poſitive, but only expoſitive*; and this Expoſition is too extenſive, for fulcrum ſignifies the Bedſtead only; and by 36 E. 3. all Pleadings ought to be entred in Latin; adjudged. 10 Rep. 130. a. 132. b. Mich. 2 Jac. Osborn's Caſe.

Cro. E. 328, 329. pl. 2. Trin 36 Eliz. B. R. Brooke v. Clarke, S. P. adjudged accordingly by all the Juſtices, and for the ſame Reaſon

10 In Action on the *Caſe for Words*, there were divers Words ſpoken *ſome of which were Actionable, and ſome* of them *not*, and the Jury have given *intire Damages for all* the Words in General. This being aſſign'd for Error, the whole Court agreed in this, that ſome of the Words were Actionable, and ſome of them not ſo, and that the Damages given by the Jury in general, *ſhall be ſaid to be given for the Words, which are Actionable, and not for the other* Words, and ſo the Judment well given, and ſo by the Rule of the Court, Judgment was affirmed. Bulſt. 37. Trin. 8 Jac. Lynker v. Stanwell.

— Where a Man ſpeaks Words which are in Part actionable, and others only put in for Aggravation, and Damages is aſſeſſed for the whole, it is good; Per Bramſton, Ch. J. Mar. 48. in pl. 76. Trin. 15 Car. Thurſton v. Ummons.

11. In an Action of *Treſpaſs for beating wounding and impriſoning of the Plaintiff*, the Defendant *pleads Not Guilty, as to Part*, viz as to *the Beating and Wounding, and as to the* other Part, viz. *Impriſoning*, the Defendant *juſtifies*, that what was done by him, was then ſo done *as a Conſtable, and in the Execution of his Office*, and ſo juſtified, the *Jury found the Juſtification good*; *but* find *nothing of the other Matter, to which*

which Not Guilty was pleaded, and yet they aſſeſs Damages to the Plaintiff, for the Wounding, for which they did not find the Defendant Guilty, and ſo the Jury gave Damages for that which was not found by them, which was void, there being no Ground for them to give theſe Damages, and ſo by the Rule of the Court, *this giving of Damages for the Wounding, which was not found, is erroneous*, and the Judgment of the Court was therefore for the Defendant, Quod Querens nil capiat per billam. Bulſt. 64. Mich. 8 Jac. Simpſon v. Claye.

12. If *Words* were *ſpoken at ſeveral Times*, and *ſome* of the Words were *Actionable, and ſome* others *not*, and two *ſeveral Actions brought for theſe Words*, and *both of them found for the Plaintiff, and Damages intire* given, this is *not good*, *But otherwiſe* it is where *there is but one Action brought for all the Words*, and in the Declaration *laid to be ſpoken at ſeveral Times*, and intire Damages given, as in this Caſe, this is good, and the Damages well given; Per Haughton, J. and therefore by the Rule of the Court, Judgment was given for the Plaintiff. 3 Bulſt. 283. Hill. 14 Jac. Meſſlyne v. Farnden.

13. H. brought an Action of Aſſault and *Battery* againſt L. *for beating of his Servant, by reaſon whereof he loſt his Service* &c. for a long Time; and declares, that the Battery was done on the 19th of January, in the 16th Year of his Majeſty's Reign that now is, and that he loſt his Service *for a long Time, viz. for the Space of ſix Months then next following*; and after a Verdict for the Plaintiff, and entire Damages aſſeſſed, it was moved, that *the Original did bear Teſte before the End of ſix Months.* And yet the Court gave Judgment for the Plaintiff, notwithſtanding this Exception, for that *the Viz. is more than needs.* Hob. 284. pl. 365. Trin. 17 Jac. Hunt v. Lawring.

14. A. *covenanted* with the Plaintiff *to do two Things.* The Plaintiff *aſſign'd the Breach in the not doing one* of them, and concluded, that he was damnified Occaſione Fractionis Conventionis prædictæ to ſuch a Sum. The Jury aſſeſs'd *Damages intirely viz. Pro Fractione Conventionis prædictæ.* It was mov'd, that this was a Covenant divided into two Parts, and that this aſſeſſing the Damages includes both Parts, and therefore is Erroneous; but Montague, Ch. J. and Haughton, J. held, that it *ſhall have Relation only to this Part, in which the Breach is aſſign'd.* 2 Roll. Rep. 178. Trin. 18 Jac. B. R. Steele v. Spight.

15. In *Debt upon a Conceſſit Solvere*, Judgment was given for the Plaintiff. It was aſſign'd for Error, that there *wanted the Words Pro Miſis & Cuſtagiis, in the aſſeſſing the Damages*; and ſo it does not appear, for what the Damages were aſſeſs'd; And for this the Judgment was reverſed, niſi. Sty. 198. Hill. 1649. Paſcall v. Sparing.

16. If in *Debt upon 2 E. 6 for Tythes of 70 Acres* of Land &c. the *Jury as to 66 Acres give Damages* &c. and *as to the five Acres reſidue* give Damages &c. whereas it ought to have been as to the four Acres reſidue, yet this being only a *Miſcounting* of the Jury, and no Damage accrues to any by the Miſtake, the Plaintiff had Judgment. Sty. 296. Mich. 1651. Creſſit v. Burgis.

16. *A. was indebted to J. S. in 6 l. and B. (A's Son) was indebted to J. S. in 63 l. A. in Conſideration that J. S. would forbear ſuing for the Debts for a Month, promiſed to pay both Debts.* J. S. brought an *Action for the 69 l. and had Judgment.* For it ſhall be *intended, that the 69 l. are given as Damages for the 6 l* and in this reſpect the Plaintiff had good Cauſe of Action; For the Aſſumpſit being to pay 69 l. is intire, and cannot be apportion'd by the Plaintiff, and therefore upon this Aſſumpſit he cannot have Action for the 6 l. only. Sid. 38. pl. 8. Paſch. 13 Car. 2. C. B. Beſt v. Jolly.

17. Where there are *two Conſiderations*, whereof the *one is good, and the other is void*, the Damages given ſhall be *intended to be all given for the*

good Conſideration. Sid. 38. pl. 8. Paſch. 13 Car. 2. C. B. in a Nota in the Caſe of Beſt v. Jolly.

18. In *Treſpaſs* the Plaintiff *declared of an Aſſault, Battery and Wounding*, the Defendant *pleaded Not Guilty, Quoad the Force, and As to the Aſſault and Battery* &c. *molliter Manus impoſuit*; upon which they were at Iſſue; and the Jury found the Defendant Guilty, de injuria ſua propria, and ſo recited the whole Declaration of the Aſſault, Battery and Wounding, (where the Wounding was not in Iſſue,) and gave Damages Occaſione Tranſgreſſionis illius to 20 l. Error was brought and aſſigned, and all the Court præter Windham held, that it ſhall be intended, that the Damages are given for all in the Declaration, viz. the Wounding, which was not in Iſſue, and ſo it is Error; For the Plaintiff might have demurr'd on the Plea. Sid. 96. pl. 23. Mich. 14 Car. 2. B. R. Calvert v. Arnold.

Raym. 200. Hambleton v. Bere, S. C Judgment was ſtay'd, and afterwards arreſted, becauſe the Jury was guided by the Per quod.

19. *Caſe* was brought againſt the Defendant, ſetting forth, *that he had retain'd A to ſerve him nine Years as an Apprentice, and the Defendant ſeduc'd him from his Service* ſuch a Day, *per quod, he loſt his Service for the Reſidue of the Term.* After Verdict it was mov'd, that *the Term is not yet expir'd*, whereas he has recover'd Damages for the Reſidue of the Term, and that A. may yet return and ſerve him, but that he ſhould have declar'd of the Loſs of the Service, from the Time of the Departure, till the Action brought, and for this Reaſon Judgment was ſtay'd by Twiſden and Rainsford only in Court. Lev. 299. Mich. 22 Car. 2. B. R. Hamilton v. Vere.

2 Saund 169 S. C. and becauſe the Damages were tax'd Generally, which ſhall be intended according to the Declaration, and if it ſhould be intended otherwiſe, it would be uncertain what Time ſhould be intended, whether for a Month or two, or till the Action brought, or the Verdict given, therefore Judgment was arreſted per Cur. abſente Kelyng Ch. J. ——— Comyns's Rep. 232. pl. 129. Mich. 2 Geo. 1. cites S. C.

But in Covenant againſt an Apprentice for going away out of his Service before his Time, per quod he loſt his Service for the Term, which is not yet expired, the *Plaintiff demurred.* Per Twiſden, though this would be naught after a Verdict, yet being on a Demurrer it may be helped; For the Plaintiff may take Damages for the Departure only, and not for the Loſs of Service during the Term, and then it will be well enough, and Judgment Nifi. Mod. 271. pl. 22 Trin. 29 Car. 2. B. R. Horn v. Chandler.

Comb. 193. S. C ——— Horner v. Bridges, and per Ch. J. and Eyre the Continuando is void, becauſe it is impoſſible, and the Damages ſhall be intended for the Treſpaſs only.

20. *Treſpaſs* &c. upon Not Guilty pleaded, there was a Verdict for the Plaintiff; and it was moved in Arreſt of Judgment, that the Declaration was ill; for it was *for erecting and continuing* 300 *Perches of Stone Wall on the Soil of the Plaintiff* 2 *April Anno* 2 *W. & M. Tranſgreſſion' præd' quoad Continuation' muri præd' a* 20 *die Februarii Anno Primo W. & M. uſq; diem exhibitionis Billæ continuando*, ſo that the Continuance is laid for one Year before the Commencement of the Treſpaſs, and entire Damages being given all is void. Sed non allocatur; For this Continuando being for a Time before the Commencement of the Treſpaſs, is *ſenſeleſs and void, and it cannot be intended that any Damages were given for that* Matter, which in itſelf is void; therefore the Plaintiff had Judgment. Carth. 230. Paſch. 4 W. & M. in B. R. Bridges v. Horner.

21. *Treſpaſs for taking and carrying away* &c. *Continuando totam Tranſgreſſionem præd.* and it was moved by Carthew, that there could not be any Continuance as to the Caption. Holt Ch. J. ſaid, It was reſolved in the Caſe of **Butler v. Hodges**, in this Court, that *no Damages ſhould be intended to be given for that which is void*; ſo here as to the Caption, which will not admit of a Continuando. Comb. 377. Trin. 8 W. 3. B R. Hayward v. Wilſon.

(R) *How*

(R) *How much* Damage ſhall be *recovered* [In Reſpect of the Declaration.]

Fol. 578.

1. IN Treſpaſs **the Plaintiff ſhall** not **recover** more **Damages** than the Plaintiff hath counted of, though the Jury give more; **for the Plaintiff knows how much he is damaged, better than any other.** * 2 H. 6. 7. 8 H. 6. 5. || Co. 10. *Pilford* 166.

* Br. Damages, pl 181. cites S. C. where the Plaintiff counted of 10 l. Damages, and the Jury found 15 l. he ſhall recover only 10 l. ——— Br. Damages, pl. 2. cites S. C. the Jury may abridge, but not increaſe ——— Fitzh. Damage, pl. 16 cites S. C. and with this accords Aſcough and Newton clearly, 18 H. 6. [but it ſeems it ſhould be according to Roll 8 H. 6. 5. a. pl. 11] and cites 42 E. 3. adjudged as Here.

|| This ſhould be 10 Rep. 116. ——— Jenk 288. pl. 22. S. C. and that Plaintiff releaſed the Surplus of the Damages, and then had Judgment for the Damages counted of, and the Coſts. Damages are for the Wrong done before the Writ purchaſed; but Coſts are Pro Expenſis Litis. Adjudged and affirmed in Error. Br. Damages, pl. 21. cites 42 E. 3. 7. S. P. ——— Ibid. 179. cites S. C. ——— Ow. 45. Paſch 13 Eliz. Anon. cites S. C. where in Treſpaſs of Aſſault and Battery the Plaintiff declared to his Damages of 20 l. and the Jury found for the Plaintiff, and gave 30 l. Damages; and by the Court, the Plaintiff ſhall recover no more than he has declared for, and this ought to be done of Courſe by the Clerks.

Treſpaſs of a Regiſter [and Boxes of Writings &c.] *taken ad valentiam* 10 *l.* The Defendant pleaded Not Guilty, and it is *found Guilty ad Damnum* 20 *l.* and yet well, per Cur. For though it be not good but for 10 l. he may be indamaged by the taking in 100 l. Quod fuit Conceſſum. Br. Damages, pl. 122. cites 7 E. 4. 31.

Tot ubere le counts of Damages of 10 *l.* he ſhall not recover more than he counted. Ibid. cites Paſch. 2 H. 6. 7.

2. [So] **If the** Tenant vouches, **the Demandant ſhall not recover more Damages againſt the Vouchee than he hath counted of; for the Vouchee comes in Lieu of the Tenant, and the Judgment is given againſt the Tenant.** 8 H. 6. 11.

3. But **the Plaintiff** in Detinue **may recover more Damages** againſt the Garniſhee **than he hath counted of; for his Count was not againſt the Garniſhee, but againſt the Defendant, and Damages againſt him are** for the Delay after the Count. 8 H. 6. 5. 11.

Br. Damages, pl. 68 cites S. C. and the Defendant by the Interpleader of the Garniſhee is wholly excuſed of Damages, and the Garniſhee has taken this Matter upon him. ——— 10 Rep. 117. b. cites S. C. that in Detinue the Plaintiff ſhall recover more Damages than he has counted of; [but ſays norging as againſt the Garniſhee] ——— Fitzh. Damages, pl. 21. cites Mich. 8 H. 6. 4. S. C. and ſays that the better Opinion was, that he ſhall recover Damages as the Inqueſt ſhall tax; For the Garniſhee ſhall recover Damages againſt the Plaintiff as the Inqueſt ſhall tax, and by the ſame Reaſon the Plaintiff ſhall do the ſame againſt him; and beſides, the Tort, which is in the Garniſhee, is the Detinue, which is after the Garniſhment; for, for the Detinue before he ſhall not recover any Damages; and cites it adjudged 7 H. 4. that the Plaintiff ſhall recover Damages againſt the Aſſignee. ——— 10 Rep. 117. b. cites S. C.

4. **In** Treſpaſs for reſcuing a Diſtreſs, to his Damage ſo much, **if the** Defendant juſtifies **the Reſcous** upon ſpecial Matter, upon which it is demurred for the Plaintiff, and adjudged for him, **he ſhall have** Damages as he hath counted; **for the Defendant hath acknowledged the Treſpaſs, and hath** * **not denied the Damages.** 21 E. 3. 4. b. [40. b.]

* See (L) pl. 1.

5. So in **an** Attachment upon a Prohibition, **if the** Defendant acknowledges all the Treſpaſs **contained againſt him, the Plaintiff ſhall recover Damages as he hath counted.** 21 E. 3. 40. b. adjudged.

6. [So] **In a** Writ for ſubſtracting his Suit to his Mill, in the Debet and Solet to his Damage 40 l. **if the** Defendant ſays he cannot deny it, **the Plaintiff ſhall recover Damages to** 40 l. **as he has counted, becauſe**

cauſe this Acknowledgment is as much as if he had ſaid, that he cannot deny that there is as much Damage as he hath counted. 29 E. 3. 13.

7. [So] In a Writ of Ward, if the Defendant acknowledges that the Plaintiff hath a Right to the Ward, the Plaintiff ſhall recover the Ward and Damages as he hath counted. 38 E. 3. 21. adjudged. Vide contra, 1 E. 3. 4. Annuity.

8. In an Action of Waſte, if the Defendant demurs upon the Declaration, and it is adjudged againſt him, yet a Writ ſhall iſſue to inquire of the Damages. 34 H. 6. 8.

9. The Jury may give as much Damage to the Plaintiff as he hath counted, and further give to him Coſts by it ſelf, though the Coſts exceed the Damages named in the Declaration; for the Damages are given for the Wrong for which the Action is brought, and the Coſts for the Charge of Suit, the one before the Suit, and the other in and for the Suit. Tr. 3 Jac. B. R. between * *Eagles and Vales*, per Curiam, in an Action upon the Caſe upon an Aſſumpſit. Co. 10. *Robert* || *Pilfold* 115. b. adjudged in Treſpaſs. Contra, H. 39 El. B. R. per Curiam. 12 H. 7. Kelleway 21. b. dubitatur.

* Cro. J. 69. pl. 11. S. C. and a Judgment in C. B affirmed; and the finding more Coſts than the Damages amounted to is not Error; For it may be, that the Coſts of Suit, through long Dependanee, exceeded the Debt. —— Yelv. 70. Vale v Egles, S. C. & S. P reſolved.

|| Cro J. 297. pl. 3. Dawkes v. Pilfield, S. C. & S. P. reſolved per tot. Cur. But for Damages only they may not exceed what the Plaintiff himſelf has declared, and denied 13 H. 7. 16. that the Damages and Coſts aſſeſſed by the Jury ought not to be for more than the Plaintiff counts, to be Law; and for a Judgment in B. R. was affirmed in the Exchequer Chamber. —— Cro E. 268 pl. 2. Trin. 39 Eliz. B. R. Rivers v. Oodskirt, S. P. For non conſtat at the Time of the Declaration what the Coſts of Suit would amount unto. —— See pl. 11. infra.

Cro J. 69, 70 pl. 11. Egles v. Vale, S C. accordingly. — Yelv. 70. S C. held accordingly.

10. So a Fortiori, the Court may increaſe Coſts beyond the Sum of the Damages mentioned in the Count. Trin. 3 Ja. B. R. between *Eagles and Vales*, per Curiam. Co. 10. *Pilfold* 115. b. adjudged. Hill. 39 El. B. R. *Morgan Woolſe's* Caſe, adjudged in a Writ of Error.

* Br. Damages, pl. 203. cites S.C. & S. P. but if they do, it is good for ſo much as is contained in the Count; Per Brian; but all agreed that they ſhould not give Coſts beyond the Sum in the Count. —— 2 Inſt. 288, 289 Ld. Coke, on the Statute of Glouceſter, 6 E. 1 cap 1. cites S. C. and ſays, that Coſts in Law are ſo coupled together as they are accounted Parcel of the Damages, and therefore if the Plaintiff in Treſpaſs declare to the Damages of 20 Marks, and the Jury give 20 Marks for Damages, and 20 Marks for Coſts, yet ſhall the Plaintiff recover in all but 20 Marks; for Damages, and Coſts muſt not exceed the Damages which the Plaintiff demands by his Count, and the Entry reciting both the Damages and Coſts, Quæ damna in toto ſe attingunt ad &c. —— In Trover it was held, that if the Damages and Coſts had been intirely aſſeſſed at more than mentioned in the Declaration, it had been ill; For non conſtat but that the Damages exceed the Damages mentioned in the Declaration; and Judgment accordingly. Cro. E. 568. pl. 2. Trin. 39 Eliz. B. R. Rivers v. Oodskirt.

11. But the Jury in the Caſe aforeſaid cannot tax the Damages and Coſts together to more than is contained in the Count. for then it will not be known how much they gave for Damages, and how much for Coſts; for perhaps they might give more for Damages than the Plaintiff had counted. * 13 H. 7. 16, 17. Co. 10. Robert *Pilfold* 117. b.

12. In an Action of Debt upon a Bill, if the Plaintiff declares to his Damage of 10 l. and the Judgment is given for the Plaintiff by Nihil dicit, and the Judgment is, that the Plaintiff ſhall recover Debitum ſuum præd', & Damna ſua Occaſione Detentionis Debiti illius ad 12 l. 10 s. eidem * Querenti ex aſſenſu ſuo per Curiam hic adjudicat' Fol. 579 &c. Though here are more Damages than he hath counted for, yet becauſe it is the uſual Courſe for the Court in ſuch Caſes to tax

tar Damages and Coſts, it is good; for it may be that all was for Coſts, and it ſhall not be intended that the Court hath done otherways than they ought. Mich. 8 Car. B. R. between Sir *Richard Greenville and Sandwich*, adjudged in a Writ of Error upon a Judgment in Banco. Intratur, Paſch. 8 Car. Rot. 280. Trin. 24 Car. between *Parſons and Batchelor*, adjudged in a Writ of Error upon a Judgment in Banco. Intratur, Paſch. 22 Car. Rot. 381.

13. *Attaint by the Heir*, he ſhall not recover Damages, ſcil. *the Iſſues of the Land to the Time of the Death of his Anceſtor*. Br. Damages pl. 156. cites 14 Aſſ. 2.

14. In *Waſte* the Jury *found to the Damage of* 40 *l.* where the *Plaintiff had declared but to the Damage of* 20 *l.* The Damages here were trebled, Fitzh. Damages pl. 7. cites H. 34. E. 3. and ſays he believes the Reaſon is becauſe the *Statute is that he ſhall recover the Treble of that which the Jury ſhall tax*; for in other Action he ſhall not recover more than he counts &c.

S. C. cited Bulſt. 49. Arg. —— S. C. cited 10 Rep. 117. b. and denied to be Law; for that the Statute *is to be intended of Damages lawfully tax'd*; and that ſo it was held by Ld. Dyer, Trin. 10 Eliz. in Waſte brought by the Lord Abergavenny that the Jurors cannot value the Waſte more than the Plaintiff has counted of; and that with this accords 3 E. 4. Rot. 137. Though in ſome Caſes he may recover more than counted of, As in Detinue. See pl. 3. ſupra.

15. If a Man *brings Debt upon Obligation in London*, the *Marſhalſea, or elſewhere, and is long delayed*, and *after is nonſuited*, and *brings Action after in Bank, he ſhall not recover Damages for the Suit elſewhere*, but only for the Suit in Bank. Br. Damages pl. 39. cites 2 H. 4. 22.

16. In *Detinue*, the Plaintiff ſhall have *no more Damages than he has declared for*; for the Judgment is to have the Thing detained, and Damages for the Detention; if the Thing detained cannot be had, the Sheriff ſhall inquire de Damnis, and the Plaintiff ſhall have Judgment for the Value and Detention upon, and according to the Sheriff's Return; That he cannot deliver the Thing by the Defendant's Fault. Jenk. 288. pl. 22.

17. Where an *Avowant* was *intitled to Two Parts only of the Rent* and the Jury aſſeſſed *Damages for the whole Rent*, the Court held that the Avowant could not have Judgment unleſs he releaſe the Damages. Mo. 281. pl. 434. Mich. 31 &c. 32 Eliz. C. B. in Caſe of Batty v. Trevillian.

18. In *Caſe on a Promiſe* the Plaintiff *declared to the Damage of* 10 *l.* and upon Iſſue tried, the *Jury gave* 13 *l.* which was more than the Plaintiff counted for, and Judgment was given accordingly viz. that the Plaintiff recover the 13 l. by the Jury aſſeſſed; but it was reverſed for this Cauſe in B. R. For the Law ſuppoſes the Plaintiff to know beſt his own Damage and he ſhall never recover more than he counts for. *But if* after ſuch Verdict *the Plaintiff had releaſed all the Damages but thoſe of which he counted*, and then had Judgment, this had been good. This Record was removed from the Court of Northampton. Yelv. 45. Hill. 1 Jac. B. R. Perſival v. Spenſer.

18. Error was brought to reverſe a *Judgment in Detinue* becauſe it was *for greater Damages than the Plaintiff counted for*. The Court held that *were the Plaintiff doth declare no certain Damage*, there *he ſhall recover ſuch Damages as the Jury find*, but where the Plaintiff counts of a certain Damage, and the Jury do find greater Damages, there the Plaintiff ought to have no greater Damages than according to his Count, and not as the Jury finds, they finding greater Damages then the Plaintiff declared upon, and in this Action the Plaintiff declaring to his Damage 100 l. and the Jury finding for the Plaintiff and Damages 150 l. and he having his Judgment for 150 l. according to the finding of the

Jury, and in more then he counted upon, the Judgment was reverſed. Bulſt. 49. Mich. 8 Jac. Hoblin v. Kimble.

19. In *Real Actions* the Plaintiff ſhall not count of Damages, becauſe *it is uncertain what they ſhall amount to* and they *ſhall be recovered Pendente Brevi.* 10 Rep. 117. a. Mich. 10 Jac. in Pilford's Caſe.

20. *But in Perſonal Actions* they ſhall count to the Damage, becauſe they *ſhall recover* Damages *only for the Tort done before the Writ brought*, but not for any Thing done pending the Writ. 10 Rep. 117. a. Mich. 10 Jac. in Pilford's Caſe.

Cro. J. 458. pl. 4 S C. but S. P. does not appear. —— 2 Jo. 138. cites S. C. and S. P. adjudged.

21. In *Treſpaſs* found for the Plaintiff, the Jury gave him *Half a Farthing Damage*; it was moved in Arreſt of Judgment that the Damage given by the Jury ought to be valuable, and that there is no ſuch Coin; Sed non allocatur; and Judgment for the Plaintiff. 2 Roll. Rep. 21, 22. Paſch 16 Jac. B. R. Marſham v. Buller.

23. In Caſe the Plaintiff declared, that he *was ſeiſed of ſeveral Parcels of Land*, and the *Defendant*, *Tenant at Will of one Parcel*, and there being a *Diſcourſe between him and T. S. for the Sale of theſe* Lands, he (the *Defendant*) *ſaid to T. S.* that *he would keep the Poſſeſſion till the* 17th *Day of Auguſt, at which Day the Defendant ſaid, the Plaintiff had no Title to that Parcel, but one G. D. had*; and ſo the Bargain broke off. Adjudged; that though the Words were ſpoken of a Parcel of the Land, yet the Plaintiff ſhall recover *Damages for the Loſs of the Sale of the whole.* 2 Roll. Rep. 447. Trin. 21 Jac. B R. Egerton v. Whittington.

24. The Defendant being a *Coachman broke a Pipe of Wine in the Street by his Careleſs Driving* the Coach, by which a great deal of the Wine run out, and was loſt, and promiſed the Plaintiff, that in Conſideration he would forbear to ſue him, *that he would pay as much as he was damnified.* In Action on the Caſe upon the Promiſe, the *Plaintiff in his Declaration did not ſet forth, how much the Wine was worth that was ſpilt*; but adjudged, that the Defendant is bound to take Notice of the Damage, and the Jury have made it certain; and Judgment for the Plaintiff. Sty. 458. Trin. 1655. Fowke v. Preſcott.

25. The Plaintiff declares, that the *Defendant in Conſideration of* 10*l. promiſed to let him enjoy certain Iron Mills for Six Months*; and it appeared that the Iron Mills were *worth but* 20*l. per Annum*, and yet *Damages were given to* 500*l.* by Reaſon of the Loſs of Stock laid in; and per Cur. the Jury may well find ſuch Damages, for they are not bound to give only the 10 l. but alſo all the *Special Damages.* Raym. 77. Paſch 15 Car. 2. B. R. Nurſe v. Barns.

26. Ward brought an Action againſt Hatton Rich *de Uxore abducta*, and keeping her from him *uſque* ſuch a Day, which was ſome Time after the exhibiting of the Bill, and concluded *Contra Formam Statuti.* After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, and the Declaration was held good, notwithſtanding the Impertinent Concluſion of *Contra Formam Statuti*, there being *no Statute in the Caſe.* Secondly, the Court reſolved, that Judgment ſhould be ſtayed; for the Jury ſhall be intended to give Damages for the whole Time mentioned in the Declaration. As in Treſpaſs, with a *Continuando* to a Day after the Writ brought, the Plaintiff ſhall not have Judgment after Verdict, which gives Damages by Intendment for the whole Time declared for. And Twiſden ſaid, theſe two Caſes were reſolved; *A Tradeſman brought an Action* in an Inferior Court *for ſlandering of him in his Trade*, by which he *loſt his Cuſtom withia the Juriſdiction of that Court & Alibi*, and it was held maintainable notwithſtanding the *Alibi*; The other was an Action brought upon the Sale of ſeveral Things for divers Sums of Money, *Quæ quidem Pecuniarum Summæ attingunt ad*

10 *l.*

10 *l.* whereas rightly computed they came but to 9 l. The Jury gave Damages leſs than 9 l. and it was held good. But if the Verdict had been for 10 l. it had been naught. Vent. 103. Mich. 22 Car. 2. B. R. Ward v. Rich.

26. In *Caſe* Plaintiff *declared*, that the *2d of July* 6 *W.* 3. he was *poſſeſſed of a Meadow* next *adjoining to a River*, and to *another Cloſe contiguous to* the ſaid River, which Time out of Mind ran through his Meadow to an ancient Mill of the Defendant's, without any over-flowing That the *Defendant the 3d of Auguſt* 6 *W.* 3. *enlarged* the Foundation of his *Mill* further into the River, whereby he ſo *obſtructed the River*, and exalted the Water, that it *drown'd the Plaintiff's Meadow*, *per quod* he *loſt the Uſe and Profit thereof*, *from the aforeſaid 2d Day of July to the Time of exhibiting the Bill.* Not Guilty pleaded, and Verdict for the Plaintiff. And it was moved in Arreſt of Judgment, that intire Damages are given to the Plaintiff, and from the 2d of July to the 3d of Auguſt, he had no Damages at all by his own ſhewing; and it ſhall not be intended, that the Damages given by the Jury are only for the Time after the 3d of Auguſt, for the Damages ſhall be underſtood to be given not according to Law, but according to the Allegation of the Plaintiff, who layeth his Damage; as reſolved in Harbin and Green's Caſe Hob. 191. Moor 887. And firſt, all the Court, except Rookby, ſeemed to think it well enough; for it may be the Plaintiff laid up his Meadow for Graſs from the 2d of July; but after Judgment was arreſted; for *though he might loſe the Profits from that Time*, he notwithſtanding *could not loſe the Uſe*; if he had not ſaid (Uſum) they might have given Judgment for him. This Caſe is the very ſame with Harbin and Green. Judgment arreſted. 12 Mod. 131. Prince v Molton.

2 Salk. 663. pl. 5. S. C. and Judgment arreſted. —— Carth. 386. S C. and Judgment arreſted. —— Comb. 442. S. C. and Judgment arreſted. —— —— Ld. Raym. Rep. 248. S. C. and Judgment arreſted. —— And the ſame Diſtinction taken in the Books cited above as to loſing the Uſe and loſing the Profits.

27. In Treſpaſs, *Aſſault*, *Battery*, *and Falſe Impriſonment*, the Plaintiff *declares*, *that the Defendant aſſaulted*, *beat and impriſoned the Plaintiff*, *the firſt of October* 9 *W.* 3. *and detained him in Priſon four Months.* Upon Not Guilty pleaded, Verdict for the Plaintiff, and intire Damages were given by the Jury. It was moved in Arreſt of Judgment, that *the Declaration was* a Declaration *of Mich.* 9 *W.* 3. *and therefore the Damages being intire*, *and given for the Impriſonment of four Months from the firſt of October*, it appears that the Damages *were given for Impriſonment after the Action was commenced.* And Judgment was arreſted. Ld. Raym. Rep. 329. Paſch. 10 W. 3. Braſhield v. Lee.

28. In an Action *upon the Statute of Wincheſter*, in which the *Plaintiff ſhewed he was robbed of a Bank Bill.* Upon Evidence at the Trial Summer Aſſiſes 10 W. 3. at Brentwood in Eſſex, before Hatſell, Baron of the Exchequer, he *directed the Jury to give Damages for the whole Value of the Bill*, which they did accordingly. Ld. Raym. Rep. 727. Windler v. Chelmsford Hundred.

29. Action upon the *Caſe for diverting a Water-Courſe* 1 *Jan.* 1 *Geo. and continuing it to March* 1715. *Per quod the Plaintiff loſt the Benefit of the Water-Courſe Abinde till Apr. tunc prox' ſequen'.* And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that intire Damages were given, when *part of the Time was to come at the Time of the Trial*; Sed non allocatur; for per Cur. *the Time mentioned March* 1715. *not being then incurred*, *it was impoſſible*; for at the Time of the Action it was not poſſible that the Diverſion of the Water-Courſe had continued till a Time then not come; and therefore when he alleges, that he loſt the Benefit of the Water-Courſe till Apr'. prox' ſequen', this is alſo impoſſible, *and therefore the Jury could not have any Conſideration of it.* Comyns's Rep. 231, 232. pl. 129. Mich. 2 Geo. 1. Yalden v. Hubbarb.

30. In

30. In an Action of *Treſpaſs* brought by the Plaintiff in the Court of C. B. *for entring on his* (the Plaintiff's) *Land 25 March 4 Geo. with a Continuando the ſaid Treſpaſs to the 25 March 6 Geo.* (which was two Years) &c. ad damnum &c. The Defendant *juſtified, by the Command of one Green*; the Defendant *replied, and ſet forth a Surrender made to him (the Lands being Copyhold) and that he was admitted a whole Year before he brought this Action of Treſpaſs* &c. and at a Trial there was a Verdict for the Plaintiff; and the *Jury gave Damages for that Year only, whereas the Plaintiff had declared for two Years Damages*; and now, upon a Writ of Error brought, it was inſiſted, that though the Plaintiff had a Verdict, yet if the Jury did not find enough, it is an inſufficient Finding, and here they had found Damages only for one Year, where the Plaintiff had declared for two Years Damages, and the Jury cannot *ſever the Damages for which the Plaintiff had declared*; but this was over-ruled by the Court, and the Judgment affirmed. 8 Mod. 78, 79. Trin. 8 Geo. Moor v. Thompſon.

31. A Judgment in C. B. was reverſed, becauſe the Jury, on the Writ of Inquiry, had given Damages *for a longer Time than laid* in the Declaration, and *alſo to a Time after the Writ of Inquiry was executed.* 2 Ld. Raym. Rep. 1382. Paſch. 11 Geo. 1. B. R. Baker v. Bache.

32. The Judge *certified the Damages* (which were 50 l.) *to be exceſſive; but the Action appearing to be* brought for a very *malicious* Proſecution *for Felony; and the Plaintiff having been impriſoned* and tried for Felony, *the Court were of Opinion, that* in the Nature of the Thing, *the Damages appear'd to be moderate*, and therefore refuſed to grant a new Trial. Barnes's Notes in C. B. 312, 313. Mich. 7 Geo. 2 Anon.

(S) What Damages ſhall be given; and for What.

1. WHERE a Man brings Action, and declares of *Falſe Impriſonment till he made an Obligation of* 40 l. he *ſhall not recover Damages for the Obligation, but for the Impriſonment*; for he is not grieved by the Obligation, till he ſhall be impleaded, and there he may plead Dureſs, and e contra of Impriſonment till he makes Fine, he ſhall recover Damages for the Impriſonment and Fine; for there he is grieved by *Fine* in Fact, which *is tort executed.* Br. Damages, pl. 119. cites 2 E. 4. 21.

2. A Man ſhall not recover Damages *for the Iſſues and Profits* in Action *upon the Statute of 5 R. 2. but only for the Entry*; for the Action is quod Ingreſſus eſt, where Entry is not given by Law. Br. Damages, pl. 120. cites 2 E. 4. 24.

3. Note, that in Replevin *of a Sow and Pigs*, which Pigs were *pigg'd after the taking*, and yet the Plaintiff had Replevin of both, and ſhall recover Damages. Br. Damages, pl. 126. cites 12 E. 4. 5.

4. One *aſſumes in Conſideration of 4 d. to pay 10 l. Damages.* They ſhall be given to the 10 l. on Non-Aſſumpſit; not to the 4 d. Mo. 419. pl. 576. Mich. 37 and 38 Eliz. Colman's Caſe.

5. The *Diſſeiſee* ſhall have an Action of *Treſpaſs againſt the Diſſeiſor*, and recover his *Damages for the firſt Entry without any Regreſs*; he may have an Action of Treſpaſs with a Continuando, and recover *as well for all the mean Occupation as for the firſt Entry.* And here note, that Litt. doth here include Coſts within Damages. Co. Litt. 257. a.

6. In *Judgment by Default in Debt on a ſingle Bill*, the *Intereſt ought to be tax'd by the Maſter of the Office in the Damages*; per tot. Cur. And it was inſiſted Arg. and not denied, that it was the conſtant Practice in all the Courts of Weſtminſter-Hall, *upon Judgments upon Default, or Confeſſion, to tax the Damages Occaſione Detentionis Debiti*; and therefore the Non-Payment of Intereſt, when the Debt carries Intereſt (as all Engliſh Bills do) is a Damage to the Plaintiff; but as to the Caſe of Rent, it does not carry Intereſt; and therefore, in ſuch Caſe, no Intereſt ſhall be given. 2 Ld. Raym. Rep. 773. Trin. 1 Ann. in ſcacc Lapiere v. the D. of St. Albans.

(T) Given. In what Caſes.

1. DEBT brought *of* 20*l. by Obligation*, and the *Reſt by lending*, and *the Defendant confeſſed the Obligation*, therefore the Plaintiff had Judgment immediately of it, and *to the Reſt he pleaded to the Countrey*, and the Plaintiff prayed Judgment of the Damages of that which was confeſſed, and could not have it till the other be tried, and after *at the Niſi Prius of it the Plaintiff was Nonſuited*, and yet at the Day in Bank he ſhall have Judgment of the Damages of that which was confeſſed, and might have had it at firſt, if he would have releaſed the Suit of the Reſt, and ſo he recover'd Debt and Damages upon the ſame Original, upon which he was Nonſuited. Br. Damages, pl. 25. cites 42 E. 3. 25.

2. The Defendant *procured J. S. to bring Formedon againſt the Plaintiff by Colluſion*, by which he was forced to travel by the Suit, and in bringing a Writ of Warranty of Charters in defence of it, *to the Damage of* 40*l.* and becauſe the Defendant could not deny the Colluſion, the Plaintiff *recover'd* 20*l. quod nota, for Vexation and Colluſion only*. Br. Action ſur le Caſe. pl. 17. cites 43 E. 3. 20. Br. Diſceit, pl. 9. cites S. C.

3. Error was brought upon *Judgment in* an *Account*. Becauſe the Judgment was to recover Damages; but not allowed; for the Defendant hath delayed the Plaintiff, and pleaded to the Iſſue, which is found againſt him. So *Occaſione interplacitandi*, he ſhall recover Damages. But otherwiſe, if the *Defendant comes the 1ſt Day, and enters in the Account* taken, for to make Account. Noy. 134. Brown v. Barwick. cites 2 R. 2. Account. 42. 5 E. 3. 40.

4. *Upon Demurrer in Law* the Juſtices may award Damages for the Party *by their Diſcretion, or award Writ to inquire of Damages at their Election*. Br. Damages, pl. 194. cites 14 H. 4. 39. 40.

5. Where a *Bill in Chancery is adjudg'd Inſufficient upon Demurrer*, the Defendant ſhall not have Damages; For the Statute does not mention, but only where the Suggeſtion is found true or not true, and here the Truth is not try'd. Br. Coſts, pl. 19. cites 7 E. 4 14. Per Cur.

6. Reſolved by the Court, that whereſoever Damages are to be given in *Debt*, Coſts are to attend them; and the Reaſon of the Damages is, becauſe the Money is not paid upon Demand; for if the *Defendant pleads Tout temps priſt* &c. the Plaintiff muſt reply, and ſet forth a ſpecial Demand, whereupon Iſſue may be taken; and if it be *found for the Defendant*, the *Plaintiff can have neither Damages nor Coſts*. Comb. 224. Mich. 5 W. & M. B. R. Company of Cutlers &c. v. Hurſley.

7. *Attachment in Chancery* on an Alias & Pluries, is returnable in B. R. and is really an Action, whereon the Plaintiff ſhall recover Damages for the Delay, in not executing the Writ. 12 Mod. 164. Hill. 9 W. 3. Per Holt Ch. J. Anon.

1 Salk 208. pl. 8. S. C. accordingly.

8. *Judgment* was in C. B. *upon Scire Fac. on a Recognizance by Bail* upon a Writ of Error, Quod, the original Plaintiff ſhould have Execution upon the Recognizance, Et quod recuperet damna ſua, which he had ſuſtained Occaſione Dilationis Executionis. And the Exception taken was, that the Court had no Power to award Damages for delay of Execution, but they ſhould give them for Coſts of Suit. Per Cur. Damages generally include Coſts, which Word (Coſts) properly ſignifies Coſts of Suit, and *Delay of Execution is properly Damage*, viz. the being ſo long out of his Money, *which the Court uſed formerly to Aſſeſs, by allowing the Party the lawful Intereſt:* So Damages of delay of Execution, and Coſts of Suit upon the Statute, are very different, and to be aſſeſſed by different Meaſures, and the Statute gives only Coſts of Suit againſt the Bail &c. Ideo, per omnes, this is Error. 6 Mod. 157. Hill. 3 Ann. B. R. Fanſhaw v. Morriſon.

As upon the Statute 2 E. 6. 13. for not ſetting forth Tithes.

9. Where a *Penal Sum is recovered*, Damages are never given. Per Parker, Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

See Cro. J. 70. Dagg v. Penkevon.

10. *But* upon a *ſingle Bill*, even by the Common Law, Damages are given for the Delay. Per Parker, Ch. J. 10 Mod. 277. Hill. 1 Geo. B. R.

(U) In what Caſes. Where there is a Demurrer for Part, and Iſſue for the Reſt.

1. TReſpaſs *of Trees cut and Goods taken*, the *Defendant join'd Iſſue for Part, and demurr'd for the Reſt*, and the *Demurrer adjudg'd againſt him*, and the *Niſi Prius upon the Iſſue, inquir'd of all the Damages*, as well of the Part in the Demurrer, as of the Part in the Iſſue, and *found the Iſſue for the Defendant, and tax'd Damages for the Reſt to* 10 *l.* Br. Demurrer, pl. 6. cites 38 E. 3. 25.

(W) In what Caſes, againſt the Plaintiff, though Part of the Iſſue is found for him.

1. TReſpaſs, *Aſſault and Battery, to the Damage of* 10 *l.* and was *found Guilty of the Aſſault, and acquitted of the Battery*, and yet the Plaintiff recover'd 10 l. as he had counted, and was amerced for the Battery. Br. Damages, pl. 198. cites 40 E. 3. 26.

2. Note, *in Avowry*, where *Part is found for the Lord, and Part againſt him*, he ſhall have Return of the Whole, and yet ſhall render Damages for the ſame taking. Br. Damages, pl. 4. cites 2 H. 6. 4.

3. *Reſcous*

3. *Reſcous* is brought *upon Diſtreſs taken for Rent due at two Days*, and it appear'd by the Declaration, that *one Day is paſſed, and the other is to come*, and the Defendant pleaded Not Guilty; the Jury ought to ſever the Damages; for, for the Rent-Day paſſed, the Plaintiff ſhall recover, and for the other not. Br. Damages, pl. 167. cites 9 H. 7. 3.

(X) Several Damages againſt ſeveral Defendants; and where Plaintiff has his Election.

1. *ASSISE againſt ſeveral, one alleged Jointenancy by Deed with a Stranger*, who upon Proceſs came not, by which the Aſſize was awarded, where *the other* had *pleaded Miſnoſmer of the Plaintiff*, and *all found for the Plaintiff*, and againſt him who pleaded Jointenancy double Damages was awarded, and ſingle Damages againſt the other, and the *double Damage* ſhall be *levied of him who pleaded Jointenancy only*, and the *other Damages ſhall be levied of him, and the other in common.* Br. Damages, pl. 104. cites 22 Aſſ. 2.

2. Treſpaſs *againſt A. and B. for beating of his Servant, and taking of Timber*; the *one was found Guilty of the Battery*, and the other acquitted, and *both found Guilty of the* [*taking of the*] *Timber*; by which the Damages were ſevered, ſcilicet, for the Battery by it ſelf, and for the Timber by it ſelf; and ſo they did, ſcilicet, for the Damage of the Battery one Mark, having regard to the Service loſt by the Maſter, and not to the Hurt which the Party has, and 100 s. for the Timber; by which it was awarded, that the one Mark ſhall be recovered againſt A. who beat him, and the 100 s. for the Timber againſt both in common, and the Plaintiff amerced againſt the one. Br. Damages, pl. 107. cites 22 Aſſ. 76.

3. In *Treſpaſs againſt* two, if the *one* comes and *pleads, and is convicted to the Damage* &c. and the *other comes and pleads, and is convicted*, the ſecond Jury ſhall not give Damages; for the ſecond who pleads, ſhall be charged by the firſt Verdict, quod nota. Br. Damages, pl. 29. cites 44 E. 3. 7. and lib. Aſſ. p. 5.

4 A. brings *Treſpaſs againſt three*; *one* appears, and *pleads Not Guilty*; *afterwards another* appears, and *pleads Not Guilty*; afterwards the *third* appears, and *confeſſes the Action*; *two Venire Facias's were awarded* to try theſe two Iſſues; *on the firſt Iſſue* 200 *l. Damages are found* for the Plaintiff, the *other Jury finds* 150 *l.* Damages; the Plaintiff ſhall have his Election which Damages he will have; for 'tis not certain which of the Iſſues was firſt try'd; for they were *try'd at the ſame Aſſiſes*, and the *Damages tax'd by the firſt Jury ought to ſtand for all.* Jenk. 269. pl. 86.

11 Rep. 5. Trin. 10 Jac. Heydon's Caſe, S. C. —— And ibid. 7. a. the 4th Reſolution, S. P. —— Cro. J. 348. pl. 2. Trin. 12 Jac B. R. Cobb v. Heydon, S. C. and Judgment in C. B. affirmed. —— Roll Rep. 30. pl. 3. S. C. and Judgment affirmed.

5. In *Treſpaſs againſt A. B. and C. — B. and C. juſtify*; upon which there is a *Demurrer*, and *A. pleads*, and thereupon Iſſue is joined, and the *Demurrer is adjudged againſt B. and C.* and upon a Writ of Inquiry, Damages are given againſt B. and C. and after the *Iſſue is found for the Plaintiff, and Damages given*; the Plaintiff may have his Election which Damages he will take. 1 Roll. Rep. 395. pl. 17. Trin. 14 Jac. B. R. Headley v. Mildmay.

6. Error of a Judgment in an *Appeal of Mayhem* in Durham; the Error aſſigned, becauſe the *Plaintiff declared* there, in an Appeal againſt them, *That they, with a third, made the Mayhem. They pleaded ſeveral Pleas,*

Pleas, whereupon *ſeveral Iſſues were joined, and Verdict for the Plaintiff, and againſt F. upon the Trial* 50 *l. Damages were found, and againſt R.* 100 *l. Damages*; and the Plaintiff prayed *Judgment againſt both for the* 100 *l. Damages* and Coſts, and had it; and now Error is brought and aſſigned, becauſe the Plaintiff hath Judgment for the 100 l. Damages, *and doth not releaſe the Damages for the* 50 l. But the Court conceived it to be no Error; for the *Judgment being for the* 100 *l. by the Election of the Plaintiff, it is a Waiver of the other Damages*, and he cannot have both; therefore he *needs not releaſe the Damages of* 50 *l.* whereupon the Judgment was affirmed. Cro. C. 192. pl. 2. Trin. 6 Car. in B. R. Johns & al' v. Dodſworth.

(Y) Where they ſhall be Joint.

1. AN *Action upon the Stat.* 1. 2. *M.* for driving *Diſtreſſes* and impending them in ſeveral Places, ſo that the Owner was put to *Several Replevins*, and it was *againſt Three Defendants*, and upon Not Guilty it was found for the Plaintiff, and 40 s. Damage aſſeſt by the Jurors againſt every Defendant ſeverally. And Judgment was given for the Plaintiff, that he ſhould recover the Penalty of the Statute (viz.) againſt every one 5 l. and for Damages againſt every one 40 s. trebled; Upon which a *Writ of Error* was brought, and Error aſſigned was in the Point of the Judgment (viz.) *becauſe the Damages and the Penalties are ſevered.* (viz.) every Defendant by himſelf, where it ought to have been jointly, (viz) all one. And that was adjudged Error, and the firſt Judgment reverſed. For but one 5 l. ſhall be inflicted upon all the Defendants, and not ſeveral 5 l. by the Statute; yet the *Words are* that *every Perſon offending ſhall pay* 5 l. but the Meaning of the Statute is, that the Penalty ſhall be referred to the Offence, not the Perſons, then becauſe there was but *one Offence* in all the Defendants, there ſhall be but one 5 l. forfeited. Noy. 62. Hill. 39 Eliz. B. R. Patridge v. Emſon.

2. *So* by Popham. If *two diſtrein, and* they alike *drive the Diſtreſs*, there ſhall be only one Action and one Penalty which was granted. Ibid.

3. *So* by Gawdy *upon the Statute* that enacts *that every one that ſues in the Admiralty* for a Thing *done upon the Land, ſhall forfeit* 10 *l.* There if *two commence an Action*, Contra Formam Statuti, yet but one 10 l ſhall be forfeited. Ibid.

4. *So upon the Statute of* 5 *Eliz. of Forgery againſt Twenty* but one *double Damages* ſhall be given againſt all. And by Popham and Fenner; That where Twenty are ſo jointly ſued, a Releaſe to one ſhall diſcharge all. *But* by Fenner, *If* the Plaintiff had brought his *Action againſt them ſeverally*, every one ſhould have paid 5 l. Sed Quære. Ibid.

(Z) Barr'd.

(Z) Barred by What.

1. IN *Aſſiſe* if the *Plaintiff enters into Parcel*, he ſhall loſe all his Damages, for they are intire and cannot be ſevered. Br. Damages, pl. 180. cites 35 H. 6. 13.

(A. a) Writ. How it ſhall be.

1. NOTE by the beſt Opinion, that *where Damages are given by Statute and new Form of Writ*, the Plaintiff ſhall not recover Damages by the Statute, if he does not *bring his Writ upon the Statute*, as in Treſpaſs de Maleſactoribus in Parcis, *but where* the Statute gives Damages, and *no new Form of the Writ*, there the Plaintiff ſhall recover according to the Statute by the Common Form of the Writ; note the Diverſity thereof; and in Aſſiſe if the Diſſeiſſin be found with Force, the Plaintiff ſhall recover double Damages, and yet the Writ is not but of the Common Form. Br. Damages pl. 8. cites 9 H. 6. 2.

(B. a) Writ of Inquiry of Damages; in what Caſes awarded; and How it may be.

1. IN *Aſſiſe* the Plaintiff prayed *Eſtrepement*, and could not have it; and the *Defendant commits Waſte in the mean Time, between the Verdict in the Aſſiſe and the Judgment*, and a Writ of Inquiry of Damages was awarded of this Waſte and cutting of Trees; which note well, for the Verdict before can't give Damages thereof. Br. Brief de enquire &c. pl. 13. cites 21 E. 3. 3.

2. In *Debt* the *Defendant acknowledged Part, and denied the reſt*, upon which they were at Iſſue, and the Plaintiff had Judgment of Part, and *for the reſt* at Niſi Prius *he was Nonſuited*; and yet, at the Day in Bank, he had a Writ to inquire of Damages, quod nota. Br. Brief de enquire &c. pl. 16. cites 42 E. 3. 25, 26.

3. In *Dower* the *Tenant ſaid*, that he has been at *all Times ready to render* Dower, *and yet is*, by which the Demandant recover'd Dower preſently, and *averr'd the Contrary againſt the Tenant for her Damages*, and pray'd a Writ of Inquiry of Damages, and could not have it; for *Iſſue* thereof *ſhall be joined and tried by Niſi Prius*. Br. Brief de enquire &c. pl. 18. cites 34 E. 3. Br. Tout temps Priſt. pl. 40. cites 34 E. 3. and Fitzh. Enqueſt. 57.

4. In *Dower* the Tenant made *Default after Default*, per quod the Demandant *averr'd, that her Baron died ſeiſed*, and pray'd a Writ of Inquiry of Damages, & habuit. Br. Brief de enquire &c. pl. 17. cites 44 E. 3. 3.

5. Where the *Defendant, or the Biſhop, pleads Ne Diſturba pas*, the Plaintiff ſhall have a Writ to the Biſhop, and Writ of Inquiry of Damages. Br. Brief de enquire &c. pl. 6. cites 22 H. 6. 44. and 21 H. 6. 56.

6. *Waſte* was brought, and the *Defendant demurred* upon the Declaration, that the Reverſion does not paſs by Deviſe by Name of Tenement, nor without Attornment, which was *adjudg'd againſt him* in both Points, and there 'twas awarded, that he ſhall not have Writ of Inquiry of Waſt, for he *is convicted of the Waſte* by the Demurrer, but he ſhall have a Writ of Inquiry of Damages, but the Plaintiff releaſed his Damages, and had Execution. Br. Brief de enquire &c. pl. 1. cites 34 H. 6. 7.

7. Error of a *Judgment in Debt*; The Error aſſigned becauſe the Judgment is, *Ideo conſideratum eſt quod recuperet* 40 *s. pro miſis & cuſtagiis, omitting* theſe Words, *ex aſſenſu ſuo per Curiam ei adjudicat'*. And it was held to be a material Part of the Judgment; for being *by Confeſſion or Default* Writ of Inquiry of Damages ſhall be awarded, unleſs the Party conſents to take ſo much for Damages; and for this Cauſe it was reverſed. Cro. J. 415. pl. 3. Hill. 14 Jac. B. R. Machin v. .....

Lat. 213. S C in totidem Verbis.—Ibid. 211. Brook v. Wood. S C. ſays the Declaration was, that the Defendant indebted to him in 16 l. upon Account, and in Conſideration that he would forbear, the Defendant promiſed to pay &c. and upon *Nihil Dicit*, Judgment was Quod recuperet Damna ſua prædicta; and becauſe no Writ of Inquiry was, the Judgment was reverſed. This was a Judgment out of an Inferior Court.

8. In an Action upon the *Caſe*, the *Plaintiff declares to* 17 *l. Damages*, and *upon Demurrer Judgment given for* 17 *l.* 10 *s. Damages by the Court.* And now that Judgment was reverſed. Becauſe the *Damages being uncertain, there ought to Iſſue a Writ of Inquiry* of Damages. Otherwiſe where the Demand is certain, as in Debt, Note 11 H. 7. 5. b. Noy 96. Paſch. 2 Car. B. R. Wood v. Brook.

S. C. cited 5 Mod. 119.—Skinn. 596. S. C. cited per Holt Ch. J.——S. C. cited by Holt Ch. J. Comb. 344. ——S. C. cited by Holt Ch J. 12 Mod 85. ——S. C. cited Arg. Ld. Raym. Rep. 60.

9. Error of a Judgment in *Aſſumpſit in an Inferior Court*; the Parties being at Iſſue, there was a *Demurrer upon the Evidence*, and thereupon the Jury was diſcharged; afterwards *Judgment* was given *for the Plaintiff*, and Damages found upon a Writ of Inquiry, where the Jury, which was to try the Iſſue, ought to have aſſeſs'd Damages Conditionally, if Judgment ſhould be given for the Plaintiff; and ſeveral Preſedents were cited in Proof thereof; But the Court ſaid, that if theſe Precedents are good Law, then it may be inquir'd by the ſame Jury Conditionally; But that it may be as well inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined, and the moſt uſual Courſe is, when there is a Demurrer upon Evidence, to diſcharge the Jury without more Inquiry. Cro. 143. pl. 21. Mich. 4 Car. B. R. Darroſe v. Newbolt.

10. Plaintiff in a *Replevin* was *Nonſuited after Evidence given* to the Jury, and the Jurors did not find Coſts and Damages; and afterwards a Writ of Inquiry of Damages was granted. And Aſhley moved, that the Writ might not be filed. Becauſe that the Writ of Inquiry of Damages could not Iſſue, but be awarded from the Court; And the Plaintiff here being Nonſuited was out of the Court, and that nothing might be done againſt him. And the Prothonotaries ſaid, That in Caſe of a Verdict, where the Jurors omit to find Damages, a Writ of Inquiry is many Times granted. But they were commanded to ſearch for Precedents in Caſe of a Nonſuit. Het. 161. Hill. 5 Car. C. B. Rawlins's Caſe.

11. In *Detinue of Charters*, there was Verdict for the Plaintiff and Damages, but the *Value of the Charters were omitted*, (which is Part of the Judgment, and to be had in Caſe the Charters cannot) and it was moved,

ed, that it may be ſupplied by a Writ of Inquiry of Damages, and according to this is a Precedent Old Ent. Raſt. tit. Judgment in detinue, pl 13. fol. 214. and 41 Eliz. in B. R. Rot. 916. Chipendale and Orn's Caſe. And the Reaſon why the Verdict may be ſupplied in ſuch Caſe is, becauſe it is only matter of Damages, upon which no Attaint lies, but the Court doubted of it. Sid. 246. Paſch. 17 Car. 2. B. R. Burton v. Robinſon.

12. In *Replevin* the Jury did not inquire of the *Value of the Rent arrear*, reſolv'd after ſeveral Debates, that this cannot be ſupplied by Writ of Inquiry. Lev. 255. Mich. 20 Car. 2. B. R. Sheape v. Culpepper. Raym. 170. Ward v. Culpepper. S C. —— Sid. 380. pl. 12. S. C. the Court doubted & adjornatur. —— Vent. 40. S. C. the Court held, it could not be ſupplied. —— S. C. cited by Holt Ch. J. Skinn. 596. and ſays, the Reaſon is, becauſe the Statute ſays, that ſuch Inquiry ſhall be by the ſame Jury. —— Ld. Raym. Rep. 60. S C. cited by Holt Ch. J.

But where in *Replevin* and Avowry for *Damage feaſant*, the Plaintiff was *Nonſuited*. The Omiſſion of the Jury was ſupply'd by a Writ of Inquiry. Comb. 11. Hill. 1 & 2 Jac. 2. B. R. Humfreys v. Miſdale.

13. Where Damages are *uncertain*, they cannot be ſet in a *Court of Equity* but by a Jury. Vent 330. Trin. 30 Car. 2. in an Anonymous Caſe.

14. In *Debt* becauſe the Demand is certain, the Courts here have ſometimes aſſeſs'd Damages without a Writ of Enquiry, but never in *Treſpaſs* or *Actions ſur Caſe*, which lie wholly in Damages. Vent. 330. Trin. 30 Car 2. in an Anonymous Caſe.

15. A *Verdict is good, notwithſtanding the Omiſſion* of inquiring of Damages on the Demurrer; for as to that, it is but an Inqueſt of Office, and may be ſupplied by another Writ; cites Dy. 135. 11 Co. 6. a. But if the Verdict would have been deficient for this Cauſe, it is *aided by a Nolle Proſequi*; for where a Verdict is *inſufficient by Aſſeſſment of intire Damages, or Non-Aſſeſſment of Damages* and Coſts, where they ought to be aſſeſſed, it cannot be ſupplied by a Writ of Inquiry; but Releaſe of Damages and Coſts remedies Suits and Imperfections in the Verdict. Arg. 12 Mod. 12. Mich. 3 W. and M. in Caſe of Germin & Ux' v. Orchard.

16. 'Tis the Courſe of the Court to give Intereſt for Damages upon a *ſingle Bill, or Bill of Exchange* (which muſt always be under the Sum laid in the Cloſe of the Declaration) in Caſe of a *Demurrer in Debt*, and there needs no Writ of Inquiry. Per Holt Ch. J. Cumb. 243. Paſch. 6 W. and M. in B. R. Anon.

17. A *Diſtreſs* was taken *for a Poor's Rate* and a Replevin brought, and upon Not Guilty pleaded by the Officer at the Trial, Evidence was given, and the *Jury charged and ready to give their Verdict*, the *Plaintiff became Nonſuit*, by which the Officer was intitled to Treble Coſts and Damages, but the Jury departed without aſſeſſing them, upon which the Court was moved for a Writ of Inquiry, and after being twice moved, Rule was given for a Writ of Enquiry. Skin. 595. Mich. 7 W. 3. B. R. Sir James Harbert's Caſe. And at another Day in this Term the Court ſolemnly declared, that a Writ of Inquiry ſhould go in this Caſe, for per Holt Ch. J. the Jury here are *diſcharged from giving their Verdict* by the Nonſuit, and *therefore* if they had given a Verdict for the Damages, this *had been as an Inqueſt of Office*, upon which no Attaint would lie, if the Damages had been exceſſive; and therefore there is no Default in the Jury, or Damage to the Plaintiff, if this be ſupply'd by a Writ of Inquiry; *but where the Jury gives a Verdict*, and does not give Damages, there ſuch a Defect ſhall not be ſupplied; for if the Jury had given Damages, this was as *Part of their Verdict upon which an Attaint lay, if* they are *exceſſive*; and therefore this ſhall be ſupplied by a Writ of Inquiry, which is but an Inqueſt of Office; if the Damages are exceſſive, the Party ſhall be oppreſſed without the Benefit of an Attaint, and therefore according to Cheyney's Caſe, ſuch Default ſhall not be ſupplied by a Writ of Inquiry. Skin. 595. in S C. —— 5 Mod. 118. Herbert v. Waters, S. C. and a Writ of Inquiry was granted. —— 1 Salk. 205. pl. 3 S. C. —— Comb. 344. S. C. the Writ was granted. —— 12 Mod. 85. S. C. accordingly. —— Ld. Raym Rep. 59. S. C. —— Carth. 362 S. C. and the Writ was granted after much Debate.

18. *For*

In which Caſe ſuch a Default had been ſupplied after by a Writ of Inquiry.

8. *For* if upon a *Demurrer upon Evidence* the Jury be diſcharged, there ſhall be a Writ of Inquiry; for the Jury does not give any Verdict, and therefore they cannot aſſeſs the Damages and the ſame Reaſon holds upon a Nonſuit, per Holt. Skin. 595. in Sir James Harbert's Caſe.

1 Cr. 143. and Holt Ch. J. cited 1 Roll Rep. 272. Brampton's Caſe, and 2 Roll 112. as Caſes [Rep] in Point; Skin. 596. Sir James Harbert's Caſe. —— 5 Mod. 119. S. C. & S. P.

12 Mod 85. S. C. & S. P. for the finding Damages was Part of the Iſſue; Per Holt Ch. J. ——

19. *But* otherwiſe *where they give a Verdict*; for there a Defect of aſſeſſing Damages ſhall not be ſupplied by a Writ of Enquiry, for in ſuch Caſe the Jury have miſdemeaned themſelves; for if they had given Damages too high &c. they might be attainted, and they are bound to give Damages, but in the other Caſes it is otherwiſe; Per Holt Ch. J. Skin. 595. in Sir James Harbert's Caſe.

Ld. Raym. Rep. 59. S. C. & S. P. per Holt Ch. J.

Holt Ch. J. ſaid, that notwithſtanding this Caſe of Burton v. Robinſon, he remembered a Caſe about 14 Years ago, where a Writ was awarded in ſuch Caſe, 5 Mod. 77. in Caſe of Harcourt v. Weekes. —— S. C. of Burton v. Robinſon, cited by Holt Ch. J. Ld. Raym. Rep. 60. but ſaid, that it was contrary to Law.

20. In a *Detinue of Charters* where they did not inquire of the Value of the Charters, Holt ſaid, he had heard that there was a Writ of Enquiry granted, but that he was not ſatisfied with it, for the Reaſon which is given in Chevney's Caſe. 10 Rep. 119. per Holt Ch. J. 596. cites it as the Caſe of Burton and Robinſon.

21. Action of *Treſpaſs*, and the Defendant juſtifies by Virtue of the Statute of 43 *Eliz. for the Poor's Rates* &c. the Plaintiff was nonſuited but no Damages were found; therefore Counſel moved for a Writ of Error; Holt Ch. J. ſaid he remembered a Caſe, where upon an Action of *Detinue* and upon Iſſue Non detinet, the Jury did not inquire of the Value and afterwards we granted a Writ of Inquiry. It is every Day's Practice, that if the Plaintiff in *Replevin* be Nonſuit, the Jury ſhall find Damages and Coſts for the Avowant. 5 Mod. 76. Mich. 7 W. 3. Gardner v. Hobbs.

22. Where *Judgment is by Default* the Court may give the Damages without putting the Party to the Trouble of a Writ of Inquiry. 10 Mod. 274. Hill. 1 Geo. B. R.

23. The Plaintiff *declared on Four Counts*, and the *Defendant demurred to one, and pleaded to Iſſue as to the other Three*, and the *Plaintiff joined* in Demurrer, *and had Judgment and a Writ of Inquiry, reciting a Judgment de Præmiſſis, and that Recuperare debet Damna Occaſione præmiſſorum*; and now it was *moved* in Arreſt of Judgment, *that a Writ of Inquiry would not lie on this Judgment, until Nolle Proſequi was entred as to the other Three Iſſues or a Venire to try them*; for then, and not before, a Writ of Inquiry might be had to inquire of the Damages upon the Judgment in Demurrer; but in this Caſe the *Plaintiff* having *remitted the Damages, as to the other three Iſſues, before the Judgment was entered on the Demurrer*, it was held good; and the Maſter the Office affirmed, that was the proper Method of Proceeding. 8 Mod. 108. 108. Mich. 9 Geo. Fleming v. Parker.

24. In an Action on the Caſe on ſeveral Promiſes the Plaintiff had *Judgment by Default*. It was aſſigned for Error that there was no Writ of Inquiry; and it ſeems the Caſe was, that the Inquiry of Damages was made by a Parcel of People got together of their own Heads, whom the Sheriff had no Authority to convene for that Purpoſe, ſo that it was urged that what they did, ſhould be of no Account. But the Court held that the Want of a Writ of Inquiry was aided by the

late

The Act for Amendment of the Law. Gibb. 162, 163. Mich. 4 Geo. 2. B. R. Mallory v. Jennings.

25. In an Action of *Covenant*, *Three Breaches* were *aſſigned*, *one* whereof *was confeſſed*, and the other two controverted, and a Venire Facias was awarded to try the Iſſues joined between the Parties, and to aſſeſs the Plaintiff's Damages as to the Breach confeſſed. Upon the Trial, Plaintiff obtained a Verdict; *Damages* were *neglected to be aſſeſſed as to the Breach confeſſed*, which was for Non-payment of Rent. A Writ of Inquiry was moved for to aſſeſs the Damages upon the Breach confeſſed. The Court granted a Rule Niſi, which was afterwards made abſolute. Barnes's Notes in C. B. 148. Mich. 7 Geo. 2. Townſend v. Pool.

(C. a) Inquiry of. In what Caſes by Default.

1. *IN Treſpaſs the Defendant appeared, and pleaded, and departed in deſpite*, and after Plea pleaded, a Writ ſhall iſſue to enquire of all the Damages, but after the Plaintiff releaſed the Departure. Br. Brief de enquire &c. pl. 3. cites 9 H. 5. 15. Br. Default, pl. 29. cites S. C.——Br. Departure, in Deſpite, pl. 4. cites S. C.

2. In Treſpaſs the Defendant *acknowledged the Treſpaſs, and juſtified*, and after *made Default at a Day of Adjournment*, and the Inqueſt was awarded by Deſault, and there is no Writ to inquire of the Damages. Br. Brief de enquire &c. pl. 4. cites 9 H. 5. 15.

3. In *Detinue* the Plaintiff and Garniſhee are at Iſſue, and *at Niſi Prius the Garniſhee made Default*; Judgment ſhall be given by his Default, and the Inqueſt ſhall not be taken upon the Iſſue, becauſe by Default the Iſſue is waived, and the *Inqueſt ſhall inquire of the Damages*, and the Garniſhee ſhall not have Attaint; Per Martyn & tot. Cur. Br. Enqueſt. pl. 57. cites 8 H. 6. 5.

4. Treſpaſs againſt *three*, who *imparled* till another Term, and at the Day *one made Default*, therefore a Writ of Inquiry of Damages was awarded againſt him, and yet *the other two pleaded a Plea in Bar, and intitled the third to all*, quod nota. Br. Brief de enquire &c. pl. 5. cites 19 H. 6. 8.

5. In *Treſpaſs* the *Defendant imparled* till another Term, and at the Day made Default, and the Plaintiff had a Writ of Inquiry of Damages. Br. Brief de enquire &c. pl. 14. cites 1 H. 7. 11.

6. In *Treſpaſs againſt two*, they *pleaded in Bar*, and *in another Term the one made Default*, Writ *of Inquiry of Damages ſhall be awarded againſt him to continue the Proceſs againſt him, but the Writ ſhall not Iſſue*; for the firſt Jury ſhall tax Damages againſt both, if they paſs for the Plaintiff, and then the Writ of Inquiry ſhall never iſſue, and if they paſs againſt the Plaintiff, then the Writ of Inquiry ſhall iſſue &c. quod nota. But where the firſt Jury aſſeſs Damages, the ſecond Jury ſhall not aſſeſs Damages. Br. Diſcontinuance de Proceſs; pl. 25. cites 21 H. 7. 40.

(D. a) Inquiry of. Writ quaſh'd or ſuperſeded; for What; and When. And Notice; In what Caſes; When; and How.

1. ERROR aſſigned upon a Judgment in Shrewsbury Court; Firſt, Becauſe upon the Writ of Enquiry of Damages *no Day was given* to the Plaintiff. Secondly, Upon the Return of the Writ of Enquiry &c. It was *entered Continuato Proceſſu Jurata ponitur* &c. in Reſpect that it is a proper Continuance for a Pannel to try an Iſſue and not upon an Inqueſt of Office, as ſo it is. But that *ought to be returned to be executed, or* that the *Sheriff hath not ſent the Writ*, becauſe it is not yet executed. And for theſe Errors Judgment reverſed. Noy. 120. Harrington's Caſe.

2. Error of a Judgment in B. R. in *Trover*, where *the Bill was for* 400 *Buſhels of Pippins*; and the *Declaration was for* 40 *Buſhels*, and *Judgment* being given *on Nihil dicit*, the *Writ of Inquiry recites the Trover of* 400 *Buſhels and Damages found to* 40 *l.* All the Juſtices and Barons held this to be Error; for *the Judgment ought to be warranted by the Declaration on the Record*; and Rule was given to reverſe the Judgment. Cro. J. 294. pl. 14. Mich. 9 Jac. in Cam. Scacc. Cleyton v. Taylor.

3. *Judgment* in an Inferior Court was reverſed, becauſe being *by Default* the Writ of Inquiry of Inquiry of Damages was only by two Jurors, and Cuſtom alleged to warrant it. But though the Writ is per Sacramentum proborum & legalium Hominum, and not Duodecim, as a Venire, yet the Court reſolved that there cannot be leſs than Twelve. Vent. 113. Paſch. 23 Car. 2. B. R. Anon.

See Tit. Trial (H a. 4) pl. 11. S. C. and the Notes there.

4. In an *Attachment upon a Prohibition*, it was *alleged that the Defendant had ſued Poſt Prohibitionem* inde ſibi Deliberatam. The *Defendant made Default*, and upon a Writ of Inquiry of Damages, the *Jury gave* 100 *l. And for theſe Damages and* 28 *l. Coſts* Judgment was given for the Plaintiff in Ireland, who was Defendant here; the *Error aſſigned* was, *that the Jury upon the Writ of Inquiry did not come de Vicineto of the Spiritual Court, where the Proſecution was after the Prohibition*, but elſewhere; and per Cur. for this Reaſon the Inquiſition is void, and the Judgment was reverſed. Hill. 31 & 32 Car. 2. B. R. 2 Jo. 128. Aungier v. Brogan.

13. No Motion for a New Trial, or to ſet aſide a Writ of Inquiry of Damages, *after Motion in Arreſt of Judgment.* 12 Mod. 158. Mich. 9 W. 3 L'Iſle v. Amſtrong.

6. *In C. B. they never give a Day upon a Writ of Inquiry*, nor is it neceſſary; for nothing is to be done but to aſcertain the Damages and it no Diſcontinuance; and though upon the Writ of Inquiry it was mentioned to be *Per Sacramentum duodecim*, and did *not ſay Proborum & Legalium Hominum*, yet it was held good; for the Entries in C. B. are always ſo. Ld. Raym. Rep. 388. Mich. 10 W. 3. R. R. Northcott v. Underhill.

1 Salk. 199. S. C. but S. P. does not appear.

7. In *Trover* for ſeveral Loads of *Wood* and Judgment by Default, and a Writ of Inquiry executed; it was moved to ſet aſide the Writ of Inquiry, upon Affidavit that the *Sheriff refuſed to receive any Evidence of the Value* of the Wood, but directed the Jury to find the full Damages declared of, and for that it was ſet aſide upon Payment of Coſts. 12 Mod. 317. Mich. 11 W. 3 Earl of Kent v. Walters.

8. *Con-*

8. *Convenient Notice* is as Requiſite to the executing a Writ of Inquiry, as for a Trial; agreed per Cur. and that by a late Rule of Court *if it is to be executed in London, or in Middleſex, and the Defendant doth not live above Forty Miles from thence, Eight Days Notice will ſuffice; but if* he lives *above Forty Miles* from thence, then *Fourteen Days Notice ought to be given*; becauſe at Twenty Miles per Day, a Man may come to London from any Part of England in Fifteen Days. Mod Caſes 146. Paſch. 3 Ann. B. R. Williams v. Jackſon.

9. 4 & 5 *Annæ cap.* 16. *All Statutes of Jeofails ſhall extend to* Judgments entered upon Confeſſions, Nihil dicit, or Non ſum Informatus, *in any Court of Court of Record; and no ſuch Judgment ſhall be reverſed, nor any Judgment upon any Writ of Inquiry of Damages executed thereon, be ſtayed or reverſed for any Imperfection, Omiſſion, Defect, or Thing which would have bien aided, or cured by the ſaid Statutes of Jeofails, if a Verdict had been given in the Action, ſo as there be an Original Writ and Warrants of Attorney duly filed.*

10. It was moved in Arreſt of Judgment that there was *not Fifteen Days between the Teſte and the Return* of the Writ of Inquiry; for in all *Judicial Writs*, where you proceed by Original, there muſt be Fifteen Days between the Teſte and Return, not only in the Writ, but alſo in the ſubſequent Proceſs. And accordingly the Court (Holt abſente) inclined that it was ill. Sed adjornatur 11. Mod. 260. pl. 15. Mich. 8 Ann. B. R. Gately v. Gillingham.

11. It was declared by the Court, upon a Motion, that all *Notices* of Trial, and of Inquiries, and Countermands of Notices, *ought to be in Writing*, and that all Verbal Notices were void. Rep. of Prac. in C. B. 3. Paſch. 11 Ann. 1712. Anon.

12. Upon a Motion in Relation to the due Execution of a Writ of Inquiry of Damages, the Court held, that *after an Interlocutory Judgment ſigned, the Plaintiff need only give Common Notice* of the Execution of a Writ of Inquiry, *notwithſtanding the Judgment was ſigned above a Year before.* Rep. of Prac. in C. B. 4. Trin. 11 Ann. 1712. Anon.

But in ſuch Caſe the Court ſet aſide a Writ of Inquiry, becauſe *executed above a Year after interlocutory Judgment, and a Term's Notice not given.* The Court ſet aſide the Inquiry, becauſe a Term's Notice ſhould have been given; And ſo in all Caſes of Notices, where there have not been any Proceedings within a Year, a Term's Notice muſt be given. Rep. of Prac. in C. B. 97, 98. Hill. 7 Geo. 2. Paul v. Gledhill. —— Barnes's Notes in C. B. 206, 207. S. C. accordingly.

13. In this Caſe the Queſtion was, whether upon the Execution of a Writ of Inquiry of Damages *in Dower*, Notice of executing that Inquiry ſhould be given; and upon hearing Counſel on both Sides, the Court were of Opinion that *Notice ought to be given*, and for Want thereof, ſet aſide the Writ of Inquiry; for *upon any Writ of Inquiry whatſoever*, it is very reaſonable that the Party ſhould have an Opportunity of defending himſelf in Reſpect to the Meaſure of Damages. Rep. of Prac. in C. B. 14. Mich. 4 Geo. 1. Strangeways v. Aſcough.

14. It is admitted, that *in Covenant*, where Damages are to be recovered, *the Jury upon a Writ of Inquiry are the proper Judges of the Quantum* of the Damages; and for that Reaſon the *Court will not ſet aſide their Inquiry where they give ſmall Damages*; but it is *otherwiſe where the Covenant is for Payment of Money, and the Sum is aſcertained*, becauſe in ſuch Caſe the Sum being certain, the *Jury cannot leſſen the Damages*; and this is the conſtant Difference in ſuch Caſes, and it is the ſame as if an *Aſſumpſit* had been brought *for Money upon a Note under Hand*, for there the Jury cannot mitigate the Damages; if they do the Court will ſet their Verdict aſide. 8. Mod. 197, 198. Mich. 10 Geo. in the Caſe of Parr v. Purbeck.

15. It

Defendant appeared by his Attorney, and after Judgment Plaintiff gave Notice of the Execution of a Writ of Inquiry *to Defendant himself*, (and *not to his Attorney*) which was held bad Notice, and the Writ of Inquiry and Inquisition taken thereupon were ordered to be set aside. Notes in C. B. 215. Mich. 10 Geo. 2. Lee v. Bradford.

15. It was held by the Court that Notice of Trial, or Inquiry must be *delivered to the Defendant, where the Aitorney is not known, or not to be met with.* Rep. of Prac. in C. B. 62. Hill. 4 Geo. 2. Higgins v. Stuart.

16. Action upon the *Case for Goods sold* and delivered upon the Execution of the Writ of Inquiry, *Jury allowed* Plaintiff 6 l. 5 s. *Interest for the Balance of the Account due to him.* Defendant moved to set aside the Inquisitiou; and Court were of Opinion that Interest could not be allowed in any Case, except upon Promissory Notes and Bills of Exchange, and that the Inquisition ought to be set aside. But by Consent the 6 l. 5 s. Part of the Damages were ordered to be remitted by the Plaintiff to save the Expence of a New-Inquiry. Barns's Notes in C. B. 149. Pinock v. Willet.

17. An Action upon the *Case was brought on a Promissory Note*, to which the *Defendant*, with Leave of the Court, had *pleaded doubly*, viz. *Non Ass.* and *Non Ass. infra sex annos.* Plaintiff took *Issue upon the Non Ass.* and *replied an Original as to the Non Ass. infra sex annos.* And thereupon *Issue* was *joined upon Nul tiel Record.* Plaintiff, upon the last Issue, obtained Judgment; and thereupon proceeded to execute a Writ of Inquiry of Damages, without Trial of the first Issue. Defendant moved to set aside the Writ of Inquiry; and the Court, upon hearing Counsel on both Sides, ordered the Writ of Inquiry and Inquisition taken thereon to be set aside. Barns's Notes in C. B. 150. Hill. 7 Geo. 2. Pryor v. the Earl of Islay, Executor of the Earl of Suffolk.

18. A Motion to set aside an Inquiry, because *one of the Defendants was not served with Notice of the Execution* of the Inquiry. Per Cur. where the Proceedings are according to the Act 12 Geo. 1. and no Attorney appears, each Defendant ought to have Notice; so the Inquiry was set aside Rep. of Prac. in C. B. 94. Mich. 7 Geo. 2. Kingdon v. Herne and Frost.

Barnes's Notes in C. B. 207. Pasch. 7 Geo 2 S. C. accordingly.

19. A Motion to set aside a Writ of Inquiry for *Uncertainty in the Notice*; the Notice given was, that the Writ *should be executed at a certain Hour* (mentioned in the Notice) *or as soon after as the Sheriff could attend*; the Court unanimously agreed that this Notice was irregular for the Incertainty, and granted a Rule to shew Cause, which was afterwards made absolute. Rep. of Prac. in C. B. 99. Pasch. 7 Geo. 2. Hannaford v. Holman.

20. Notice of the Execution of a Writ of Inquiry of Damages was *given for a particular Day, but no Hour was mentioned.* Defendant moved to set it aside, and obtained a Rule Nisi; Plaintiff, on shewing Cause, swore that *Defendant, after the Notice* given, had *declared he would make no Defence.* Court was of Opinion, that this was not sufficient to make the Notice good, and therefore set aside the Inquiry, but without Costs. Barnes's Notes in C. B. 204. Mich. 7 Geo. 2. Langstaffe v. Lamb.

21. *Plaintiff replied to a Plea of a Record of a former Recovery of the same Debt, quod non habetur aliquod tale Recordum, and gave Notice upon the Back of the Replication to execute a Writ of Inquiry* of Damages, *in Case Judgment went for him upon the Issue of Nul tiel Record.* Defendant mov'd to *set aside* the Inquiry *for want of due Notice*, and insisted that this Case is not within the Letter of any of the Rules of Court obliging Defendants to take short Notice. A Rule was made to shew Cause, which was afterwards discharged upon hearing Counsel on both Sides. If this Case be not within the Letter of the Rules, it is within their Intention

Intention, and is warranted by the conſtant Practice of the Court. Barnes's Notes in C. B. 174. Hill. 8 Geo. 2. Long v. Lingood.

22. Notice was given *to execute* a Writ of Inquiry of Damages, *at the Sheriff's Office in Northampton* *, *between the Hours of Ten and Two.* Upon hearing Counſel on both Sides, the Court was of Opinion, that the Notice was bad, both as to Place and Time. It *ſhould have* been *expreſſed* at *what Sign, or whoſe Houſe*, the Sheriff's Office was kept at; and the *Time* is too extenſive, which *ought to be confin'd to two Hours.* The Writ of Inquiry and Inquiſition taken thereupon, were ſet aſide. Barnes's Notes in C. B. 211. Hill. 8 Geo. 2. Squire v. Almond.

Rep of Pract. in C. B. 113. S. C. accordingly. — Same Points cited as held accordingly, Comyns's Rep. 551. — S. C.

cited Barnes's Notes in C. B. 215. * Notes in C. B. 207. Paſch. 7 Geo. 2. Foſter v. Smales, S. P. and ruled to ſhew Cauſe why the Inquiry ſhould not be ſet aſide. — So where the Notice was of executing it between 11 & 2. Barnes's Notes in C. B. 210. Trin. 7 & 8 Geo. 2. Robinſon v. Philips.

23. Notice of the Execution of the Writ of Inquiry was *twice continued.* Court held the ſecond Continuance bad. A Notice can be continued but once. The *firſt Continuance was* alſo bad, *not* being *ſerv'd till within an Hour before the Time* appointed for the Execution of the Writ of Inquiry; it *ſhould have been ſerv'd two Days before.* Notes in C. B. 210. Mich. 8. Geo. 2. Price v. Bambridge.

24. Notice was given of the Execution of a Writ of Inquiry of Damages, *at the Three Tons in Brook-Street*, without ſaying in Holborn, or elſewhere, though there are three Streets of that Name in Com' Midd'. On a Motion to ſet aſide the Writ of Inquiry for this Defect in the Notice, it was urged for the Plaintiff, that the Three Tons in Brookſtreet, *where the Sheriff of Middleſex conſtantly executes Writs of Inquiry in Vacation Time*, is a well known Place to every Practiſer; but per Cur. the Notice is not ſo certain as it ought to be, the Inquiry and Inquiſition thereupon taken, muſt be ſet aſide. Barnes's Notes in C. B. 214, 215. Trin. 10 Geo. 2. Le Mark v. Newnham.

Comyns's Rep. 551. S. C. and the Writ was ſet aſide, by the Opinion of all the Court. — Rep. of Pract. in C. B. 133. S. C. accordingly, but

if it had been ſaid in Brook ſtreet Holborn, it would have been good. — Plaintiff gave Notice of the Execution of a Writ of Inquiry of Damages *at the Sign of the Bell*, *without* making *mention of any Town*, which Notice was held inſufficient, and the Inquiry ſet aſide. Barnes's Notes in C. B. 218. Paſch. 11 Geo. 2. Hollis v. Weſtbury.

25. Notice of executing Writ of Inquiry of Damages *at the Moot-Hall in the Caſtle-Garth*, *without ſaying in what County*, was held inſufficient, and the Inquiry ſet aſide. Barnes's Notes in C. B. 216. Mich. 11 Geo. 2. Lowes v. Smith in Northumberland.

26. Defendant had obtained a Judge's *Order for Time to plead, pleading iſſuable, and taking Notice of Trial within Term, or if he ſhould not plead, taking the like Notice of executing Writ of Inquiry.* The *Time for pleading expired February 5*, when *Defendant not pleading*, *Plaintiff ſigned Judgment*; and *February 7*, *gave Notice to execute Inquiry on the 8th.* Defendant moved to ſet aſide the Inquiry for Inſufficiency of Notice, urging, that the Plaintiff ought to give as much Notice as he could. Per Cur. Plaintiff might have given Notice on the 6th; *ſhort Notice* ſhould be, at leaſt, as much as is ſufficient to countermand a Notice, *viz. two Days.* Let the Inquiry be ſet aſide without Coſts. Barnes's Notes in C. B. 217. Hill. 11 Geo. 2. Butler v. Johnſon.

27. Rule to ſhew Cauſe why *Writ* of Inquiry, *returnable on a general Return* (and *not at a Day certain*, as it ſhould have been, the *Proceeding being by Bill*) ſhould not be ſet aſide, diſcharged, becauſe this is Matter of *Error*, *appearing upon the Record*, and not Irregularity; and whether it is helped, or no, by the Statutes of Jeofails, is not now the Queſtion. Barnes's Notes in C. B. 152. Mich. 12 Geo. 2. Elmes v. Tomlinſon.

28. Motion to ſet aſide Inquiry for Irregularity, Notice being given *to execute it at Eleven o'Clock*, without naming any other Hour; Cur. held it regular, provided it was executed before Twelve; which appeared by Affidavit. Court diſcharged the Rule to ſhew Cauſe. Barnes's Notes in C. B. 218. Mich. 12 Geo. 2. Laſt v. Denny.

(E. a) Writ of Inquiry. Executed. At what Time or Place, and what muſt be proved then.

Le. 178. pl. 251. S. C. but S. P. does not appear.——Cro. E. 146. pl. 9. S. C. but S. P. does not appear.

1. IN Trover and Converſion of 40 Loads of Corn, the Defendant as to 20 Loads pleaded not Guilty, and as to the Reſidue, a Special Plea to which the *Plaintiff demurred*, and it was adjudg'd for him; whereupon iſſued a Writ of Inquiry of Damages; It was moved, that the Writ of Inquiry ought not to be, becauſe *the Iſſue was yet untried*; It was ſaid on the other Side, that it is in the Diſcretion of the Court to grant ſuch Writ or not, which Wray granted, but ſaid, it is *uſual here to grant it preſently*. Le. 141. pl. 197. Trin. 31 Eliz. Ward v. Blunt.

See tit. Proceſs (G) pl. 4. S. C. and the Notes there.

2. A Writ of Inquiry may be executed on *the ſame Day* on which it is returnable. Cro. E. 468. (bis) pl. 26. Paſch. 38 Eliz. B. R. Gawen v. Ludlow.

See tit. Proceſs (G) pl. 5. and the Notes there.

3. In a Quare Impedit, where the Writ of Inquiry was of the Value, it was executed on the Day of the Return; *but the Jury did not give their Verdict till two Days after*; adjudged good. Cited per Cur. Cro. E. 468. pl. 26. Paſch. 38 Eliz. as the Caſe of Buckler and the Queen.

Cro J 142 pl. 21. Mich. 4 Jac. B. R. Smith v. Barten. S. C. & S. P. and held the Writ well executed in London; becauſe the Covenant is founded on a Writing made in London, and adjudg'd accordingly.

4. A Writ of *Covenant* was brought *in London*, and the *Breach* was alleged *in Hertfordſhire*; the Plaintiff had Judgment upon a Nihil Dicit. By the Court, and the Prothonotaries ſaid that, the Writ of Inquiry of Damages, ſhall be awarded to London, and not to Hertford; for the Action is Law in London; though the *Thing, in which the Breach is alleged*, was *meerly local*, becauſe *Damages only* are *to be recover'd*. As in *Treſpaſs in London*, the Defendant pleads *a Releaſe* &c. *at Hertford*, that ſhall be tried at London. And that is but a Jury of Office, whereof no Attaint lies. Noy. 142. Smith v. Payter.

Yelv 151. S. C. held accordingly.——Brownl. 214. S. C. in totidem Verbis——S. C cited. Vent. 347. in Caſe of Reve v. Cropley.

5. Upon Judgment in *Treſpaſs* on *non ſum Informat'* and a Writ of Inquiry, it was moved, that the Writ ſhould not be filed, becauſe the Plaintiff on the Inquiry, did *not prove that they were his Goods*, but *only the Value* of them, and a Difference taken at the Bar, between an *Action confeſs'd*, and a Non ſum Informat' but per Cur. both Caſes are alike, and the Plaintiff is not bound to prove his Property in either of them, for the Writ commands the Value only to be inquired of, and if the Plaintiff ſhould be bound to prove his Property, and fail thereof, it would be in *Deſtruction of the firſt Judgment*, which cannot be. But it is otherwiſe where *Not Guilty* is pleaded, for then the Treſpaſs is deny'd, which muſt be prov'd and try'd by the Jury, and in that Caſe both the Value and Property do come in Queſtion. Cro. J. 220. pl. 1. Paſch. 7 Jac. B. R. Goodwin v. Welch and Over.

6. Upon

6. Upon a Writ of Inquiry upon a *Judgment by Default* upon an *Assumpſit* (if it be inſiſted upon) the Plaintiff muſt *prove his Debt*; for by the Judgment the Plaintiff is to recover; but the *Quantum is to be inquired* into by the Jury; and if the Plaintiff is to recover, and if the Plaintiff proves nothing, he muſt be content with a Penny, or ſome ſuch ſmall Matter of Damages. 2 L. P. R. 67.

7. An *Indeb. Aſſ.* was brought *for* 20 *l. as Executor* to A. for ſo much of the ſaid A's *Money, had and receiv'd* by the Defendant in his Life-time; whereupon the Plaintiff had *Judgment by Nihil Dicit*, and upon a Writ of Inquiry, (the *Plaintiff not being provided to prove the Debt*, ſuppoſing it to be confeſſed by the Judgment) the *Jury found but* 2 *Pence Damages*. Ventris moved to ſet aſide the Writ of Inquiry, for that the Plaintiff was not obliged in this Action to prove the Debt at the Executing of the Writ of Inquiry, no more than if he had brought an *Action of Debt*, cites Cro. J. 220. and Yelv. 152. Per Cur. this being in an *Action upon the Caſe*, which *lies in Damages*, the Debt ought to have been proved, and ſo let it ſtand. Vent. 347. Hill. 31 & 32 Car. 2. B. R. Reve v. Cropley.

8. Upon executing a Writ of Inquiry the *Defendants having confeſſed* is not ſufficient, but the Plaintiff muſt prove the Quantum and Value. 2 Show. 86. Hill. 31 & 32 Car. 2. B. R. Hodder v. Saunders.

9. A Writ of Inquiry was *made returnable after the Term, but was executed within the Term*; and the Court inclined to amend it. Carth. 79. Mich. 1 W. & M. in B. R. Hammond v. Purcell.

10. If there be *Demurrer to part*, and *Plea to iſſue to part*, and *Judgment upon the Demurrer before* the *Iſſue* tried, the Plaintiff, if he pleaſes, may *enter a Non Pros.* upon the Iſſue, and take a Writ of Enquiry of Damages upon the Judgment on Demurrer, but it is not to be taken out till after Non Proſ. entered on the other; for if they will proceed upon the Iſſue, the Jury that try it ought to inquire of the Damages on the other; and here, becauſe a Writ of Enquiry was taken out without entering of Non Pros' that Matter was moved in Bar of final Judgment, and thereupon it was ſtayed till they moved of the other Side. Per Cur. 12 Mod. 558. Mich. 13 W. 3. Anon.

11. If Plaintiff delay the executing a Writ of Inquiry, till a *Year after the interlocutory Judgment* he cannot do it after without a *Sci. Fa.* Per Holt Ch. J. 12 Mod. 500. Paſch. 13 W. 3. How v. Acton.

12. In this Caſe it was held that *in all Superior Courts the Judge ſends his Precept to the Sheriff* to enquire of Damages, *but in London* [and] *in all other inferior Courts, an Inqueſt is ſummoned in Court, and the Court takes the Inquiſition* of Damages. 3 Salk. 400. pl. 2. Mich. 1 Ann. B. R. Eaſt v. Eſſington. 1 Salk. 130; pl. 14. S. C. but S. P. does not appear.

13. After a *Judgment by Default* for the Plaintiff and a *Writ of Inquiry* brought, it was moved that it might be *executed before the Ch. J.* at the Sittings at Guildhall in London, the Action being brought for 20000 l. and a Rule was made accordingly. 8 Mod. 240. Paſch. 10 Geo. Eaſt India Company v. Ellis.

14. Plaintiff had given *Notice of executing* a Writ of Inquiry at St. Albans, Com' Hertf' and *both Parties attended* with Counſel and Witneſſes on May 2, 1739. But when the *Under-Sheriff* was about to execute the Writ, he *perceived* it to be *returnable laſt Term*, and *would not proceed*. Defendant moved for Coſts upon Affidavit of great Expence, and had a Rule to ſhew Cauſe. Upon ſhewing Cauſe it was urged for the Plaintiff, that this Court had never yet given Coſts for not proceeding to execute Writs of Inquiry according to Notice. And this is a meer Miſtake; Plaintiff was diſappointed as well as Defendant. Per Cur. though there has been hitherto no Rule for Coſts in this Court

Coſts in this Court, yet Notices of Inquiry ſtand upon the ſame Reaſon as Notices of Trial, and the Court of King's Bench grants Coſts in both Caſes; and were this a Common Caſe, Coſts could not be granted; but it appearing that the Inquiry was returnable long before the Day appointed for the Execution thereof, let the *Plaintiff pay Coſts*; it is not reaſonable the Defendant ſhould ſuffer by the Miſtake of the Plaintiff's Attorney, and let a general *Rule* be drawn up, *that Coſts be paid for the future where Inquiries are not executed purſuant to Notice*, Barnes's Notes in C. B. 152. Paſch. 12 Geo. 2. Ketle v. Bromſall.

15. Plaintiff executed a Writ of Inquiry; whereupon the Jury *found no Damages*; and Plaintiff *executed a Second Writ* of Inquiry *without quaſhing the firſt*. And on the Second the Jury *found a Half-penny* Damages. Defendant moved to ſet aſide the Execution of the Second Writ, and had a Rule to ſhew Cauſe, which Rule was made abſolute; the Court being of Opinion that the Second Writ was irregularly iſſued, the Firſt pending, and not returned. Barns's Notes in C. B. 154. Trin. 13 Geo. 2. Bunting v. Teaſdaile.

(F. a) Inquiry of. New Writ granted; or neceſſary; in what Caſes.

1. WASTE was brought *by J. Archdeacon of D. of the Leaſe of his Predeceſſor*; the *Proceſs iſſued to the Sheriff to inquire of the Waſte*, and he made Return. The *Original was, That the Defendant fecit Vaſtum in Tenementis, which J. S. Predeceſſor of the Plaintiff, leas'd to the Defendant ad exhæredationem ipſius Archidiaconi*, but it did not determine if the Waſte was in the Time of the Predeceſſor, or in the Time of the Plaintiff, and the *Writ of Inquiry* of the Waſte *was* quod *Venire fac.* coram te Twelve &c. *qui querentem nulla Affinit. attingant*, and *did not ſay eundem querentem nec defendentem nulla Affinitate attingunt*, and therefore ill; for in this Writ the Sheriff is Judge and Officer, and the Party may challenge, and have Attaint; for which Default, and becauſe *it is not expreſſed in the Original, nor in the Verdict, if the Waſte was in the Time of the Predeceſſor, or in the Time of the Plaintiff*, therefore *Mention was made in the Roll of thoſe Matters by Special Entry, and another Writ awarded to inquire of the Damages, and thoſe Matters ſpecially put in the Writ*; quod nota. Br. Waſte, pl. 58. cites M. 2 H. 4. 2.

Ibid. Rhodes J. cited S. P. held accordingly in Dower brought by the Counteſs of Derby.

2. In *Treſpaſs* by a poor Woman for breaking her Cloſe, *Continuando for ſix Years*. Upon a Writ of Inquiry, the *Jury found only* 10 *s. Damages*; *whereas the Land was worth* 4 *l. a Year*; and thereupon ſhe moved the Court for a *Melius Inquirendum*, but it *was denied*; for ſo there might be infinite Inquiries. But it is *ſometimes granted upon the Motion of the Defendant*, where the Damages are exceſſive, or ſome Miſdemeanors are alleged in the Plaintiff, but never to the Plaintiff, becauſe the ſuing forth the Writ is his own Act. 2 Leon. 214. pl. 272. Mich. 30 Eliz. C. B. Anon.

3. In an *Aſſiſe of Novel Diſſeiſin*, the Diſſeiſin was found, and Damages taxed by the Recognitors; the *Diſſeiſor, after this Verdict, and before Judgment, cut down Timber* to the Value of 10 l. the Recognitors may be re-aſſembled to increaſe the Damages. By all the Sages of the Law. I underſtand this Caſe to have been before the Recognitors were diſcharged by the Court, and the Verdict entered. Jenk. 6. pl. 9.

4. The

4. The Court was moved for a new Writ of Inquiry into London, and to ſtay the filing of a former, becauſe of *Exceſſive Damages*, but it was denied. 1 Mod. 2. pl. 3. Mich. 21 Car. 2. B. R.

5. A *new Writ of Inquiry was* granted, where the Damages given were *unreaſonably ſmall.* 2 Show. 20. pl. 203. Paſch. 34 Car. 2. B. R. Creſwick v. Saunders.

8 Mod. 196. Parr v. Purbeck. S. P. ——Ibid. 213. Parr v. Nibbet. S P ——2 Le. 214. pl. 272. S. P. but deny'd to be granted, for ſo there might be infinite Inquiries. Anon.——Rhodes J. cites the Counteſs of Derby's Caſe, in Dower. Ibid.

6. In all Caſes where Attaint would lie againſt the Petit Jury for exceſſive *Damages*, there, if no Damages be aſſeſſed, ſuch an Omiſſion ſhall not be ſupplied by a new Inquiry. 12 Mod. 12. Mich. 3 W. and M. Germin & Ux' v. Orchard cites 11 Co. 119. a.

7. In *Covenant to pay* 100*l. and that upon Default the Covenantee might enter and take the Profits*; the Defendant *pleaded Entry and Prizal del Profits in Bar*, and *Judgment was for the Plaintiff upon Demurrer*; and upon the Writ of Inquiry the Jury gave Damages; and upon Motion a Writ of Inquiry was awarded; for Debt might have been brought upon this Covenant, it being to pay a Sum certain, and this is not like an Iſſue where the Jury are to give no more Damages than are proved. But here the Jury are to give the Whole, unleſs the Defendant proves ſomething in Mitigation, which was not done in this Caſe; therefore, though the common Rule holds, That no new Trial, or new Writ of Inquiry, ſhall be for too ſmall Damages; yet there being a Contrivance in this Caſe, it differs. 2 Salk. 647. pl. 17. Mich. 10 Will. 3. B. R. Anon.

8 Mod. 197. Arg. cites S. C. and the Court looking upon the firſt Jury's giving ſmall Damages to be a Contrivance of theirs, awarded a new Writ; Yet they held the Common Rule to be as in the principle Caſe, and ſaid, that otherwiſe this Inconvenience might follow, viz. that the ſmall Damages given by the ffrſt Jury, might influence the ſecond Jury to give greater.

8. In an Action of *Covenant for Non-Payment of Rent reſerved* upon a Leaſe for Years, there was Judgment againſt the Defendant by Default; and upon a Writ of Inquiry executed, *the Jury gave the Plaintiff but* 1 *s. Damages*, and no more, *though he proved that the Defendant owed him* 150 *l. for Rent.* The Reaſon why the Jury gave 1 s and no more, was, for that *the Defendant took this Leaſe of the Plaintiff of a certain Piece of Ground, in which he (the Leſſee) covenanted to pay ſo much Rent; and the Leſſor covenanted, that he ſhould have ſuch a Sewer, or Dam, to keep Water*, he *(the Leſſee) intending to ſet up a Paper-Mill, but the Commiſſioners of Sewers had made the Water-Courſe ſo narrow, that he could not have Water ſufficient for his Purpoſe; and being unwilling to ſue the Leſſor upon this Covenant, he left the Land* to the Leſſor; *and thereupon another Perſon entered, and was poſſeſſed thereof, and ſet up a Corn-Mill, and the Miller paid the Rent*; and all this being known to the Jury, who were of the Neighbourhood, they gave the Plaintiff 1 s. and no more. The Court was of Opinion to ſet aſide this Writ of Inquiry; for though the ſuppoſed Breach of Covenant (on the Plaintiff's Side was true) viz. that the Defendant had not ſufficient Water to ſet up his Paper-Mill, and that had been given in Evidence to the Jury on the Writ of Inquiry; yet they could not have mitigated the Damages on that Account, much leſs when it was not given in Evidence. 'Tis true, the Leſſee left the Land for that Reaſon; and another entred and poſſeſſed it, *which Entry &c. might have been given in Evidence upon the Trial of an Iſſue joined, but not to a Jury upon a Writ of Inquiry after a Judgment upon a Demurrer; neither did the Defendant give it in Evidence to the Jury, but pretends they knew it themſelves.* 8 Mod. 196, 197. Mich. 10 Geo. Parr v. Purbeck.

(G. a) In what Caſes a Writ of Inquiry may be awarded after Reverſal and Judgment Quod Recuperet and the Record remanded; And out of what Court.

Cro J. 206. pl. 1. Paſch. 6 Jac. B. R. Faldow v. Ridge. S. C. ſtates the Demurrer to be upon the Replication, and adjudg'd

1. A. brought Treſpaſs againſt B. in B. R. and upon *Demurrer upon the Plea of Defendant*, it was *adjudged for Defendant*. But that Judgment was *reverſed in the Exchequer-Chamber* in Error, but no Writ of Inquiry of Damages could be awarded out of the Exchequer-Chamber by the Statute 27 *El.* 8. A. may ſue a Writ of Inquiry *out of the B. R.* For the firſt Judgment being reverſed, is not a Bar. Noy. 129. Falder v. Ridge.

for the Defendant, and that Judgment reverſed, and adjudg'd, that the Plaintiff recuperet, and the Record remanded; And the Law intends that Execution ſhall be done upon the Record remanded, and that all ſhall be done which appertains thereto; So that a Writ of Inquiry of Damages is to be awarded, which being return'd, there is to be a ſecond Judgment, that the Plaintiff ſhall recover the Damages found; And adjudg'd accordingly ——— Yelv. 74. S. C. but S. P. does not appear.

In the Caſe of Faldow v. Ridge, the Court of Exchequer Chamber after the Reverſal &c. gave Judgment *quod Querens recuperet* &c. But becauſe they wanted Power to award a Writ of Inquiry, which was neceſſary in that Caſe, being on a Demurrer, and therefore it was ſent back into B. R. for the Execution of that Writ, and thereupon to give Final Judgment for him. Carth. 181. Hill. 2 & 3 W. & M. in B. R. in Caſe of Philips v. Bury.

But it is otherwiſe where the *Judgment is againſt the Plaintiff in B. R. upon a Special Verdict, and* that Judgment *reverſed in the Exchequer Chamber*, for in that Caſe there being no Writ of Inquiry requiſite, the Court of Exchequer Chamber does not only give Judgment of Reverſal, but a compleat Judgment for the Plaintiff in the Action (viz.) *Quod recuperet &c.* and for this Difference the Caſes (mark'd * Infra) were cited. Carth. 181. in S. C.

* D. 343. 373. 4 Inſt. 72. Yelv. 118. F. N. B. 19. (D) 2 Saund. 224. 234. 235.

2. *And* if *Judgment* had been given in Treſpaſs *in C. B. for Defendant, and reverſed in B. R.* ſuch Courſe ſhould have been taken, as if the firſt Judgment had been given againſt the Defendant. Cro. J. 206. pl. 1. Paſch. 6 Jac. B. R. in Caſe of Faldowe v. Ridge.

3. If *Judgment* be given againſt the Defendant *in King's-Bench*, and a Writ of Error be brought thereupon, and *Judgment reverſed in the Exchequer-Chamber*, the Exchequer-Chamber muſt give the Interlocutory Judgment, Quod quer' recuperet, and this Court award the Writ of Inquiry of Damages; and ſo is Faldo and Ridge's Caſe in Yelv. 74. 2 Cr. 206. 12 Mod. 153. Mich. 9 W. 3. Anon.

(H. a) What Damages may be given on a Writ of Inquiry.

Br. Damages, pl. 121. cites S. C.

1. IN a Writ of Inquiry of Damages, the *Sheriff returned*, that he *had extended the Land of which the Diſſeiſin was made at 26 s. 8 d. per Annum*, and that from the Day of the Diſſeiſin, till the Day of the Inquiſition taken, is a Year and a Half, and taxed the Damages at 10 l. Per Danby, the Plaintiff ſhall recover the Damages taxed, for though the Land is worth but 26 s. and 8 d. per Annum, yet it *may be that the Defendant has cut Trees* upon the Land, or ſuch like, ſo that in a Year and a half upon ſuch little Land he might do 20 l. Damage, Quod Nota, good Reaſon. Br. Brief de Enquire &c. pl. 9. cites 7 E. 4. 5.

2. Where

2. Where on Writ of Inquiry *intire Damages* are given, and *for Part of which no Damages could be given*, that Part ſhall be rejected as *Surpluſage*. 12 Mod. 157. Trin. 9 W. 3. Weſt v. Cole.

3. Writ of Error of a Judgment in C. B. where the Judgment was by Default and Damages *ſeparated by Writ of Inquiry*, Per Holt, if there be two Plaintiffs, in many Caſes there may be Judgment for one Party, and Non Pros' entered for the other; and the Judgment upon the Non Pros' is, Quod eat inde ſine Die; but where the Non Pros' is only for Part of the Thing demanded it amounts to a Releaſe only for ſo much. 12 Mod. 384. Paſch. 12 W. 3. Stanhope v. Pemberton.

4. In *Covenant to pay the Rent and maintain the Tenements*, the Plaintiff had Judgment and a *Writ of Inquiry* iſſued, and was returned; it was aſſigned for Error, that the ſaid Writ could not be a Writ in this Action, becauſe it *recited all the Facts in the preſent Tenſe*, viz. that the Rent *Adhuc inſolutus* exiſtit, and the Tenements adhuc are out of Repair; whereas the Action of Covenant is only for Rent in Arrear, and Tenements not repaired at the Time of the Original ſued; but this *adhuc* in the Writ of Inquiry *refers to the Time of the Teſte of the Writ of Inquiry*. Secondly, the Plaintiff ought to recover only for the Damages that he hath ſuſtained at the Time of the Action brought; but here the Jury upon the Writ of Inquiry, have given Damages that the Plaintiff ſuſtained the bringing of the Action, viz. until the Writ of Inquiry ſued, which is erroneous, cites 2 Saund. 169. Hambleton v. Vere. Hob. 189. Harbin v. Green. Trin. 9 W. 3. B. R. Prince v. Moulton. But it was anſwered by the Ch. J. 1. That the *Writ of Inquiry recited the Declaration in Hæc Verba*, which *was well enough*. 2. That it was not like the Caſes cited, where more Damages were given then ought to have been given; becauſe the Jury in this Caſe ought to give ſo much in Damages as would repair the Tenements, and put them into ſuch Condition, as they ought to be in, and Damages alſo for the Rent; and therefore *if the Tenements were become in a worſe Condition ſince the Action brought, they ought to give Damages for them*. And the Judgment was affirmed by the whole Court. 2 Ld. Raym. 802. Mich. 1 Ann. Shortridge v. Lamplugh.

5 A Writ of Inquiry was executed, and Plaintiff moved to quaſh the Inquiſition by Reaſon of the *Smallneſs of Damages*, which was denied. Where the Jury find *any Damages*, the Inquiſition muſt ſtand; aliter had they found no Damages. Barns's Notes in C. B. 152. Mich. 10 Geo. 2. Burges v. Nightingale.

(I. a) What Things are to be Inquired.

1. UPON the executing a Writ of Inquiry of Damages in Treſpaſs for *digging a Hole* in the Plaintiff's Soil, *whereby his Land was over-flown, continuando tranſgreſſionem for nine Months*; and it was inſiſted, that they might give Evidence of a *conſequential Damage after* the nine Months, as well *as in a Nuſance* which continues for nine Months, and the Cauſe is removed, if the Effect continues after, Damage may be recovered for it; but Holt ſaid, he was not ſatisfied that the Parity would hold, for the *Giſt of the Action in a Nuſance is the Damage*; and therefore, as long as there are Damages, there is Ground for an Action; *but Treſpaſs* is one intire Act, and *the very Tort is the Giſt* of the Action; and therefore he ſaid, he doubted whether an Action would

would lie for the Continuance of a Treſpaſs, as for that of a Nuſance. Note, in Writs of Inquiry, the Jury ſet their Hands and Seals to their Verdict. 12 Mod. 519. Paſch. 13 W. 3. the Caſe of the Farmers of Hampſtead-Water.

(K. a) What may be done in or about the Executing a Writ of Inquiry.

1. THOUGH *Defence* be made upon a Writ of Inquiry, yet it *would not aid a Judgment, if irregularly obtained.* Per Holt Ch. J. 11 Mod. 262. pl. 20. Mich. 8 Ann. B. R. in Caſe of Taylor v. .....

(L. a) Inquiry of. In what Caſes it muſt be by the Firſt Jury, or not, and where by the Court.

1. IN *Dower*, the *Tenant ſaid* that *he has been ready at all Times to render* Dower *and yet is*, and the *Demandant averred the contrary*, by which *ſhe recovered Dower, and* for Damages *prayed the Inqueſt to inquire of the Damages*, and could not have it; for this is an Iſſue joined between the Parties, which ſhall be tried by Niſi Prius; per Cur. Br. Enqueſt. pl. 79. cites 34 E. 3.

2. *Decies tantum*, the Inqueſt *found that one had taken* 10 *s. and another* 6 *s. and another a Coat, Price* 40 *d. to the Damage of Ten Marks*, and becauſe the Damages were not ſevered, the Juſtices were in Opinion to have taken Inqueſt De Novo; by which the Plaintiff releaſed his Damages, and had Judgment. *Quære*, if this is intended this Inqueſt which gave the firſt Verdict, or other Inqueſt de Novo. Br. Enqueſt. pl. 6. cites 44 E. 3. 36.

Br. Default, pl. 59. cites S. C. Brooke ſays, from hence it ſeems, that if Treſpaſs be brought againſt one alone, and he pleads to Iſſue, and after makes Default, that by this the Iſſue is waiv'd, and Writ ſhall be awarded to enquire of the Damage, and where the firſt Jury aſſeſs Damages, the ſecond Jury ſhall not aſſeſs Damages.——Br. Diſcontinuance de Proceſs, pl. 25. cites S. C.——S. C. cited per Cur. 11 Rep. 6. a. —— S. C. cited Roll Rep. 30.

3. In *Treſpaſs againſt ſeveral*, they pleaded in Bar and are at iſſue, and *at another Term one of them made Default*, and *Writ was awarded to inquire* of Damages againſt him in Order to continue the Proceſs againſt him and to avoid a Diſcontinuance, *but* this Writ *ſhall not iſſue till the* Iſſue be *tried againſt the others*; for if it paſſes for the Plaintiff againſt the others, then they ſhall aſſeſs Damages for the Whole and then the Writ of Inquiry ſhall never iſſue; for the Damages are tried againſt all by the Inqueſt which paſſes upon the Iſſue. But if the Iſſue paſſes againſt the Plaintiff, then the Writ ſhall iſſue againſt him that made Default, and ſo it was done by Accord of all the Court. Quod Nota. Br. Brief. de Inquier &c. 8. cites 39 H. 6. 1.

Br. Default, pl. 95. cites S. C.

4. In *Treſpaſs*, the *Defendant imparled* and at the Day &c. *made Default*, and therefore Writ of Inquiry of Damages was awarded, Quod Nota. Br. Default pl. 72. cites 1 H. 7. 11.

5. And

5. And per Moyle, where *two plead Not Guilty ſeverally in Treſpaſs, and ſeveral Venire Facias are awarded*, the *Inqueſt which firſt paſſes ſhall aſſeſs Damages againſt all*, and the Second Jury ſhall not aſſeſs Damages, and there the other Defendant ſhall be charged of the Damages by the Inqueſt, which paſſed upon the Iſſue, to which he was no Party, but he was Party to the Original, Quod Nota; and therefore may have Attaint alſo, Et non Negatur, and in this Caſe the *Second Inqueſt ſhall not aſſeſs the Damages*, *Quod Nota*. Br. Brief de Inquier &c. pl. 8. cites 39 H. 6. 1.

6. In *Treſpaſs*, they were at Iſſue, and *Venire Facias returned*, and at *the ſame Day the Defendant confeſſed the Action*, and *the Inqueſt* [*was*] *at the Bar*, and by Award of the Court *this Jury tried the Damages*, and no new Writ, to inquire it, was awarded, Quod Nota. Br. Damages pl. 227. cites 18 E. 4. 7.

7. An Action of *Battery* brought before the Mayor of Plymouth, and *Not Guilty pleaded*; but afterwards *the Iſſue was waved and Judment* was given *for the Plaintiff*, *and a Writ of Inquiry* of Damages was *awarded to the Serjeants at Mace*, *returnable at the next Court before the Mayor and Bayliff*. Upon Error brought, it appeared upon *the Record certified*, *that the Writ of Inquiry was executed before the Mayor*, *who was alſo the Judge of the Court*, and for that Cauſe was *reverſed*; for the Writ warrants the Inquiry to be made before the Serjeants of the Mace, who by the Writ for that Purpoſe are made diſtinct Officers, and ſo an Inquiry before the Mayor was not warranted by the Writ which was directed to other Officers, and not to him. Brownl. 203. Trin. 3 Jac. Bailey v. Moon.

Yelv. 69. S. C. in totidem Verbis.

8. In an Action of *Treſpaſs againſt Churchwardens*, where by the Statute 43 *El.* 2. *If for a Diſtreſs taken by them for Money for the Relief of the Poor Treſpaſs be brought againſt them*, *and Verdict paſs for them*, *the Defendants ſhall recover Treble Damages*, *with their Coſts*, and that *to be aſſeſt* &c. *by the ſame Jury*, *or by Writ of Enquiry* of Damages; It was reſolv'd, that treble Damages are well aſſeſt by the Jury, though that it be not done by the Court; becauſe the Words are (by the ſame Jury to be aſſeſt) and not Damages to be trebled by them. Noy. 137. Okeley v. Salter.

Yelv. 176. Trin. 8 Jac. B. R. the S. C. agreed, and adjudg'd per Cur. that Damages in this Action for the Defendants, by reaſon of the Vexation, ſhall be aſſeſs'd by the Jury, but ſhall be trebled by the Court, and that the Court thereupon may give Coſts De Incremento; For no Evidence for Coſts can properly be given to the Jury, inaſmuch as it depends on the Uſage of the Court in which the Suit is;——And Ibid. ſays, that according to this Judgment was the Caſe Trin. 44 Eliz. B R. Menial v. Ball.

9. If there be *Demurrer to part*, and *Plea to iſſue to part*, and *Judgment upon the Demurrer before* the *Iſſue tried*, the Plaintiff if he pleaſes may enter a Non Pros' upon the Iſſue, and take a Writ of Inquiry of Damages upon the Judgment on Demurrer, but it is not to be taken out till after Non Pros' entered on the other; for if they will proceed upon the Iſſue, the Jury, that try it, ought to inquire of the Damages on the other. And here becauſe a Writ of Inquiry was taken out without entering of Non Pros', that Matter was moved in Bar of final Judgment, and thereupon it was ſtaid till they moved of the other Side. Per Cur. 12 Mod. 558. Mich. 13 W. 3. Sutton the Marſhall's Caſe.

For more of Damages, See **Coſts** and the ſeveral other proper Titles.

(A.) Day-Writ.

1. THE King may *grant Writ of Warrantia Diei* to any Perſon which ſhall ſave his Default *for one Day*, be it *in Plea of Land, or other Action*, and be the Cauſe true, or not; and this by his Prerogative, quod nota. Br. Prerogative, pl. 142. cites F. N. B. 7.

Where one is Priſoner in a Civil Cauſe, and in Execution. The Courſe is upon Motion to grant him a Rule *Ad loquend' cum conſilio &c.* and it was granted accordingly. Per Aſtry. Comb. 25.

2. 'Tis againſt Law to grant Liberty to *Priſoners in Execution*, by other Writs than Day-Writs; But they ſhall have as many Day-Writs as ſhall be needful for Attendance on Commiſſioners, to whom the Cauſe being Matter of Account, was referred, and that without paying any Fees, either for making, or ſealing them. Chan. Rep. 67. 9 Car. 1. Rigault v. Cloberry.

3. No Priſoner *committed by B. R.* ought to have the Benefit of the Day-Rule of going abroad in Term-Time; for their Impriſonment is their Puniſhment for their Contempt, or Misbehaviour. 2 Show. 88. pl. 80. Hill. 31 and 32 Car. 2. B. R. The King v. Deane.

Going to Kenſington on a Day-Rule was held an Eſcape had it been well proved. 2 Show. 298. Cooling v. Glover, alias, Ld. Purbeck's Caſe.

4. One in Execution had a *Habeas Corpus from the Lord Keeper* (which they call a Day-Writ) *returnable three or four Days after its Teſte.* By Virtue of this Writ, he went to the Wine-Licence-Office, but never to any Inn of Court or Chancery, or to the Lord Keeper's, and this in the Vacation. Per Pemberton Ch. J. this is a Habeas Corpus out of Chancery, which they may ſend at any Time, and by Virtue of the King's Writ, the Party was brought out of the Priſon-Houſe, and that is juſtifiable. Then all the Day, *ſo long as there was a Keeper with him*, he was in Cuſtody ſtill, and returning to Priſon at Night, it is well enough, and no Eſcape; though Chancery may examine the Contempt, that is nothing to B. R. 2 Show. 298. pl. 299. Paſch. 35 Car. 2. B. R. Harwood v. Manlove.

5. A Priſoner *taken on an Eſcape Warrant before the Sitting of the Court* the ſame Day, ſhall be diſcharged, if his Name was entred with the Clerk the Night before; but not if it was enter'd the ſame Morning only; and in the firſt Caſe the Proſecutor ſhall be committed. 8 Mod. 80. Trin. 8 Geo. Wilkinſon v. Matthews.

6. *Entry of the Name* in the Petition for a Day-Rule, ſignifies little, unleſs it be *read in Court.* 8 Mod. 240. Paſch. 10 Geo. The King v. Dunbarr.

For more of Day-Writ in General, See other proper Titles.

Deaf, Dumb and Blind.

(A) How conſider'd; and Favour'd, or not, in Law.

1. IN *Writ* brought *by a Feme*, the *Tenant pleaded that the Demandant had nothing, unleſs in Coparcenary with one Alice her Siſter, who is in full Life, not named* &c. To which the Demandant *replied, that the ſaid Alice was Dumb and Deaf* &c. by which the Tenant paſſed over, and vouch'd &c. Thel. Dig. 6. Lib. 1. cap. 7. S. 4. cites Trin. 14 H. 3. Brief 877.

2. A *Feme Dumb ſued Formedon in proper Perſon, and pleaded by Prochein Amy*, but ſhe *always was in proper Perſon.* Thel. Dig. 6. Lib. 1. cap. 7. S 5. cites Mich. 10 E. 3. 536.

3. A *Man Dumb gag'd his Law of Non-Summons*, and perform'd his Law *by Signs.* Thel. Dig. 6. Lib. 1. cap. 7. S. 6. cites Mich. 18 E. 3. fol. 53. which Book, Theloall ſays, agrees with Bracton, where he ſays, Lib. 2. cap. 5. fol. 12. Item nec ſurdus qui Omnino non audit dare poteſt. Secus autem, ſi tarde audit, quia tunc poteſt dare. De muto autem, qui omnino loqui non poteſt id idem erit dicendum, poſſunt enim conſentire (ſecundum quoſdam) per ſigna & nutum.

4. A *Man* when he was *of ſound Memory made* and ſealed a Charter of *Feoffment and Letter of Attorney to deliver Seiſin*, and *before the Livery* by Illneſs *he became* Paralitick, ſo that he *Dumb at the Time that the Seiſin* was delivered, but by all Signs that a Man could perceive he agreed to the Livery of Seiſin, and adjudged a good Feoffment. Thel. Dig. 6. Lib. 1. cap. 7. S. 9. cites 25 Aſſ. 4.

5. A Man, who *could neither ſpeak nor hear* committed Felony, and was arraigned, and therefore was commanded to Priſon. Br. Corone pl. 216. cites 26 E. 3.

6. One was *indicted of the Death of a Man*, who could nor ſpeak nor hear, and the Court was in Doubt what to do with him &c. wherefore they though that he ſhould be remanded to Priſon. Thel. Dig. 6. Lib. 1. cap. 7. cites 26 Aſſ. 27.

7. *One who had made his Will* and became ill, and (as it ſeems) had *loſt his Speech*, the ſame Will was delivered into his Hands, and *it was ſaid to him that he ſhould deliver it to the Vicar, if it ſhould his Laſt Will, otherwiſe he ſhould retain it, and he delivered it to the Vicar, and this was held a good Will.* Thel. Dig. 6. Lib. 1. Cap. 7. S. 8. cites 44 Aſſ. 36.

8. A Man Deaf and Dumb *a Nativitate*, is Non-Compos, but otherwiſe, if *by Accident.* But Deaf, Dumb, and Blind by Accident is Non Compos. Per Wakering, Reader of Lincolns-Inn, June 1626. cited D. 56. pl. 13. Marg.

9. It appears by Oath, that the *Defendant is both Senſeleſs and Dumb*, and therefore cannot inſtruct his Counſel to draw his Anſwer; and therefore ordered that *no Attachment*, or other Proceſs of Contempt be awarded againſt the Defendant for not anſwering, without Special Order of this Court. Cary's Rep. 132. cites 22 Eliz. Altham v. Smith.

10. One

See And. 209. that Signs and other Dumb Motions are but Conjectural.— Fin.

10. One that is Deaf and wholly deprived of his Hearing cannot *give*, and ſo one that is Dumb and cannot ſpeak. Yet (according to the Opinion of ſome) they may *conſent by Signs* and Nods, but it is generally held, that he that is Dumb cannot make a Gift, becauſe he cannot conſent to it. Cow. Inſt. 107.

Law. Svo. 103 cites Perk. 5. that one born Deaf and Dumb may make a good Grant. For divers may have Underſtanding by their Sight only, but that for want of Sight, one born Deaf Dumb and blind can't grant. —— Perk. S. 25. is, that he may make a Gift if he has Underſtanding; But he ſays, it is hard that ſuch a Perſon ſhould have Underſtanding. For a Man ought to have his perfect Underſtanding by his Hearing, yet divers Perſons have Underſtanding by their Sight &c. And a Man *born Dumb and Blind* may have Underſtanding; *But* a Man that is *born Blind Deaf and Dumb* can have no Underſtanding, ſo that he can't make a Gift or a Grant.

11. If a *Blind* Man has underſtanding he may *deliver a Deed* ſealed by him. Jenk. 222. pl. 75. ad finem.

12. The Lord ſhall have the *Cuſtody of a Copyholder* that is Deaf and Dumb; for elſe he ſhall be prejudiced in his Rents and Services, and adjudged for the Grantee of the Lord againſt the Prochein Amy of the Copyholder. Cro. J. 105. pl. 43. Mich. 3 Jac. B. R. Eavers v. Skinner.

13. A *Dumb* Man *ordered to anſwer upon Interrogatories* by Mr. Colcheſter. Toth. 237. cites 14 Car. Harcourt v. Roberts.

And Bridgman Ch. J. cited the ſame, allow'd per Warburton

14. One born Deaf and Dumb, who ſignified by Signs that ſhe underſtood what ſhe was about to do, was allowed to *levy a Fine* of Lands by Bridgman. Ch. J. & al' Juſtices. Cart. 53. Trin. 18 Car. 2. C. B. Martha Elliot's Caſe.

J. with Conſent of the other Juſtices, after having examined and found him Intelligent, in one Hill's Caſe. Ibid. ——— And per Archer J. If there be good Intelligence ſuch may make *Feoffments*, and make *Contracts* for their Good. They are admitted on Examination to *Marry*, and on Examination to *receive the Sacrament*. Ibid. 54.

ac 1. Hal. Hiſt. P. C. 34.

For more of Deaf, Dumb, and Blind, See **Ley Gager** (K) and other Proper Titles.

* Debt *is* what a Man *may recover by Action, to his own Uſe.* Arg. 10 Mod. 163. cites Brackt. lib. 3. cap. 1.

* Debt.

This in Roll is in Folio 591.

(A) *For what* Things it *lies.*

S. P. Br. Debt, pl. 50 cites 50 E. 3. 16. and that it was held,

1. IF a Man leaſes for Years, reſerving ſo many Quarters of Wheat yearly, an Action of Debt lies for the Wheat, if it is Arrear. Tr. 3. Ja. B. R. between the *Lord Denny and Parnell*, admitted and adjudged.

that the Writ being in the Detinet only, was good. ——— Thel. Dig. 113. Lib. 10. cap. 23. S. 14. cites S. C. ——— Ow. 32. Paſch. 7 Eliz. Anon. the Court held, that where a Leaſe is made, reſerving ſo many Quarters of Wheat Yearly, and the Leſſor makes a Leaſe of the Rent Corn, reſerving a Rent, that the Reſervation is good; For a Man may reſerve a Rent upon a Leaſe of Rent, and the Rent is not Parcel of the Reverſion, but only incident thereto, and the Leſſor has the ſame Inheritance therein, as he hath in the Reverſion.

2. If

2. If Two ſubmit to an Award, and they award a Collateral Matter to be done, and not any Money, no Action of Debt lies upon this Award. 9. 10 Ja. B.

3. Debt *againſt the Executors of the Clerk of the Hamper, upon a Writ De Liberate currant*, by the King, of Receipt of the Clerk of 100 l. the Plaintiff delivered ſufficient Acquittance, and that he ſhew'd the Liberate to the Clerk Anno 13, and offered Acquittance ſuch another Day after, and the Defendant ſaid, that he was ready the ſame Day to have paid it, if the Plaintiff would have deliver'd Acquittance; and the Plaintiff demurr'd in Law; and the Juſtices were in diverſe Opinions, if he be Debtor without Acquittance offer'd; But after, Judgment was given for the Plaintiff. See the Book for the Form of the Declaration. It was held that the *Patent*, by which the King had granted the Debt, *and the ſhewing of the Liberate, made the Clerk Debtor*, if he has Aſſets enter mains, *without ſhewing of the Acquittance*; And per Townſend and Huſſey, the Clerk ought to pay and demand Acquittance; and yet it was agreed there, that the Clerk ſhall not have Allowance upon his Account without Acquittance. Br. Dette. pl. 136. cites 2 H. 7. 8.

4. If *Rent-Corn* be *reſerved upon a Leaſe for Years*, and it is behind for two or three Years, the Leſſor may have Debt for the Corn; and ſhall make his Declaration of ſo much Corn, and the ſame ſhall be in the Detinet; But yet he ſhall not have Judgment to have Corn, but ſo much Money as the Corn was worth, every ſeveral Year being accounted; Per Cur. 3 Le. 260. pl. 347. Mich. 32 Eliz. in the Exchequer, in Cheney's Caſe. 4 Le. 46. pl. 122. Anon but S. C. in totidem Verbis.

5. A Writ of Debt properly lies where a Man *owes* another a certain Sum of *Money by Obligation*, *or* by *Bargain* for a Thing ſold, or by *Contract*, *or* upon a *Loan* made *by the Creditor to the Debtor*, and the Debtor will not pay the Debt at the Day appointed, that he ought to pay it, then the Creditor ſhall have an Action of Debt againſt him for the ſame. F. N. B. 119. (G).

6. The Lord may bring Action of Debt *for* his *Fine againſt Copyholder*; affirm'd by two, and not denied; and Twiſden ſaid, that ſo it was held 15 Jac. by Foſter J. which was not denied; but it was ſaid the Opinion of Bacon was e contra. Sid. 58. in pl. 26. in a Nota there. Mich. 13 Car. 2. B. R.

7. Debt will not lie for a *Wager*; adjudg'd per tot. Cur. Lord Raym. Rep. 69. Hill. 7 W. 3. Bovey v. Caſtlemain.

(B) Debt for *Rent.*

Who ſhall have the Action, and *againſt whom.*

Who ſhall have it.

1. He that is privy in Eſtate, ſhall maintain an Action of Debt for the Rent.

2. If a Man leaſes for Years, rendring Rent, and after grants over the Reverſion, and the Tenant attorns, the Grantee ſhall have an Action of Debt for the Rent incurred after. Dubitatur, 9 H. 6. 16. b. It was held by the Juſtices, that ſuch Grantee ſhall have Debt for the Rent; for the Reverſion comes to him lawfully. Br. Debt, pl. 140. cites 5 H. 7. 18. Ibid. in pl. 177. verſus finem. S. P. and cites 4 H. 7. for the Action of Debt runs with the Reverſion. 5 Rep. 22. b. 23. a. Hill. 29 Eliz. B. R. the S. P. in Walker's Caſe.

* Br. Debt, pl. 122. cites S. C. but I do not obſerve S. P. there. —Br. Rent, pl. 10. cites S. C. and by Cottington and Paſton, the Heir ſhall have the Rent, for it is Parcel of the Reverſion, and ſhall paſs by Grant of Reverſion, and yet it does not appear there that it was reſerv'd to the Leſſor and his Heirs, Quod Nota.

3. So **if he in** Reverſion dies, **his** Heir **ſhall have an** Action of **Debt for the Rent incurred after.** * 14 H. 6. 26. Dubitatur 9 H. 6. 16. b.

* Fitzh. Debt, pl. 30. cites 9 H. 6. 43. S. C. ſays it ſeems that he ſhall be put to his Action of Debt; becauſe the Frank-tenement is in the Heir without Entry, and then the Leaſe is utterly determined; and therefore it ſeems he cannot diſtrain. ——Br. Debt, pl. 7 cites S. C ſays, that though the Baron had never any Iſſue by his Wife, [and ſo was not intitled to be Tenant by the Curteſy,] yet Action of Debt lies by the Baron againſt the Leſſee well enough, for Rent incurr'd after the Wife's Death, till the Heir enters; Per Opinionem Curiæ Quod Nota.

4. **If the** Baron leaſes **for Years the** Land of his Wife, **rendring Rent, and after the** Feme dies, **he ſhall not have Debt for the Rent, incurred after, for his Reverſion is gone (and ſemble the Leſſee is become Tenant at Sufferance.)** * 9 H. 6. 42. b. **Contra** || 14 H. 6. 26.

|| Br Debt, pl 122. S. C. the Leaſe was of Lands which the Wife had in Dower, and held, that after the Wife's Death the Baron ſhall have the Rent, per Juyne; For the Tenant had the Occupation of the Land for the Rent, during the Life of the Feme, and conſequently what incurr'd during the Feme's Life, the ſecond Baron ſhall have; for the Tenant had Quid pro Quo; but the Heir cannot have it ut Videtur. ——Br. Rents, pl. 10. cites S C.

Fitzh. Debt. pl. 33. cites S. C. and whether ſhe had the Rent by the way of Dowe or otherwiſe, it is all one; per Bab & Cott. For the Baron had Frank-tenement in the Rent, during his Wife's Life &c. ——F. N. B. 121. (C) S. P. and in Marg. cites S C. —— See tit. Baron and Feme (H) pl. 1. S C and the Notes there.

5. But **if a** Feme, having a Rent for Life, **takes Huſband and** dies, **the** Baron **ſhall have Debt after the Death of his Wife for the Rent incurred during the Coverture.** 10 H. 6. 11. 12.

Fol 592. * See pl. 4. 5 ſupra and the Notes there.

6. **If Baron and Feme** join in a Leaſe **for Years, rendring Rent** of the Land of which the Wife is ſeiſed for Life, **and after the** Feme dies within the Term, **it ſeems the Baron ſhall not have the Rent, becauſe the Reverſion is gone. By Reports, 14 Ja. between** * *Smalman and Agborrough*, **per Curiam. Contra,** 9 H. 6. 26.

7. Debt lies for *Succeſſor or Heir* in ſome Caſe, As *where a Man grants an Annuity and for Default of Payment to forfeit* 40 *s. Nomine Pœnæ*; the Heir or Succeſſor ſhall have the Action of Debt; for it goes with the Annuity. Br. Dette pl. 86. cites 7 H. 6. 19.

8. It was held, where one *leaſes his Manor for Term of Years*, that the *Leſſee ſhall have Action of Debt againſt the Tenants of the Manor, after the Term ended, for their Rents Arrear within the Term.* Thel. Dig. 19. Lib. 1. Cap. 21. S. 8. cites Mich. 19 H. 6. 42.

Br. Debt. pl. 140. cites S. C. and ſame Point held by the Juſtices accordingly.

9. The *Lord* who has the Reverſion *by Eſcheat*, and the Lord *who enters for Alienation in Mortmain*, and the Lord *who claims the Reverſion by the Purchaſe of his Villein*, ſhall have Action of Debt for the Rent Arrear. Thel. Dig. 19. Lib. 1. cap. 21. S. 6 cites Paſch. 5 H. 7. 18.

10. If the Lord grants his Seigniory for Years, the Grantee during the Years ſhall not have Action of Debt. 7 Rep. (39) 38. b. cites 9 H. 7. 17. a.

11. But how *Aſſignees* and *Grantees* at this Day ſhall have Actions See the *Statute* made Anno 32 *H.* 8. *cap.* 14. & 37. And by thoſe and by the Statute 27 H. 8. *of Uſes*, divers Perſons who were *Strangers and not*

not Privies before this Statute, now are enabled to avow, and to maintain Actions in diverſe Caſes. Thel. Dig. 19. Lib. cap. 21. S. 9.

12. *Leſſee* for Years *makes Feoffment* of it to B. Yet Leſſor ſhall have Action of Debt againſt Leſſee on the Firſt Contract. D. 4. b. Marg. pl. 1. & 5. a. Marg. pl. 5. Mich. 25 H. 8.

13. *Leſſee aſſigns Part*, the *Aſſignee enfeoffs B.* The Queſtion was, if the Leſſor (the Reverſion being out of him) might have Debt before he had recontinued the Reverſion. D. 4. b. pl. 1. But in the Margin 5. a. pl. 6. ſaith that he had heard that it was adjudged that the Action lay upon the firſt Contract.

14. It was ſaid by Anderſon, and agreed by the Court, that if a a Man *grants an Annuity out of Land, and has nothing in the Land*, that yet this ſhall be good to charge the Grantor in a Writ of Annuity; and in the ſame Caſe it was alſo agreed by the Court, that if a Man grants an Annuity to a Woman, who takes a Husband, and after Arrearages do incur, and the Wife dies, ſo that the Annuity is determined, that the Husband ſhall have an Action of Debt for the Arrearages by the Common Law. Shuttleworth ſaid this is remedied by the Statute of Arrearages of Rents, and then at the Common Law it is but a Thing in Action. Peryman ſaid an Annuity is more than a Thing in Action. Windham ſaid he may grant it over, and ſo the Opinion of the whole Court was, that Debt was maintainable. Goldsb. 30, 31. pl. 1. Mich 29 Eliz. Sellenger's Caſe.

15. *Leſſor* for Years *grants the Rent.* Leſſee attorns; Debt lies for Grantee without his having the Reverſion; Per Cur. The *Attornment makes Privity*; and Judgment for the Plaintiff 2 Jo. 1. Mich. 22 Car. 2. B. Goodman v. Packer.

16. An Action of Debt lies againſt a Returning Officer at Elections for 500 l. Penalty upon the Statute for not delivering a Copy of the Poll to the Candidates, being required. MS. Tab. May 3d. 1718. Smith v. Phillips.

(C) Debt for *Rent*. *Againſt Whom* it lies.

1. IF Leſſee for Years grants over **his Term, an Action of Debt** lies againſt the Grantee for Rent incurred after. * 9 H. 6. 52 b. 10 H. 6. 11. b. * Br. Debt, pl 8. cites S. C.

2. [So] **if** Leſſee for Life, **rendring Rent, grants over his Eſtate, and after dies, Debt lies againſt the Grantee for Rent incurred after the Grant.** 10 H. 6. 11. b.

3. **If** Feme Leſſee for Life takes Husband, and dies, **Debt** lies againſt the Husband for Rent **iſſuing out of the Land** incurred during Coverture; **for he took the Profits out of which the Rent iſſued.** 10 H. 6. 11. **Curia.** * 26 E. 3. 64. **adjudged.** * 4 Rep. 49 b cites 26 E. 3. 64. a. b. Loring's Caſe. S. C. & S. P. adjudged accordingly; and that there it is held, that after the Death of the Baron, the Action of Debt in ſuch Caſe will lie againſt his Executors.

4. **If an** Annuity **was** granted by a Biſhop **before the Statute of** 1 Eliz. and confirmed by the Dean and Chapter, **and after Arrearages incur, and the Biſhop dies, an Action of Debt** lies for the Arrearages againſt the Succeſſor. **Tr. 10 Ja. B. between** *Edwards and the Biſhop of Ely.*

S. C cited Cro. E. 634. pl. 30.

5. *A. leaſed Bl. Acre and Wh. Acre to B.* rendering 20 l. Rent. *B. granted Wh. Acre to W. M. who made a Feoffment thereof to J. S.* Afterwards *A. brought an Action of Debt againſt B.* for the Rent Arrear. The Queſtion was, whether the Action lay or not, or whether the Reverſion of Wh. Acre muſt not firſt be recontinued. The Caſe was argued but no Judgment. D. 4. b. pl. 1. Trin. 24 H. 8. in Cam. Scacc. Ruſhden's Caſe.

S. C. cited 3 Rep. 24 a. as adjudged accordingly.

6. *B. leaſed Three Acres* of Lands *to H. for Years rendering Rent. H. leaſed one Acre to W.* Then *B. granted his Reverſion to C. who brought Debt againſt H. for the intire Rent*; It was adjudged that the Action did well lie, becauſe the intire Eſtate remained in Part of the Land, and ſo the intire Privity and Action remains for the whole, againſt the firſt Leſſee, and that ſo is Ryſden's Caſe [D. 4. b. 5. a.] 24 H. 8. & 2 Aſſ. 52. And Judgment for the Plaintiff. Cro. E. 633. pl. 30. Mich. 40 & 41 Eliz. B. R. Broom v. Hore.

Cro. E. 715. pl. 39. S. C. adjudg'd accordingly.—2 And. 133. pl. 99. S. C. adjudg'd, that the Action does not lie.———3 Rep. 24. a. b. S. C. cited as held accordingly.

7. Debt *againſt Two Adminiſtrators for Rent behind after the Death of the Inteſtate*, they *pleaded that before the Rent behind, they aſſigned the Term to M. of which the Plaintiff had Notice, and accepted of the Rent by the Hands of the Aſſignee.* Adjudged per tot. Cur. that that the Plaintiff be barred. Mo. 600. pl. 829. Trin. 41 Eliz. Marrow v. Turpin.

8. Where a Man grants a *Rent Charge for Life*, and the *Rent is Arrear*, and the *Grantor infeoffs A.* of the Lands, and the *Rent Charge is in arrear in the Time of A.* and then *A. infeoffs B.* and the *Rent Charge is likewiſe arrear in his Time*, and then the *Grantee of the Rent Charge dies*, his Executor ſhall have an Action of *Debt againſt every one* of them for the Rent which was in Arrear *reſpectively* in their Times, becauſe Qui ſentit Commodum ſentire debet & Onus; Reſolved. 7 Rep. 39. Mich. 5 Jac. C. B. Lillington's Caſe.

2 Bulſt. 151. S. C. adjudg'd for the Defendant.

9. Debt for Rent, the Defendant *pleaded that after the Leaſe made to him, and before the Action brought, he aſſigned over his Term to J. S. and that the Leſſor had received of the Aſſignee the Rent which grew due after the Aſſignment.* All the Court reſolved, that this Aſſignment and Acceptance of the Rent from the Hands of the Aſſignee is Notice of itſelf, and an Agreement that he is his Tenant, and then he cannot afterwards reſort to the Leſſee to recover his Rent of him, which was due after the Aſſignment. Cro. J. 334. pl. 1 Hill. 11 Jac. B. R. March v. Brace.

10. *After the Determination of a Rent Charge Debt* does not lie againſt one Perſon only that received a Part of the Profits of the Lands, but it *muſt be brought againſt all that had any Part of the Lands charged.* Saund. 284. Trin. 21 Car. 2. Duppa v. Mayo.

(D) Debt.

The *Giſt* of the Action.

In what Caſes an Action of *Debt* lies, *or Covenant.*

1. IF in a Deed **ſealed and delivered by A. it be** recited, **That** whereas by Obligation **of ſuch Date**, B. C. D. and E. ſtood bound in the penal Sum of 160 l. to the ſaid A. for the Payment of 86 l. 18 s. at a certain Day, Now this Writing witneſſeth, that he, **ſcilicet,**

ſuſtect, the ſaid A. ſuſcepiſſet & promiſiſſet to the ſaid B. C. D. and E. in Conſideration of the Sum of 40 l. to the ſaid A. paid by the ſaid B. and C. in part of the ſaid 86 l. 18 s. with Intereſt and Coſts, not to proſecute the ſaid B. C. D. and E. or any of them, **in any Action or Proceſs** before ſuch a Day **after the Date of this Writing, omnia quæ ſupra mentionata ſunt per ipſum performari,** & in defectu inde, vel alicujus rei inde mentionatæ ſunt per ipſum performari, idem A. forisfaceret to the ſaid B. and C. præd' ſummam 80 l. **If the ſaid** A. before the Day **mentioned in the ſaid Writing,** ſues the ſaid B. C. D. and E. **upon the ſaid recited Obligation, the ſaid** B. and C only may have an Action of Debt upon this laſt Writing for the 80 l. **for this is a diſtinct Clauſe by it ſelf, by which the 80 l. is limited to be forfeited to the ſaid B. and C. only; for it appears the 40 l. was paid to him only by B. and C. ſo that it appears it was intended that the Recompence ſhould be forfeited to them alſo, though the Promiſe by the firſt Part of the Deed was made to all four, upon which they might have had an Action of Covenant, but none præter the ſaid B. and C. may have Debt for the 80 l. to whom the Forfeiture is limited. Tr. 22 Car. B. R. between** *Harriſon and Cheſton,* **adjudged upon Demurrer. Intratur, P. 21 Car. Rot.**- - - - -

2. In ſome Caſes no Action of Debt lies on a Covenant to pay Money, As if *A. covenants that his Executor ſhall pay to B. within a Year after his Death* 10 *l.* Now becauſe no Action of Debt lay againſt A. himſelf, it lies not againſt his Executor, but only an Action of Covenant. Wentw. of Executors, 123. ſays, it was held ſo in Q. Elizabeth's Time.

3. *So* if the *Covenant is Conditional,* as thus; viz. that if C. do not pay to B. 10 l. then A. will pay it. Went. of Exec. 123.

4. *So* perhaps, if the Covenant be in the *Disjunctive,* viz. to do ſuch an Act, or to pay 10 l. Now if the Act be not done, yet Debt lies not, but Covenant only. Wentw. of Exec. 123.

5. A. by Indenture *leaſed Lands* to be for Years, *Leſſee covenanted to pay for the firſt Year* 6 *l. and afterwards* 8 *l. per Annum*; after the firſt Year, for Arrears of the 8 l. either Debt or Covenant lies. Cro E. 797. pl. 45. Mich. 42 & 43 Eliz. B. R. Sicklemore v. Simmonds.

6. Debt lies not, but Covenant, on a *Bill that aſcertains the Summe.* Vide 2 Jo. 184.

7. The Plaintiff declared that the *Defendant covenanted* with him *to pay* him *ſo much Money as he ſhould expend for reparing and victualling a Ship* for him, *and avers that he expended* 300 *l.* in repairing and victualling it, and *that he gave the Defendant Notice of it at ſuch a Day,* and for Non-Payment he brings his Action of Breach of Covenant. It was objected that in this Caſe the Plaintiff ſhould have brought an Action of Debt, and not of Covenant. But to this alſo, Roll anſwered, that it was well enough, for *it is in the Election of the Plaintiff to bring either* an Action of *Debt,* or an Action of *Covenant,* and that it has been heretofore queſtioned, whether an Action of Debt did lie in this Caſe, but it was never doubted, but that an Action of Covenant did very well lie. Sty. 31. Trin. 23 Car. B. R. Anon.

8. An Action of Debt was brought for 1500 l. *upon a Deed of Charter-Party.* The Plaintiff had a Verdict. Roll J. ſaid, either an Action of Debt, or an Action of Covenant lies here; for it is upon a Charter-Party. Sty. 133. Mich. 24 Car. B. R. Frere's Caſe.

9. Debt lies *on any Covenant, where the Sum is reducible to a Certainty.* Per Windham J. cites F. N. B. which the Court agreed. 2 Keb. 225 pl. 80. Paſch. 19. Car. 2. B. R. in Caſe of Birch v. Weaver.

10. If *Leſſee aſſigns,* and afterwards *Leſſor accepts of the Aſſignee for his Tenant,* he cannot afterwards maintain Debt for Rent againſt the firſt

Leſſee, but he may maintain Covenant againſt him. Sid. 402. pl. 8. Hill. 20 & 21 Car. 2. B. R. And the Ch. J. cited it as ſo adjudged in 13 Car. 1. in Middleham's Caſe, and ſo it was agreed now.

11. If A. *covenants to pay B. ſo much as his Part of the Charge of a certain Suit between the Vicar of* S. *and the Plaintiff touching a Modus in the ſaid Pariſh, and which concerned all the Pariſhioners*, and B. brings Debt upon this Covenant and averrs that B's Proportion, or Part amounts to ſuch a certain Sum, Debt lies as well as Covenant; for the Damages, which before were uncertain, are by the Avernment reduced to a Certainty. 3 Lev. 429. Mich. 7 W. 3. C. B. Saunders v. Marke.

12. *Debt for Rent is founded on the Privity of Eſtate*, but Action of *Covenant* is founded *upon the Privity of Contract*; Arg. and ſeems admitted. 1 Salk. 82. pl. 3. Mich. 8. W. 3. B. R. in Caſe of Woodward v. Marſhall.

13. In Debt upon Bond, the Defendant pleaded, that, ſince the laſt Continuance, the Plaintiff did *by* his *Deed* grant and *agree* to, and with the Defendant *to accept a Bond for the Building of a Houſe* in Satisfaction of the firſt Bond; and now it was held not to be a good Plea, for it amounts to no more than a *Covenant*, and *not to a Releaſe*. 12 Mod. 559. Trin. 13 W. 3. Baber v. Palmer.

2 Salk. 658. pl. 3 Incledon v. Cripps. S. C. but S. P. does not appear.—— 7 Mod. 87. Grips v. Ingledew, S. C. but S. P. does not appear.

14. Plaintiff agreed to ſell the Defendant ſo many Stacks of Wood, and the Defendant covenanted to pay the Plaintiff 35 l. for every hundred of the ſaid Stacks, and bound himſelf in the Penalty of 100 l. to do it. It was held, Per Cur. that the Plaintiff may have Debt or Covenant at his Election; for the Rate being certain, viz. 35 l. for every Hundred Stacks of Wood, when the Defendant has the Wood, the Agreement becomes certain, for which Debt lies. 2 Ld. Raym. Rep. 814. Mich. 1 Ann. Ingledew v. Crippe.

(E) What will be a *good Conſideration* to raiſe a Debt.

Fol. 593.

|| See tit. Actions of Aſſumpſit, (N) per tot.

|| The *Gift* of the Action, ſcilicet, whether he ſhall have an Action of *Debt*, or Action upon the *Caſe*, or *Covenant*.

Br. Dette, pl. 104. cites 15 E. 4. 32. contra per tot. Cur. that the Action does not lie, becauſe the Defendant has not Quid pro quo, Quod Nota; but cites 31 E. 3. and 37 H. 6. fol. 8. to the Contrary.——Br. Dette, pl. 117. cites 37 H. 6. 8. by the Juſtices that the Action does not lie; For the † Diſcuſſing and Remedy of the Marriage, to make him marry her *lies in the Spiritual Court*, and therefre the Action for the Money; and *ſo of Legacies*, *Contrary* where *Tithes* are *leaſed or ſold* for 10 l. for there the *Nature is changed*, contrary above, and ſo two Juſtices againſt two.

1. IF a Man promiſes another 20 l. in Conſideration that he will marry his Daughter, or Couſin, this is a good Conſideration, and after Marriage he ſhall have an Action of Debt. By Reports, 14 Jac. 17 E. 4. 4. b. 22 Aſſ. Placito 70.

If a Man *promiſe to pay to J. S. 100 l. if he will take his Daughter to Wife*, Debt lies of it; *Contra* if it be *promiſed in Marriage* with the Daughter, by reaſon of this Term Marriage. Br. Dette, pl. 134. cites 22 Aſſ. 70. ——S. P. and ſo in Conſideration of marrying a poor Woman. Arg. Roll Rep. 433. pl. 21. Mich. 14 Jac. B. R.

† S. P. Br. Dette, pl. 160. cites 14 E. 4. 6.——S. P. Ibid. pl. 161. cites 17 E. 4. 4.

2. [So] If a Man promiſes another 20 l. in Conſideration that he will marry A. S. a Stranger, Debt lies for it after Marriage. Mich. 12 Ja. B. R. between *Freeman and Freeman*, adjudged that an Action upon the Caſe lies. Roll Rep. 61. pl. 4. S. C. adjudged.—— 2 Bulſt. 269. S. C. adjudged for the Plaintiff.——But both thoſe Reports mention it to be an Action on the Caſe, and not Debt——In ſuch Caſe Debt lies; Per Cur. All. 6. Mich. 22 Car. 2. B. R. Obiter.

3. [So] if a Man ſays to a Phyſician, or Surgeon, that if he will go to J. S. who is ſick, and make him well and ſound, he will give him ſo much &c. Debt lies for the Surgeon, if he makes him well and ſound. 37 H. 6. 9. per Moile. Cro. J. 521. pl. 4. Hill. 16 Jac. B. R. Per Cur. S. P. Obiter.

4. So if a Man promiſes a Phyſician, or Surgeon, a certain Sum to cure ſuch a poor Man, an Action lies if he cures him. 17 E. 4. 5. S. P. Br. Dette, pl. 161. cites S. C.

5. So if a Man promiſes a Labourer certain Money for repairing ſuch a Way, which is an Highway, an Action of Debt lies. 17 E. 4. 5. Br. Dette, pl. 161. cites S. C.

6. If A. at the Requeſt of B. and for the proper Debt of B. delivers Money to T. S. to be repaid to A. by B. upon Requeſt, A. may have an Action of Debt for the Money againſt B. for this is a plain Contract between them, ſcilicet, that if he will pay at his Requeſt a Debt that he owes J. S. he will re-pay him. Mich. 18 Car. B. between *Adrian Henrick and Inigo de Taſſes* Comes Quate adjudged per totam Curiam, this being moved in Arreſt of Judgment after a Verdict for the Plaintiff. Intratur, Tr. 18 Car. Rotulo 366. and after affirmed in a Writ of Error in Banco Regis.

7. If J. promiſe J. S. a certain Sum for the Commons of J. D. an Action of Debt lies for it. 17 E. 4. 5. for the Law intends that J. S. is ſuch an one, by whoſe Service I have Advantage.

8. If A. buys of me certain Cattle for a certain Sum, and B. at the ſame Time undertakes to pay it, if A. does not pay it at the Day; if A. does not pay it, yet Debt lies not againſt B. for it ſounds in Covenant. 18 E. 3. 13. it ſeems is ſo to be intended.

9. If J. retain a Carpenter to build an Houſe, and that he ſhall have 40 s. for the doing thereof, an Action of Debt lies for the 40 s. 37 H. 6. 9. S. P. though the Houſe is to be built for another Perſon. Cro. J. 521. pl. 4. Hill. 16 Jac. B. R. Per Cur. Obiter. ——S. P. Arg. Cro. C. 194. in pl. 4. cites 37 H. 6. 10.

10. If C. recovers 10 l. againſt A. and B. comes to C. and ſays, that if he will releaſe the 10 l. to A. that he will be his Debtor, and he accordingly releaſes the 10 l. to A. yet no Action of Debt lies, for that it ſounds in Covenant. 9 H. 5. 14.

11. If J. retain a Counſellor for a Year for 40 s. Debt lies for this 40 s. 37 H. 6. 8. b.

12. If a Stranger comes to an Attorney, and retains him to be Attorney for J. S. in an Action between him and J. D. and he is his Attorney accordingly, he may well maintain an Action of Debt againſt J. S. for his Fees, though this Retainer by the Stranger was Maintainance in the Stranger; for between J. S. and the Attorney this is lawful, and ſo the Conſideration not againſt Law. H. 38. El. B. R. between *Truſſel and Monſlow* adjudged upon Demurrer.

13. If a Sollicitor of J. S. comes to an Attorney de Banco, and retains him to proſecute a Suit in Banco for the ſaid J. S. againſt J. D. capiendo of the Sollicitor pro feodo quolibet Termino 3 s. 4 d. ultra alias miſas & expenſas per ipſum circa Proſecutionem Sectæ præd' depo- 2 Roll Rep. 76. S. C. and Judgment affirm'd.——

† Fol. 594. Cro. C. 194. S. C. cited. ——See tit. Attorney, (R) pl. 3. Bradford v. Woodhouſe S. C. and the Notes there.

deponendas; in this Caſe an † Action of Debt lies by the Attorney againſt the Sollicitor for his Fees and Expences diſburſt in this Suit, for that the Contract is made between the Sollicitor and Attorney, in the Name of the Sollicitor himſelf, and not in the Name of his Maſter. P. 16 Jac. B. R. Rot. 416. adjudged in a Writ of Error between *Woodhouſe and Bradford.* I have a Copy of the Record.

Cro. C 107. pl. 8. in B. R. the S. C. adiornatur. Ibid. 193, 194. pl. 4 S. C. in B. R. adjudg'd, that the firſt Judgment be reverſed. And Richardſon Ch. J. of C.B being moved therein ſaid, that this Point was never moved before them;

14. So if J. S. a Stranger for any Thing that appears by the Record, comes to an Attorney de Banco, and retains him to proſecute a Suit in Replevin for J. N. the Plaintiff, againſt W. S. the Defendant, then depending in Bank, Capiendo de J. S. pro feodo & expenſis &c. as in *Bradford's* Caſe before; in this Caſe an Action of Debt lies by the Attorney againſt J. S. becauſe he made the Contract in his own Name, and it ſhall be intended that he ſhall have Benefit by it, and it cannot lie in the Conuſance of the Attorney how he is concerned that retains him. Contra, Tr. 6 Car. B. R. between *Trevillian and Sands*, in a Writ of Error, reſolved per Curiam, againſt the Opinion of *Jones*, that Debt did not lie, but that he is put to his Action upon the Caſe, and they gave a peremptory Rule for the Reverſal of the Judgment; but this was afterwards ſtay'd, upon Information that the Parties were about a Compoſition, which Intratur. Mich. 4 Caroli. Rot. 96. I my ſelf was of Counſel with Trevillian the Attorney.

and that they were of the ſame Opinion, that Debt lies not, but only an Action on the Caſe. —— S. C. cited All. 6. Mich. 22 Car. B. R. Roll ſaid, that the Judgment was not reverſed on the Roll, and that his Opinion was, that the Judgment was good ——S. C denied to be Law. 2 Show. 421. pl. 387 Hill. 36 & 37 Car. 2. B. R. and held, that the expreſs Promiſe will well raiſe an Action; And the Ld. Ch Juſtice ſaid, that he thought Roll's Argument in that Caſe was not to be anſwered.——7 Mod 148. Hill. 1 Ann. B. R. Arg. cites S. C. as adjudged, that an Indebitatus Aſſumpſit will not lie; and by Holt Ch. J. Ibid. 149. an Indebitatus will not lie for being an Attorney to a third Perſon, becauſe in that Caſe his being an Attorney on Record, is what intitles him to Debt; and therefore if another does promiſe to pay, yet he for whom he is an Attorney on Record, is not diſcharged, and therefore the other cannot in that Caſe be liable to an Indebitatus.

15. In Debt the Count was *for* 10 *l. upon Vendition and for* 100 *s. the Reſidue which he had bail to re-bail* &c. and held good; for in Debt and Detinue the Warrant of Attorney and the Eſſoign ſhall be in Placito Debiti. Thel. Dig. 84. Lib. 9. cap. 5. S. 29. cites Paſch. 32 E. 3. Brief 288.

16. If a Man *puts his Cloth to the Taylor, who makes of it a Robe* and *does not agree for the Price*, the Taylor ſhall not have Action of Debt. Otherwiſe it is of *Victuals and Wine in a Tavern*; for there Price is aſcertained by the Clerk of the Market. Br. Dette pl. 158. cies 12 E. 4. 9. per Bryan.

17. Debt does not lie for *Marriage-Money*; for the Defendant who ſhould render the Money for the Marriage of his Daughter *has not Quid pro Quo.* Br. Contract. pl. 14. cites 15 E. 4. 32.

18. There is a Diverſity between Debt and Aſſumpſit. In *Aſſumpſit*, it is not neceſſary that the *Contract to be Eodem* Inſtante, but it ſuffices if there be Inducement enough to the Promiſe, and though it is precedent, it is not material; but in *Debt* it is requiſite that Benefit come to the Party, otherwiſe for Want of *Quid pro Quo* Debt lies not. D. 271 b. pl. 29. Marg. cites 28 & 29 Eliz.

19. Error of a Judgment, where the Plaintiff declares his *Debt for* 256 *l. for ſeveral Retainers to embroider ſeveral Gowns*; Error aſſigned, becauſe the Plaintiff declares *(inter alia) That the Defendant retained him,*

him, ſuch Year, Day, and Plsce, *to Embroider a Sattin Gown for a Maid Servant of her Daughters*, and to take for it 40 s. and *the embroidering of another's Gown* is no good Conſideration; But the Court held it to be a *good Conſideration*, in Regard he did it at her Requeſt, and he may have *Debt or Aſſumpſit*. Cro. E. 880. pl. 11. Paſch. 44 Eliz. B. R. Shandois v Simpſon.

20. An Action of Debt brought for ſolliciting a Cauſe in B. R. and it was adjudged by the whole Court, that an Action for Debt *for Solicitor's Fees* would not lie, but ought to bring an Action of the *Caſe*, and afterwards the Court held, an Action of the Caſe would not lie. Brownl. 73. Leech v. Phillips.

21. An *Executor brought* an Action of *Debt upon a Promiſe made to the Teſtator for bringing up of Children and teaching*; and after a Verdict for the Plaintiff upon Nil debet pleaded, it was moved that Debt would not lie in the Caſe, becauſe it was not laid that they were the Plaintiff's Children. But the Opinion of the Court was for the Plaintiff. All. 6. Mich. 22 Car. B. R. Hains v. Finch.

22. Debt will lie *upon a Promiſe made by a Stranger*, as in N. B. 122. K. If one promiſes Money to another *for marrying of a Poor Virgin*; Debt lies. All. 6. Mich. 22 Car. B. R. Haines v. Finch.

(E. 2) Conſideration Good; though there is not Quid pro Quo.

1. IF I *promiſe to J. S.* 30 *s. to carry the Corn of W. N.* to D. and he does it, he ſhall have Debt againſt me, and yet I have not Quid pro Quo, per Davers; and Danby agreed, that Debt does not lie. — Per Moyle, if I retain a Carpenter to make a Houſe for 10 l. who does it, Action of Debt lies, and if I *promiſe a Surgeon* 10 *l. to cure J. N.* and he does it, Debt lies againſt me. Br. Contract, pl. 17. cites 37 H. 6. 8.

2. In Debt, a Man *ſeiſed in Right of his Wife ſold* 400 *Oaks for* 20 *l.* and the *Vendee took* 200 *in the Life of the Feme*; the *Feme died*, the *Baron not being Tenant by the Curteſy*, the *Heir entered*, and the *Baron brought Debt of* 10 *l.* For the Vendee had paid the other 10 l. in the Life of the Feme; and per tot. Cur. becauſe the *Contract was good at the Time of the Bargain*, and is intire, and cannot be ſevered, and he haa part of the Oaks, and might have taken all the 400 in the Life of the Feme, and did not, therefore it is his Folly, and he ſhall render the intire Sum. Br. Contract pl. 26. cites 18 E. 4. 5.

3. *But* contra *if a Day of the cutting had been agreed*, and he had not cut before ſuch a Day, and the *Feme died before the Day*. Debt does not lie, for he has not *Quid Pro Quo*. Ibid.

4. If I take *another Man's Horſe and ſell him for* 10 *l.* and the *Owner retakes him*, yet Debt lies of the 10 l. for the *Contract was executed* by Delivery of the Horſe, Et expectet Emptor. Ibid per Vaviſour.

5. *So* per Littleton, *if the Horſe dies in the Stable of the Vendor Meſne* between the Sale and Delivery. Br. Contract pl. 26. cites 18 E. 4. 5.

6. *But*, per Brian J. Fol. 22. *if I ſell a Horſe for* 10 *l. I may retain* the Horſe *till I am paid*, and yet I ſhall not have an Action of Debt, till the Horſe be delivered, and yet by the Bargain the Property is in the Buyer. Ibid.

7. *But* if the *Buyer tendeus the Money*, and the other refuſes, there *he may take the Horſe*, *or have* an Action of *Detinue*. Ibid.

(F) *Consideration paſſed.*

1. IF J. promiſe my Bailiff, upon his accounting to me, to pay him 5l. at a Day certain for his Service paſt, **this is no good Conſideration to maintain an Action of Debt, becauſe the Service was ended before.** 29 E. 3. 26.

Sty. 6. Ward v. Coggin. S. C. adjudg'd, and Error brought, and Error aſſign'd, but does not mention whether the Judgment was reverſed or not.

2. In an Action upon the Caſe, if the Plaintiff declares, That the Defendant was indebted to him 20 l. pro parte pretii diverſorum mercimoniorum & merchandizarum by the Plaintiff to J. S. being a Stranger, at the Inſtance and Requeſt of the Defendant, ante tempus illud venditorum & deliberatorum, & pro quibus **mercimoniis & merchandizis**, the Defendant ante tunc promiſerat to the Plaintiff, to ſee the Plaintiff ſatisfied, & ſic indebitatus exiſtens, he promiſed to pay him at a certain Day; **this is no good Conſideration; for upon his own ſhewing, it appears that this was not any Debt, nor could he have an Action of Debt for it, but only an Action upon the Caſe upon the Promiſe, inaſmuch as this is a Collateral Promiſe, and not in Nature of a Debt, for the Debt was made upon the Sale of the Goods to J. S. and between them; and though this was at the Requeſt of the Defendant, yet this Requeſt, without more, did not make any Debt in the Defendant without the Promiſe, which was made at another Day, and though the Requeſt was ſufficient, with the Promiſe, to maintain the Action upon the Promiſe, yet this did not make it a Debt in the Defendant; and alſo, this is but a Conditional Promiſe, ſcilicet, that if the ſaid J. S. did not pay, that he himſelf would.** Tr. 22 Car. B. R. between *Cogan and Green*, **adjudged, per Curiam, this being moved for Error upon a Judgment in Banco; which Intratur in Banco** Tr. 21 Car. Rot. 390. **and now the firſt Judgment was affirmed.**

(G) Where Debt lies. The *Giſt* of the Action.

4 Rep. 49. a. Hill. 29 * Fol. 595. Eliz. C. B. in Ognell's Caſe. S. P.

1. FOR **Arrearages of** Rent of a Freehold, during the **Time of the** Continuance of the Freehold, **Debt does not lie.** 6 H. 4. 7. b. **adjudged.** 19 H. (*) 6. 29. 47. 17 E. 3. 48, 72. b. 39 E. 3. 22. **agreed. Contra,** 38 E. 3. 10. **admitted. Contra,** 26 E. 3. 64. **admitted.**

——— 8 *Ann. cap.* 14 *S.* 4 Enacts, that *it ſhall be lawful for any Perſon, having* Rent due upon any Leaſe for Life, *to bring an Action of Debt for ſuch Arrears, as upon a Leaſe for Years.*

2. Where **a Man** may have Annuity, **he ſhall not have an Action of Debt.** 8 H. 6. 6. b. **agreed.**

Roll. tit. Annuity, (A) pl. 1. cites 7 H. 6. 19. b. S. P.

3. **If a Man** grants **to another** 10 l. every Year he ſhall be reſident within **ſuch a Pariſh, the Grantee** cannot have Debt **for it,** but **an** Annuity, **for this is Annual at his Will.** 4 H. 6. 91. b. 8 H. 6. 7.

4. If

4. If a Man makes a Feoffment in Fee, reſerving a Rent for ten Years to him and his Heirs, Debt lies for this Rent, for it is but a Chattel.

5. So if a Man leaſes for Life, rendring a Rent for one Year, Debt lies for it, for this is but a Chattel.

6. So if a Man leaſes for ten Years, rendring 10 l. Rent to him and his Heirs, upon Condition to have a Fee, and if he performs the Condition, reſerving 20 l. per Annum; though the Fee paſſes preſently, yet it ſeems Debt lies for the Rent before the Condition performed, for before that it is but a Chattel. 7 E. 3. Det. 147. adjudged. Co. Litt. 217. a. cites S.C. and that Herle Ch. J. of C. B. gave the Rule, that during the Term the Leſſee had only for Years, and therefore the Action of Debt is maintainable.

7. If an Annuity be granted and a Nomine Pœnæ every Day that it is Arrear, if the Nomine Pœne be forfeited, Debt lies for it. 20 H. 6. 6. Contra, 8 H. 6. 6. b. Dubitatur, 7 H. 6. 40. Where *Compoſition* is made *of Tithes of an Annuity* in Perpetuity *in Fee Simple*, between the Parties and their Succeſſors, *and for default* of Payment *a Penalty*, Debt lies of the Penalty, though the Annuity be Real and Inheritance, Quod Nota. Br. Dette, pl. 66. cites 11 H. 4. 85. by the beſt Opinion. ——S. P. Br. Dette, pl. 201. cites S. C. and 7 H. 6. 19. 39. And per Skrene, if *Rent-charge* be granted to me, and if it be Arrear that I ſhall have ſuch a Penalty, I may *diſtrain* for Rent, and alſo for the Penalty; Quære inde, for it ſeems that he cannot unleſs the Deed expreſs that he may diſtrain for both.

8. If by Preſcription the Burgeſſes of a Town ought every Year to elect a Man to collect the Rents of the Lord, and that he ought to pay to the Lord 22 s. for the Profit of the Market, an Action of Debt lies for every 22 s. by the Lord, for that though this be an Inheritance, yet it is a particular Duty by every Collector. 11 H. 6. 14. b. is, that the Executor of the Lord ſhall have an Action.

9. Debt lies for the Arrearages of the Rent of a Freehold, ſcilicet, for Life, after the Eſtate determined. 10 H. 6. 11. 11 H. 6. 15. 19 H. 6. 25. Debt of 20 l. and counted, that the *Defendant held* to him *for* Term of his *Life* certain Land, *rendering* 20 *l. per Ann*, the *Reverſion to the Plaintiff*, *and ſurrender'd to the Plaintiff*, *ſaving his Action of the Arrearages* And per Kirton, he has not ſhewn of whoſe Leaſe he holds, and yet has brought Debt of 20 l. of the Arrearages of the Rent, Judgment of the Count, quære inde; For it was not denied, but that the Action of Debt well lies Br. Dette, pl. 82. cites 38 E. 3. 10.

10. If a Man takes a Seignioreſs to his Wife, who dies, the Baron ſhall have Debt for Relief fallen during Coverture. 10 H. 6. 11. b.

11. Where *Annuity* granted *Pur Auter Vie*, *or for Years expires pending Writ of Annuity* thereof *or before*, he ſhall not recover by Writ of Annuity, but is put to the Action of Debt. Br. Dette pl. 203. cites 34 H. 6. 20.

12. If a Man *loſes his Goods* and *J. S. finds them*, and after *ſells them to the firſt Owner in Market Overt for certain Money*, Quære if the Vendor be barred in Action of Debt for the Money or not; for the Sale ſeems to be void; for the Promiſe was never out of the Owner; for if the Diſſeiſor comes upon the Land and infeoffs the Diſſeiſee, this is a void Feoffment and Remitter. Br. Property. pl. 27. cites 7 E. 4. 15.

13 In Debt, where a Man is *bound to appear upon Writ at a certain Day*, it is no Plea that the Writ is not returned, for he may have Special Entry of his Appearance, but it is a good Plea that the Bailiff to whom he is bound kept him in Priſon till the Day of his Appearance; for he ſhall not gain a Forfeiture by his own Act. Br. Dette. pl. 109. cites 9 E. 4. 23.

14. If

14. If a *Leſſor borrow of his Leſſee for Years* 20 *l. and* after *by Deed indented* between them, the *Leſſor grants, that his Leſſee ſhould recoupe the Rent until he ſhould be paid the* 20 *l.* the Leſſee cannot here have a Writ of Debt for the 20 l. becauſe he had eſtopped himſelf by Deed indented to be contented another Way, viz. by Way of Recouper of his Rent. But otherwiſe it is, where a Man owes me 20 l. and I grant to him by Indenture that he may levy the Money of my Goods. Here he has his Election, whether he will bring a Writ of Debt, or levy it of my Goods. Keilw. 112. b. 113. a. Caſus incerti Temporis. Anon. cites 2 R. 3. pl. 15. S. P.

15. P. *granted an Annuity* of 5 l. per Annum to B. *for Two Years, payable at Michaelmas, or within Sixteen Days after*; in Debt for this 5 l. Plaintiff *declared, that it was in Arrear at Michaelmas, Et adhuc aretro exiſtit*; Defendant demurred, it was inſiſted, that Debt lies not for this Annuity during the Two Years but a Writ of Annuity; but per Cur. Debt lies, it being a Grant for Years; for it is by the Deed as a Contract. Cro. E. 268. pl. 4. Hill. 34 Eliz. B. R. Brown v. Pendlebury.

But in Cro. E. 3 pl. 7. Hill. 24 Eliz. Tanfield's Caſe, it was agreed by all the Juſtices in C. B. that Grantee of an Annuity for Years cannot have an Action of Debt for the Arrearages, during the Term in the Annuity.

16. If *Goods* be *pawned* for Money, and the Goods *be demanded and detained*, whereby the whole Property is in the Pawner; there the Party who had the Pawn may maintain Debt for his Money. Per Fleming Ch. J. and not denied. Yelv. 179. Trin. 8 Jac. B. R. in the Caſe of Ratcliffe v. Davis.

17. *So* if *Goods periſhable in their Nature* be pawned, and they do *periſh of their own Accord*, then Debt may be brought for the Money. Per Fleming Ch. J. and not denied. Yelv. 179. Trin. 8 Jac. B. R. in Caſe of Ratcliffe v. Davis.

18. For the Arrears of an Annuity *for Years* an Action of *Debt lies*, but not for rhe Arrears of an Annuity for *Life*, or in *Fee*. Bulſt. 151. Trin. 9 Jac. in Caſe of Lucas v. Fulwood, alias Ward. Arg. cited to have been ſo adjudged.

19. If *Leſſee for Years grants Annuity for Years* to another, Debt lies for it; Per Yelverton J. Bulſt. 151. Trin. 9 Jac. in Caſe of Lucas v. Fulwood alias Ward

20. *Leſſor*, for Years, rendering Rent, *granted the Rent*; the *Leſſee attorned*; the *Grantee* of the Rent *brought* an Action of *Debt* againſt the Leſſee for Rent Arrrear after the Attornment; and upon Demurrer it was inſiſhed that this Action of Debt would not lie, becauſe there was no Privity, the Reverſion being ſtill in the Leſſor; but per Curiam, the *Attornment made a Privity*, and Judgment for the Plaintiff. 2 Jo. 1. Mich. 22 Car. 2. Goodman v. Packer.

Lev. 22. Paſch. 13 Car 2. B. R. Robins v. Cox. S. P. exactly, and the Court divided, whereupon it was adjourn'd into the Exchequer Chamber, but on the publiſhing of the Caſe of Ards v. Watkins, in Cro. C. 637. 651. where it was adjudg'd, that ſuch Action was maintainable; the Parties before any Argument in the Exchequer Chamber agreed, and the Rent was paid without any more ado.

(H) Where Debt *lies* in Reſpect of the Eſtate *by Matter ſubſequent.*

1. IF the Rent of the very Tenant be Arrear, and after the Lord aliens the Seigniory, yet he ſhall not have Debt for the Arrearages, becauſe the Freehold of the Rent continues. 19 H. 6. 42. b.

Br. Debt, pl. 93. cites S. C. & S. P. though the Tenant attorns. Per Paſton.

2. So if a Man leaſes for Life, rendring Rent, and after Arrearages incur, and the Leſſor grants over the Reverſion, to whom the Tenant attorns, yet he ſhall not have Debt for the Arrearages, becauſe the Freehold of the Rent continues. 19 H. 6. 42. b.

Br. Debt, pl. 93. cites S. C. & S. P. Per Paſton, for theſe are the Acts of the Party himſelf.

3. If a Parſon hath an Annuity in Fee, and leaſes it to another for Years, and after Arrearages incur, the Leſſor ſhall not have an Action of Debt during the Years for the Arrearages ſo long as the Eſtate of Inheritance of the Annuity continues. Mich. 1649. between **Tintal and Harrington*, adjudged in Arreſt of Judgment. Intratur 1645. Rot. 1612.

But if I have Annuity or Rent ſervice to me and my Heirs, and I grant it for Years to J. S. and the Annuity or the Rent Servive is arrear, and the Term expires, J. S ſhall have Debt. Br. Debt. pl. 93. cites 19 H. 6. 41. Per Aſcue.——[The Year Book is of an Annuity granted by me to B and his Heirs, and by B. granted to J. S. for Years, and the Annuity &c. being Arrear, the Term expires, the Termor ſhall have Writ of Debt, (ſays the old Edition, but the new Edition ſays Detinue,) and yet the Annuity continues; and ſo of the Rent Service, notwithſtanding the Frank-tenement continues in me. 19 H. b. 42. a.] * Sty. 162 S. C. it was moved, that he ought to have brought a Writ of Annuity, and cited 6 H. 4. 7 & 9 H. 6. 94. The Judgment was arreſted till the Plaintiff ſhould move.

4. If a Prebend hath an Annuity in Fee in the Right of his Church, and after Arrearages incurr'd he reſigns, he ſhall have Debt for the Arrearages, becauſe the Perſon of the Grantor was at all Times chargeable before in Annuity, and now the Manner of the Action is changed into Debt for Neceſſity. Dubitatur, 19 H. 6. 41. b.

Br. Debt, pl. 93. cites S. C. Per Fulthorpe and Paſton, that Debt does not lie, but Aſcue and Newton contra. And Brooke ſays, that the beſt Reaſon as it ſeems that the Action does not lie, is, becauſe it was the Folly of the Plaintiff himſelf.——4 Rep. 48. b. 49. b. cites S. C.

5. So if a Parſon hath an Annuity, and he is deprived, he ſhall have Debt for the Arrearages due before. 19 H. 6. 42 b.

6. So he ſhall have Debt for the Arrearages after a Recovery againſt him and the Patron in a Quare Impedit. 19 H. 6. 42. b.

7. If Leſſee for Life of a Rent acknowledges a Statute, and after releaſes to the Tertenant, and then the Statute is extended, and after the Rent is Arrear, the Tenant by the Statute ſhall not have an Action of Debt for the Arrearages during the Extent; for though in Truth the Freehold is extinct by the Releaſe, yet as to him it is in Eſſe, otherways the Extent lay not; and during the Continuance of the Freehold, Debt lies not, though the Tenant, by the Statute, hath but a Chattel, for this is derived out of the Freehold. Hil. 4 Jac. B. between *Duncombe and Lillington*, per Curiam.

Fol. 596.

7 Rep (38) 37 Mich. 5 Jac. C. B. Lillingſton's Caſe. S. C. reſolv'd accordingly.

8. The very Lord ſhall not have an Action of Debt for Aid to marry his Daughter, or make his Son a Knight. Co. Lit. 47. 6.

S. P. But *contra of his Executors*, for they may have Debt of it; for it is not Annual. Br. Dette, pl. 193. cites 7 H. 6 13. Per Rolf.

9. [So] **The very Lord ſhall not have an Action of Debt for** Relief due **to himſelf, for this is Part of his Seigniory, and he may diſtrain for it. Co. Lit. 47. b.**

And Adminiſtrator of a Lord brought Action of Debt of the Relief, which fell in the Time of the Inteſtate, and the Defendant pleaded in Barr, and therefore it ſeems that it lay clearly; For he did not Demurr. Br. Dette, pl. 193. cites Trin. 32 H. 8. Rot. 528.——Co. Litt. 83. a. ad finem. S. P ——Kelw. 133. a. pl. 111. Per Keble, e contra, becauſe it is only an Acknowledgment to be made to the Lord after the Anceſtor's Death, and is not of the ſame Nature as the Rent is; For a Man cannot have a Præcipe quod reddat of it as he may of the Rent; beſides, it is not Annual but a Caſualty, which perhaps the Lord may not have in all his Life.——Dal. 17 pl. 6. Anno. 1 & 2 P. & M. by the greater Opinion, the Lord himſelf may have Action of Debt for Relief, becauſe it is not Annual as other Services are. —— 4 Rep. 49. b. that the Lord himſelf ſhall diſtrain, and ſhall not have Action of Debt, and cites 7 H. 6. 13. and 22 Aſſ. 52.——See tit. Tenure (N. a) per totum.

10. [So] **The very Lord ſhall not have an Action of Debt** for Eſcuage **due to himſelf for the Cauſe aforeſaid. Co. Lit. 47. b.**

Br. Debt, pl. 93. cites 19 H. 6. 41. S P. Per Fulthorp.

11. **If a** Rent **be reſerved** upon a Leaſe for Life, **after the** Death of the Leſſee, **Debt lies for the Arrear Ages before; for now the** Freehold **is determined, and it is** changed into a Contract. 10 H. 6. 11. 11 H. 6. 15.

* Br. Debt. pl. 116 cites 29 E. 3. 22.

12. So **if a Leaſe be for the Life of another, and** Ceſtuy que vie dies **after the Rent incurr'd.** 19 H. 6. 41. b. * 39 E. 3. 22.

[but the other Editions are 39 E. 3. 22]

S. P. by Fulthorp, J. Br. Debt, pl. 93. cites 19 H. 6. 41.——S. P. Br. Debt, pl. 90. cites 19 H. 6. 29. but makes a Quære if an Occupant enters where Leſſee himſelf dies, if he ſhall not render the Rent, and ſays, it ſeems he ſhall by Diſtreſs, but not by Action of Debt, during the Life of Ceſtuy Que Vie.——Br. Debt. pl. 195. cites 9 H. 6. 29 [and the other Editions at pl. 196. (the Number only varying) cites 9 H. 6. 29. but it ſeems it ſhould be 19 H 6. 29. per Paſton.—— All the Editions are (devant) which ſeems miſprinted for (durant.)]

In Caſe of a Condition of Re-entry for Non-payment of the Rent, the Re-entry is the Cauſe of the Action,

13. But **if a Leaſe be made for Life, rendring Rent,** upon Condition for Non-Payment to re-enter, and detain till **the Arrearages paid; if the** Leſſor re-enters **for Non-Payment, he cannot, during his Seiſin, have Debt for the Arrearages before, becauſe the Freehold remains in the Leſſee, and the Leſſor hath it but in Nature of a Diſtreſs. Contra,** 30 E. 3. 17. **adjudged.**

which cannot be by the Condition without Deed, for before the Re-entry he cannot have Debt; for it was then Frank-tenement, and now by the Eſtate being determined, Debt lies. Br. Debt, pl. 16. cites 29. [but it ſhould be 39 E. 3. 22.]——Br. Debt, pl. 93. cites 19 H. 6. 41. Per Fulthorp, J.

S. C. cited Co. Litt. 203. a. S. P. Contra that he ſhall not have Debt, and therefore ſays,

14. Contra, 30 E. 3. 7. **adjudged; but** this Matter of the Freehold is not intended; **but there in the ſame Folio is another Caſe of a Leaſe for Years, and it ſeems this is the ſame Caſe with the other, and ſo the other is** miſprinted, **in that it calls it a Leaſe for Life; (but Fitzherbert abridges this Caſe to have been a Leaſe for a Year.)**

that the Book [of 30 E. 3. fol. 7. which he cites in the Margin.] which ſeems to the Contrary, is falſe printed, and that the true Caſe was of a Leaſe for Years, as appears afterwards in the ſame Page of the Leaf.

Br. Debt. pl. 93. S. C. cites S. P. by Fulthorp, J.

15. **If** Leſſee for Life, **rendring Rent,** does Waſte after Arrearages due, **and the** Leſſor recovers in **an Action of** Waſte, **he may have an Action of Debt for the Arrearages, becauſe the Eſtate is determined by lawful Action to avoid his Diſinheritance.** 19 H. 6. 42.

16. So

16. So if such Leſſee aliens in Fee, and the Leſſor enters for a Forfeiture, he may have Debt for the Arrearages. 19 H. 6. 42. b. Per Fulthorp, J. Br. Debt. pl. 93. S. P. cites S. C.

17. So if a Leaſe for Life be upon Condition, and the Leſſor enters for Breach of it, he ſhall have Debt for the Arrearages. Dubitatur, 17 E. 3. 48, 73. b. but 18 E. 3. 9. adjudged. Contra, 19 H. 6. 42. * 39 E. 3. 22. agreed. * S. P. Br. Debt, pl. 83. cites 38 E. 3. 22. [and Roll. 39 E. 3. &c. ſeems miſprinted.]

18. So if Leaſe for Life be made rendering Rent and *Leſſee ſurrenders.* F. N. B. 120. (G) in the New Notes there (b) cites 17 E. 3. 48. 18 E. 3. 10. 30 E. 3. 7. 38 E. 3. 10. contra by ſome; 19 H. 42. for the Re-entry is not a Penalty, ſo of a Nomine Pœnæ. And ſays, ſee 38 E. 3. 22. 19 H. 6. 42. 6 H. 7. 3.

19. If a Man *leaſes* Land *for Years* and *the Rent is arrear*, and a *Stranger recover the Land againſt the Leſſor*, yet the Leſſor ſhall have Debt, Per Newton. Br. Dette pl. 93. cites 19 H. 6. 41.

20. Where *Rent is arrear*, and the *Leſſor diſtreins*, and the *Tenant Tenant for Life ſurrenders* and *ſues Replevin*, the Leſſor may make Avowry, but Quære of Debt; it ſeems all one, if he ſhall have the Avowry he may have Debt; for it is his own Act to take the Surrender. Br. Dette pl. 93. cites 19 H. 6. 41.

21. Where *a Thing determines by the Act of God*, Action of Debt will lie, though it did not lie before, and ſo it is where it determines *by Courſe of Law*. But *otherwiſe*, where it is *by the Act of the Party* himſelf. 19 H. 6. 42. a. per Fulthorp. Br. Debt. pl. 93. cites S. C.

22. If a Man *ſells Twenty Acres of Land for* 10 *l.* the *Vendor may have Writ of Debt, though he has not enfeoffed the other* of the Land, and the *other has no Remedy but by* Action upon the *Caſe*; for it his Folly that he had not taken better Surety to have been enfeoffed, Quod non Netur, Br. Action, Sur le Caſe, pl. 60. cites 22 H. 6. 44.

23. If *Annuity of Fee* be *extinct* Debt lies of the Arrears. Br. Debt pl. 121. cites 37 H. 6. per Priſot.

24. Debt lies *for the Lord of a Leaſe made by his Bailiff*, per Moil J. Quod non Negatur. And Choke J. that a Bailiff may leaſe at Will, for he is accountable to the Lord. Br. Dette. pl. 146. cites 2 E. 4. 5.

25. If a Man grant *an Annuity for Years*, the Grantee ſhall have *Writ of Annuity* as long as the Years continue, and after the Years expired he ſhall have *Debt of the Arrears*; for he has no other Remedy. Br. Dette pl. 144. cites 9. H. 7. 17. Br. Annuity, pl. 132. cites S. C.

26. *So* where a Man *grants a Seigniory for Years*, the Grantee may make Avowry during the Years, and after the Years ſhall have Debt of the Arrears for the Cauſe aforeſaid. Ibid.

27. Action upon the Caſe, that the Defendant *aſſumed* to the Plaintiff, *that if the Plaintiff diſcharged J. T. of ſuch Execution*, in which he is *at the Suit of the Plaintiff*, that then *if the ſaid J. T. does not ſatisfy the Plaintiff by ſuch a Day, that then Defendant ſhall do it*, and counted accordingly, and they were at Iſſue upon Non-Aſſumpſit, and the *Evidence* to the Jury in Proof of the Aſſumpſit, and the Truth of the Matter alſo *was, that the Defendant aſſumed to the Plaintiff's Wife, in the Abſence of the Plaintiff, and when he came to his Wife he agreed to it and diſcharged J. T. without ſpeaking with the Plaintiff*, and per tot. Cur. upon good Argument the Action upon the Caſe lies; and by the beſt Opinion, for he ſhall have Action upon the Caſe, and not Writ of Debt. And by ſome he may chooſe the one or the other. Br. Action Sur le Caſe pl. 5. cites 27 H. 8. 24, 25.

28. *In*

28. *In moſt Caſes* a Man ſhall have Action upon the Caſe, when he may well have other Remedy, but this ſeems that it is *in another Degree.* Ibid.

29. *As* where a *Man is indebted* to me, *and he promiſes to pay before Michaelmas*, I may have Action of Debt upon the Contract, or Action of the *Caſe upon the Promiſe*, and ſo this is in diverſe Reſpects, for upon the Promiſe Action of Debt does not lie. And this in B. R. Ibid.

30. Where a Man *grants an Annuity to J. S. during the Life of the Grantor*, and the Annuity is *arrear* and the *Grantor dies*, the Grantee himſelf ſhall have Action of Debt of the Arrears of the Annuity, becauſe the Annuity is determined. Contra when the Annuity continues, as it ſeems. Br. Dette pl. 191. cites Vet. N. B. Annuity.

3 Rep. 23. b. cites S. C. and 30 E. 3. 7. and 6 H. 7. 3. b. contrary to the Book of 32 E. 3 tit. Barr 262. (which is not Law,) and this is in reſpect of the Contract between the Leſſor and the Leſſee.——See Kelw. 153. b. pl. 1. Mich. 1 H. 8.

31. If a Man *leaſes* Lands *for Years* rendering Rent, and for Default of Payment, that he ſhall re-enter; if he do re-enter into the Land for Non Payment of the Rent, yet he may have an Action of Debt for the Rent, for which he does Re-enter, and in the Writ ſhall *recover the Rent for which he re-entered.* F. N. B. 120. (H.)

32. If a Man *leaſes* Land *for Term of Years* rendering Rent, and afterwards the Rent is behind, and the *Leſſee ſurrenders* his Term, yet the Leſſor ſhall have an Action of *Debt for the Arrearages before*, as it ſeems by P. 38. E. 3. Tamen Quære, for the Opinion is contrary to 2 H. 6. F. N. B. 122. (A)

(I) Executor. Pl. 1. 2. 3. 5.
[Baron after Death of the Feme. Pl. 4.]
[Leſſee for Years after the Term expir'd. Pl. 6. 7.]

1. IF a Rent becomes due to the very Lord, and after he dies, his Executor ſhall not have Debt for this Rent, becauſe the Rent continues a Freehold in the Heir. 11 H. 6. 15. 19 H. 6. 41. b.

Executor may have Action of Debt *for Relief due to the Lord.*

2. The Executor ſhall have Debt for Relief fallen in the Life of the Teſtator. 11 H. 6. 15. Co. Lit. 47. b.

See all the Books cited at (H) pl. 9. which are full as to this Point.

Co. Litt. 47. b. S P.

3. The Executor ſhall have Debt for Eſcuage, Aid pur faire Fitz Chivalier, & pur file marrier due in the Life of the Teſtator.

4. The Baron ſhall have Debt for Relief fallen in the Right of the Feme during the Coverture after the Death of the Feme. 10 H. 6. 11. b.

Fol. 597. See (K) pl 9. S. C.

5. If there be a Cuſtom that a Town ought yearly to chooſe a Man to collect the Rents of the Lord, and to pay 22 s. to him for the Profits of his Fair, if there be 22 s. due by a Collector, and after the Lord dies, his Executor ſhall have Debt for it. 11 H. 6. 14. b. Dubitatur. (So it ſeems the Lord himſelf might.)

6. If the Grantee in Fee of an Annuity grants it over for Years, and after the Term expires, the Leſſee ſhall have Debt for the Arrearages, though the Annuity continued of Inheritance, becauſe the

the Eſtate of the Leſſee is determined, and ſo he hath no other Remedy, and the Perſon of the Tertenant was chargeable before. 19 H. 6. 42.

7. So Leſſee for Years of a Manor, after Term expired, ſhall have Debt for the Arrearages, becauſe he hath no other Remedy, yet the Inheritance continued. 19 H. 6. 42. 9 H. 7. But quære the Reaſon thereof.

8. If *Parſon* or Prebendary *dies*, his Executors ſhall have *Debt for the Arrearages of an Annuity* incurred in the Life of his Teſtator, becauſe the Perſon of him that ought to pay the Annuity is chargeable in Writ of Annuity. 4 Rep. 49. a. in Principio. Hill. 29 Eliz. C. B. per Cur. in Ognel's Caſe. F. N. B. 122 (L) S. P.

(I. 2) Pleadings in Debt for Rent.

1. DEBT *upon a Leaſe for Years, rendering Rent payable at another County, than where the Land is*, and *no Diſtreſs in the Indenture*, yet he diſtrain, and there *Levied by Diſtreſs upon the Land and ſo he owes him nothing is a good Plea.* Br. Viſne pl. 19. cites 44 E. 3. 42.

2. In Debt for Rent againſt Leſſee for Years, if *Payment in another County*, or *levied by Diſtreſs* be *pleaded*, he ſhall conclude, And ſo he owes him nothing. Br Debt pl. 27. cites 34 H. 6. 17.

3. A *Leaſe* was made of Tithes *paying Rent with a Proviſo, that* if J. S. the *Leſſee, attempt or proſecute any Action againſt A. B. who pretended a former Leaſe* made to him *of the ſame Tithes, and if upon ſuch Action a Verdict ſhould paſs againſt J. S. the Leſſee*, that *then the Rent ſhould ceaſe.* In Debt on a Bond entered into by the Leſſee for Performance of Covenants the Breach aſſigned was Non-Payment of Rent; J. S. the Defendant pleaded, that *A. B. enjoyed the Tithes* by Virtue of his former Leaſe, ſo that the Defendant could not have and enjoy them according to his Leaſe, and ſo there were no Covenants to be performed no his Part; upon Demurrer the Opinion of the Court was againſt the Defendant, for *the Rent is payable until a Verdict ſhould paſs* &c. Dy. 318. b. pl. 11. Mich. 19 Eliz. Anon.

4. If in Debt for Rent, the *Plaintiff declares upon a Leaſe for Years rendering* 31 *s. Yearly at Lady-Day and Michaelmas by equal Portions, and demands* 15 *s.* 6 *d. for Rent behind for one Year ending at Lady-Day* laſt, the Declaration is naught; for the Demand of the 15 s. 6 d. being for the Arrears of the Rent of the whole Year, it *ought to have been ſhewed how he was ſatisfied the Reſidue*; and for this Cauſe after a Demurrer to the Defendant's Plea the Writ was abated. Cro. C. 137. Trin. 4 Car. Bailey v. Hughes.

5. *Debt upon Bond for Performance of Covenants* in a Leaſe; the Defendant *pleads Performance*, the Plaintiff replied and *aſſigned a Breach for Non-Payment of Rent* on ſuch a Day, *Secundum Formam & Effectum Conditionis Obligationis præd'* the Defendant *rejoins and alleges an Entry by the Plaintiff* on the Lands leaſed *before the Rent due, and that he kept Poſſeſſion till the Rent-Day was paſt*; and *found for the Plaintiff*; it was moved in Arreſt of Judgment on the Plaintiff's Replication, it being that the Defendant did not pay the Rent Secundum Formam & Effectum Conditionis of the Bond, whereas there is *no Mention of any Payment of Rent in the Condition of the Bond but in the Leaſe only*; Sed non allocatur; becauſe the Defendant by his *Rejoinder confeſſed that ſuch Rent was arrear*, and waived taken Iſſue upon it, but took Iſſue on another Matter, and ſo this is well enough after a Verdict. And per Hale

Ch. B. it is all one in Substance to plead, as the Plaintiff did, and to have pleaded Secundum Formam & Effectum Indenturæ; For the Condition of the Bond comprehends all that is comprized in the Leafe; but though *it might have been a Queſtion upon Demurrer*, yet there can be no Doubt of it after a Verdict. Hard. 319. pl. 13. Mich. 14 Car. 2. in the Exchequer. Anon.

Sid. 423. pl. 2. S. C. but mentions the Action to be brought for Rent of the third Year, and that the not averring the Continuance of Poſſeſſion was aided after Verdict. ——2 Keb. 543. pl. 7. Coſtrike v. Maſon, S. C. held accordingly, and that this was a Leaſe for three Years, and not at Will after the firſt Year.

6. Debt for Rent *upon a Leaſe for a Year, and ſo from Year to Year, Quamdiu ambabus Partibus placuerit*; there was a Verdict for the Plaintiff for Two Years Rent. Sanders moved in Arreſt of Judgment, that the Plaintiff alleges indeed, that the Defendant entered and was poſſeſſed the firſt Year, but mentions no Entry as to the Second. Per Twiſden, the *Jury* have *found the Rent to be due for both Years*, and we now intend, tnat he was in Poſſeſſion all the Time for which the Rent is found to be due. Mod. 3. pl. 10. Mich. 21 Car. 2. B. R. Goſtwicke v. Maſon.

7. In Debt *for Rent upon a Demiſe* of a Fiſhery to the Defendant *for Three Lives*, the Plaintiff in his *Declaration ſet out the Demiſe, Virtute Cujus the Leſſee entered, & fuit & adhuc eſt inde Poſſeſſionatus.* The Defendant *pleaded Nil debet*, and there was a *Verdict for the Plaintiff.* And Serjeant Prat moved in Arreſt of Judgment, that it appeared upon the Declaration, that the Eſtate for Three Lives was continuing, and therefore Debt did not lie, it being a Rent iſſuing out of a Freehold. Serjeant Hooper, in Anſwer, ſaid, that this was well enough after a Verdict, for that Nil Debet put all the Matter in Iſſue, and if the Eſtate had not been determined, the Plaintiff could not have had a Verdict; and that that Matter indeed was the greateſt Matter litigated at the Trial, and therefore the Continuing not appearing directly, the Court would take the Eſtate to be determined. Pratt ſaid, that *the Averment in the Declararation of the Fuit & adhuc* &c. was an expreſs Averment that the Eſtate did continue; but if it were only indifferent, it would not be good; for the *Plaintiff ought to ſhew expreſsly in his Declaration, that the Eſtate for Three Lives was determined*, or elſe he was not intitled to bring his Action of Debt, within the Statute of H. 8. which was agreed by the Court, and the Judgment arreſted. 2 Ld. Raym. 1056, 1057. Mich. 3 Ann. Biſhop of Wincheſter v. Wright.

Diſtreſs ſufficient to ſatisfy the Rent, is a good Plea in Bar to Debt, for the Rent. Per Turton, J. 12. Mod. 663.

8. If a Man *diſtrains* for Rent *and impounds* the Diſtreſs and then brings Debt for the ſame Rent, the Defendant may plead *levied by Diſtreſs*; Per Holt Ch. J. 11. Mod. 144. Hill. 6 Ann. in Caſe of Alton v. Jarvis.

9. In Debt for Rent the Plaintiff *declared on a Demiſe* by *Mentionat' exiſtit*; this was held to be Ill and not helped by Defendant's pleading over. 11. Mod. 258. Mich. 8 Ann. B. R. Joddrell v. Heath.

(K) Where

In what Cases an Action on the Case lies, where Debt lies. See tit. Actions (N) Per totum.

(K) Where Debt, Covenant, an Action upon the Case, or Account lies, without Contract.

1. IF a Man delivers Money, upon Condition to be his Money, and that if it be not performed, that it shall be re-delivered; if the Condition be not performed, the Bailor may have Debt for it, 41 E. 13. 10. The Bailor may have Debt, or Account. Br. Debt. pl. 223. cites S. C.

2. If a Man delivers 100 l. in a Bag unsealed to another, Debt does not lie for it, because the Property was never out of the Bailor. 18 H. 6. 20. b.

3. If I have a Rent out of Land, and the Tenant delivers it to another to pay to me, I cannot have Debt against him for what he hath received. 6 H. 4. 7. b.

4. If a Man delivers Money to you to pay to me, I shall not have Debt for it, because there is not any Contract between us. 6 H. 4. 8. D. 21. b. pl. 131. Trin. 28 H. 8. S. P.—Cro. J. 687. pl. 1. Trin. 27 Jac. B. R. the S. P. adjudged, that Debt lay.

5. If a Man receives Rent of my Tenant by my Command, I shall not have Debt against him. 6 H. 4. 8.

6. So if he receives it of his own Head. 6 H. 4. 8.

7. If a Man by Obligation acknowledges that he hath received a Sum ad proficiendum & computandum, the Obligee may have Debt for it if he will. 42 E. 3. 9. Br. Debt, pl. 32. cites S. C.

8. If a Man by Deed delivers certain Money to another, to render an Account thereof to him, he may have an Action of Debt for the Money at his Election. 28 E. 3. 98. b.

9. If there be a Custom that the Collector of the Rents of the Lord ought to pay 22 s. to the Lord for the Profits of the Market of the Lord, the Executor of the Lord may have Debt for the 22 s. without bringing a Writ of Account, for he is not a Receiver of this, but he ought to pay it, whether he receives the Profits or not. 11 H. 6. 14. b. See (I) pl. 5. S. C.

10. If a Man delivers Money to deliver to J. S. if he does not deliver it, yet J. S. cannot have a Writ of Debt against him. 19 H. 6. 5. b. 20 H. 6. 35. D. 28 H. 8. 21. S. 131.

11. So [But] if J. S. refuses the Money, the Bailor may have Debt against the Bailee for it. 19 H. 6. 35. S. P. Br. Debt. pl. 91. S. C by Fulthorp, J. For the Bailee shall not retain the Money by the refusal of a Stanger; and Brooke says, this seems to be good Law; For the Bailor may have Debt or Account, because there is Privity.

12. If a Man by his Deed acknowledges that he hath so much of the Money of J. S. due to him in his Hands, though here is no Contract or Borrowing between them, yet J. S. may have an Action of Debt against him. 11 H. 6. 39.

13. If I deliver Money to another to repay at a certain Day, Debt lies for it at the Day. 29 E. 3. 26. b.

14. [So] If I deliver Money to B. to keep safely, I may have an Action of Debt against B. for it. 2 R. 3. 15. D. 28 H. 8. 22. S. 137.

15. If

15. If A. by my Command pays Money to B. to my uſe, and B. does not pay it to me, I may have Debt for it againſt him. 36 H. 6. 9. b.

Fol. 598.

16. If a Man leaſes for Years, rendring Rent, and after deviſes the Rent to another, and dies, the Deviſee may have an Action of Debt for the Rent, though it is become a Rent-Seck, becauſe by the Original Creation thereof Debt lay. Mich. 11 Jac. B. R. between *Holland and Hunt*, per Houghton.

17. If a Sheriff levies certain Money upon a Levari Facias out of a Recognizance at the Suit of J. S. and after returns the Writ ſerved, J. S. may have an Action of Debt againſt the Sheriff, as well as a Scire Facias, or Fieri Facias, though there be not any actual Contract between the Sheriff and him; for this is a Contract in Law, ſcilicet, the levying the Money to the uſe of J. S. Hill. 15 Jac. B. between * *Speak and Richards*, per Curiam, adjudged. Hobert's Reports 279. the ſame Caſe. Paſch. 15 Car. B. R. between || *Parkinſon and Culliford*, adjudged per Curiam, that an Action of Debt lay againſt the Executor of the Sheriff, though it did not appear that the Fieri Facias upon the Judgment was returned; for it is not material, inaſmuch as the Party is diſcharged by the Payment thereof, without the Return; and it is not grounded upon a Perſonal Tort, but upon a Contract in Law made by the Teſtator, upon the Receipt of the Money; and this is not a Simple Contract, but grounded principally upon the Record, ſo that the Executor cannot wage his Law, and therefore the Action lies againſt the Executor. Adjudged, this Matter being moved in Arreſt of Judgment.

* Hob. 206. pl. 260. S. C. reſolved accordingly. ——Hutt. 11. S. C. but not reſolved.—— Noy. 22. Spark v. Richards. S. C. the Court held, that Action of Debt lay on ſuch Return. —Mo. 886. pl. 1244. S. C. adjudg'd — Brownl. 51. S. C the Action well lies.———Hutt. 32. Trin 16 Jac. cites S. C. as adjudg'd accordingly.

|| Cro. C. 539. pl 3 Perkinſon v. Gilford. S. C. all agreed, that the Action well lay, and Judgment was given Niſi &c.——— Jo. 430. pl. 2. S. C. adjudg'd by three J (abſente Brampſton,) that either Account or Debt lies at the Plaintiff's Election; and that it lies againſt the Adminiſtrator.—— Mar. 13. pl. 33 S. C and all conceiv'd that the Action would lie.——See tit. Sheriff (L.) Per totum.

18. Debt lies in Bank of an *Amerciament* aſſeſſed *in a Leet* by the beſt Opinion of the Court. But Quære, becauſe it was not much argued. Br. Dette. pl. 179. cites 10 H. 6. 7.

19. If I deliver Money to A. *to beſtow in Charity*, and before he gives I *countermand* it, Debt lies for me againſt him for the Money; for the Property is ſtill mine. D. 22. a. pl. 135. Trin. 28 H. 8.

20. B. *retained R. to be Miller to his Aunt at* 10 *s. a Week*; Adjudged that Debt lies not upon this, but Action on the Caſe; for in Debt it is requiſite that the Thing comes to the Party that promiſes; and ſo for Want of *Quid pro Quo* Debt does not lie; But per Cur. this maintains Action upon the Caſe; for though it be not beneficial to B. it is chargeable to R. Dy. 272. a. Marg. pl. 31. cites Mich. 26 & 27 Eliz. Baxter v. Read.

21. The Words of an Oligation were, *I am Content to give to A.* 10 *l. at Michaelmas*. Held that Debt or Covenant lies at the Election of the Plaintiff. 3 Le. 119. pl. 169. Mich. 27 Eliz. B. R. Anon.

22. Y. was an Innholder in a great Town in the County of S. where the Seſſions uſed to be holden, and the Defendant was *a Gentleman* of Quality in the Country there, and he *in going to the Seſſions uſed to lodge in Houſe of* the ſaid Y. *and there took his Lodging and his Diet for himſelf, his Servants, and Horſes*, upon which the Debt in Demand grew; but the ſaid Y. *was not at any Price certain with the Defendant, nor was* there ever *any Agreement made betwixt them for the ſame.* It was ſaid by Anderſon Ch. J. that upon that Matter an Action of Debt did not lie. And therefore afterwards the Jury gave a Verdict for the Defendant.

Defendant. 3. Le. 161. pl. 210. Hill. 29 Eliz. C. B. Young v. Aſhburnham.

23. Caſe for that in Conſideration, he on ſuch a Day &c. had *contracted with and by his Bill of Articles had bargained and ſold unto the Defendant and his Heirs a Meſſuage*, the *Defendant promiſed to pay the Plaintiff* 300 *l. on ſuch a Day*, which he had not paid; and upon Demurrer it was adjudged, that this Action would not lie, becauſe in this Caſe he might have an Action of Debt; and *where a Man may have an Action at Common-Law (as Debt is)* an Action upon the *Caſe will not lie.* 2 And. 53. pl. 39. Trin. 38 Eliz. Wade v. Branch.

24. A. *delivered* 16 *l. to B.* to keep for him the ſaid A. and to be redelivered and paid to the ſaid A. *upon his Requeſt*; it was inſiſted that Debt lay not, but Accompt; but adjudged, that on B's refuſing to pay it, upon A's Reqeſt, Debt did lie for A. againſt B. D. 20. b. Marg. cites 40 Eliz. C. B. Bretton v. Barley. Ow. 86. S. C. held accordingly;

25. A Man made a *Leaſe for Life rendering Rent, and for Non-Payment to re-enter*; and afterwards he brought an Action of Debt for the ſame and recovered. Ibid. 21. a. Marg.

26 A Man *delivers Money to another to buy certain Things for him*, and he does not buy them, the Party may bring an Action of Debt, but he ſaid that the Plaintiff ought to aver, that the Defendant had not re-delivered them. Ow. 86. cited by Glandville as adjudged, Hill. 41 Eliz. in Caſe of Bretton v. Barnet.

27. Walmſley took a *Difference between Goods and Money*; for if a Horſe be delivered to be re-delivered, there the Property is not altered, and therefore Detinue lies. And if Portugal's or other Money that may be known be delivered to be re-delivered, a Detinue lies, for they are Goods known; but if Money be delivered it cannot be known, and therefore the Property is altered, and therefore Debt will lie. Ow. 86. Mich. 41 & 42 Eliz. Bretton v. Barnet.

28. A. gives Money to B. to buy Wares, and B. does not buy them. Debt was maintained for the Money. D 20 a. pl. 119. in Marg. cites it as a Caſe cited by Glanvil Mich. 41 & 42 Eliz. as adjudged.

29. A. *delivered a Horſe to B.* with Orders to *ſell him for* 3 *l.* Adjudged that *Debt* did not lie, but an Account for the Horſe and the Profits. D. 20. Marg. pl. 120. cites Trin. 2. Jac. 1. Holcomb v. Sumwood.

30. A. *delivers Money to B. to pay it to C. for the Debt of A. A. himſelf* afterwards *paid the Debt, and afterwards B. pays the Money to C.* and it was ruled that an Action of *Debt lies againſt C.* for the laſt Money, for the laſt Payment was upon a Tacit Condition, if the Debt was not paid before. Cited per Cur. Noy. 22. Trin. 15 Jac. C. B. in Caſe of Spark v. Richards.

31. In all Caſes where the *Party who receives Money, is to have any Allowance or Reward* for the receiving thereof an Action of Account-render, and not an Action of Debt, or upon the Caſe muſt be brought againſt him. L. P. R. 30.

32. An Action of Debt, or an Action on the Caſe upon an Inſimul. Computaſſet lies at the Election of the Plaintiff *againſt one for receiving Money of a Third Perſon for the Uſe of the Plaintiff, although he had no Authority given him to receive it*; Hill. 23 Car. 1. B. R. For it is the Intereſt that the Plaintiff hath in Money paid for his Uſe, that gives him the Cauſe of Action, and it is a Receipt of the Money that makes the other Party liable to the Action, and it *matters not by what Authority he received it.* L. P. R. 30.

33. An Action of Debt was brought againſt the Defendant upon an *Inſimul Computaverunt*, and a Verdict and Judgment given againſt him

whereupon he brought his Writ of Error, and aſſigns for Error that *the Action was brought againſt him for Rent as a Tenant of Land and not as a Receiver*, and therefore an Account did not lie; Roll Ch. J. cited 20 H. 6. *Rent alone* lies not in Account, becauſe Rent is a certain Thing, and it is alſo the Realty; but if Rent be *mixed with other Things*, an Account will lie; but here it appears the Action is brought againſt the Defendant as a Receiver, and if one *receives Money due to me upon Obligation*, I ſhall have either an Action of Account, or an Action of Debt againſt him, ſo if he receives my Rents without my Conſent. Therefore let the Judgment be affirmed. Sty. 287. Trin. 1651. Hamond v. Ward.

34. The *Nature of a Debt* is not *changed* by an Account no more than accounting with an Executor, but a Specific Promiſe to the Husband to pay him a Debt due to the Wife Dum Sola may alter the Debt. Sty. 473. Mich. 1655. Conie v. Lawes alias Lewis.

35. *I oblige myſelf to pay ſo much at ſuch a Day* and ſo much at ſuch a Day, Covenant lies, eſpecially if both Days are not paſſed; but Ch. Bar. Bridgman doubted how the Law would have been if the Words were *Teneri & firmiter Obligari*, becauſe thoſe Words found in Debt and not in Covenant. Hard. 178. Hill 12 & 13 Car. 2. in Scacc. Norris's Caſe.

36. *Indictments for clipping being found againſt W. he gave K. a* Newgate *Sollicitor* 70 *l. to procure his Diſcharge and for his Pains*; and W. not being proſecuted on theſe Indictments he brought an Indebitatus Aſſumpſit againſt K. for the whole 70 l. Upon the Trial before Holt Ch. J. it being proved that the Defendant confeſſed that he had *diſpoſed of this Money in Bribes*; the Jury by Direction gave a Verdict for the Plaintiff. Ld. Raym. Rep. 89. Trin. 8 W. 3. Wilkinſon v. Kitchin.

37. If one Covenants or *promiſes ſpecially* upon Receipt of Goods to be accountable for them, if he will not account, Action upon the Covenant or Promiſe will lie, and an Action of Account lies upon the *General Receipt*. Per Holt Ch. J. 12 Mod. 517. Paſch. 13 W. 3. B. R. in Caſe of Spurraway v. Rogers.

[K. 2] *Debt. On Penal Statutes, though not expreſs'd in the Statutes.*]

18. [1.] WHERE by the Statute of 14 H. 8. cap. 5. and the Letters-Patents of the King, it is enacted, That every one that practiſes Phyſick in London without Licence of the College of Phyſicians, ſhall forfeit for every Month 5 l. one Moiety to the King, and the other to the College; though no Action is appointed for it, yet they have an Action of Debt for it. Trin. 4 Jac. B. R. College of Phyſicians adjudged.

19. [2.] An Action of Debt lies upon the Statute of 2 E. 6. for the treble Value for not ſetting forth of Tithes, though the Statute does not mention any Action but only that he ſhall forfeit the treble Value, and does not mention to whom he ſhall forfeit it, nor by what Action it ſhall be recovered. Co. Entries. And this is now the common Practice.

Mo 853. pl. 1166. S. C. adjudged, and though the Statute

20. [3.] An Action of Debt lies by a Sheriff upon the Statute of 28 Eliz. cap. 4. for his Fees given by the Statute, for an Execution ſerved by him, though the Statute does not ſay that he ſhall have his Fees, or any Action for them, but only ſays, that he ſhall not take

take for any Execution ſerved any Conſideration or Recompence beſides that thereafter in the ſaid Act mentioned, which it ſhall be lawful to be had and received, ſcilicet, 12 d. for 20 s. where the Sum does not exceed 100 l. and 6 d. where above 100 l. 14 Jac. B. R. between *Proby and Lumly*, Plaintiffs, and *Mitchel*, Defendant, adjudged. Intratur. Paſch. 14 Jac. Rot. 531.

does not give any Action for his Fees, yet it being a Duty, an Action is given by that Law of Neceſſity.——Roll. Rep. 404. pl. 34. adjudg'd; and it was ſaid, that there was no Precedent of ſuch Action having been brought before.——Noy. 75, 76 S. C. cited as adjudg'd.——S. C. cited as adjudg'd Poph. 173.——S. C. cited Lat. 51.——See tit. Fees Per totum.

(L) Upon an Account.

1. DEBT lies upon an Account before himſelf. 45 E. 3. 14. b. 7 H. 4. 14. b.

2. Debt lies for the Arrearages of an Account againſt the Bailiff of a Manor. 7 H. 4. 3.

3. If the Bailiff of a Manor accounts for the Iſſues before they are leviable, an Action of Debt lies for the Arrearages, for he hath voluntarily charged himſelf with them. 13 H. 4. 12. b.

4. If upon the Account of a Bailiff of a Manor it appears, that he hath paid more than he received, he may have Debt for this Surpluſage. 7 H. 4. 3.

5. If upon the finding the Surplus the Lord promiſes to pay it, the Bailiff may have Debt for it. 29 E. 3. 25 b. Br. Debt, pl. 58. cites S. C. and no mention is there made of any Promiſe of the Lord, but only of his being over paid, and that in Debt brought by the Bailiff, the Lord was compelled to anſwer.

6. If a Man accounts before Auditors for a Thing that lies not in Account, As for a Contract, Debt lies not for the Arrearages of the Account. 8 H. 6. 10. b. 15. b. Fol. 599. Debt *upon Arrears of Account* the Plaintiff was examined, and found that it was *for certain Stuff bought* of the Plaintiff, and for this he had accounted before Auditors, and becauſe it did not lie in Account, he was commanded to amend the Count, or the Defendant ſhall be diſmiſſed, by which he declared upon a Contract. Br. Debt, pl. 89. cites 8 H. 6. 10. But in ſuch a Caſe the ſame Year, fol. 15. the Plaintiff would not amend his Count, by which the Defendant made his Law immediately.

7. If a Man accounts againſt another as Receiver to a Stranger, if the Defendant be found in Arrearages before Auditors aſſigned, Debt lies not for the Arrearages upon the Account, becauſe it appears that he is not accountable to the Plaintiff. 20 H. 6. 6.

8. But in an Account as Receiver of the Plaintiff, if the Defendant be found in Arrearages, Debt lies for it upon the Account, though in Fact he never was his Receiver. 20 H. 6. 6. b. contra.

9. Debt lies againſt Executors upon the Arrearages of an Account by the Executor himſelf, of Receipts by the Teſtator. 2 H. 4. 13. b.

10. And the Court in this Caſe may be of Receipts in general, without mentioning the Particulars, becauſe the Defendant was Party thereto. 2 H. 4. 13. b.

11. In a Writ of Account againſt another as Receiver, if the Defendant be found before Auditors in Surplus, yet he ſhall not have Debt againſt the Plaintiff for it, inaſmuch as he is charged as Receiver, and not as Bailiff, for a Receiver ſhall not have any Recompence of his Travel &c. Mich. 12 Jac. B. R. between the *Earl of Suffolk and Floyd*, adjudged upon Demurrer. Roll. Rep. 87. pl. 38. S. C. adjudged.—— 2 Bulſt. 277, 278. S. C. adjudged.

12. Debt

12. Debt by Executor, and counted how *a Stranger by his Will had deviſed* 100 *l. to the Teſtator of the Plaintiff, which came to the Hands of the Defendant, who recited by Indenture that it came to his Hands, and that he had delivered* 40 *l. to J. N. for the Uſe of the Teſtator*, and ſo there remained 60 l. in his Hands for which Action accrued to the Plaintiff as Executor, and by Award the Defendant was compelled to anſwer without other Contract or Appointment, and without being put to Action of Debt. Br Debt pl. 186. cites 11 H. 6. 39.

13. It was held for Law, That where *Two Jointenants* are *of a Manor*, and the *one of them aſſigns Auditors* to hear the Account of the Bailiff of the Manor, who is found in Arrear, the Action of *Debt ſhall be brought in both their Names* &c. Thel. Dig. 26. Lib. 2. C. 2. S. 17. cites Paſch. 18 E. 4. 3.

[L. 2] For other Matters.]

5 Rep 64. a. Trin 38 Eliz. C. B. Clark v Gape S. C. See tit. By Laws, (A 2) pl. 1. S C. and the Notes there.

2. [1.] **If a Corporation that has Power by Charter or Preſcription to make By-Laws,** makes a By-Law, and that if it **be broke,** to forfeit **a certain Sum to the Corporation**; though it **be not appointed by the By-Law that it ſhall be recovered by Action of Debt, yet an Action of Debt lies for it, becauſe this is a Duty in the Corporation, this being a By-Law, and this Sum forfeited to them. Co. 5. Clark 64. Hobert's Reports 279.**

Hob 206. in pl. 260. Per Hobart, Ch. J. S. P.

13. [2.] **Debt lies** for an Amercement in a Court-Baron. **Hobert's Reports** 279.

Hob. 206. in pl. 260. S. C cited by Hobart, Ch. J.

14. [3.] **If a Talley be** delivered to a Cuſtomer, **Debt lies for it as ſoon as the Money comes to his Hand. 1 H. 7. Hobert's Reports 279.**

Where the King is indebted to me, and aſſigns me to take it by the Hands of a Cuſtomer, and delivers me a Talley of it, I by ſhewing of the Talley to the Cuſtomer, ſhall have Action of Debt upon it againſt the Cuſtomer, if he has enough to pay. Br. Debt, pl 17. cites 27 H. 6. 9.——S. P. Br. Debt. pl. 120. cites 37 H. 6. 15. and *if ſeveral have ſeveral Tallies* to be paid &c. the *Collector is charged, firſt to him who ſhews him*, and ſo to the Second, and ſo to the Third, as long as he has Aſſets in his Hands to pay, and the Adminiſtrator of the Creditor ſhall have Action, by ſhewing [the Talley] of the Inteſtate againſt the Collector. And 21 ibidem, is, that he who ſhews Talley ought to offer Acquittance.——Br. Tail de Exchequer, pl. 1. cites S. C.

S. P. by Hobart, Ch. J. Hob. 206, in pl. 260. cites S. C——Br. Debt, 127. cites 21 H. 7. 40.——Br. Preſcription, pl. 40. cites S. C.——Br. Debt, pl. 239. cites 11 H. 7. 13.

15. [4.] **If there be a** Cuſtom **that** if any breaks the Pound **of the Manor, that he** ſhall pay **3 l. to the Lord; admitting this to be a good Cuſtom, an Action of Debt lies for it. 11 H. 7. 14. by all the Juſtices.**

5. Debt was brought for that the Defendant had a Leet, and his Steward commanded the Defendant, being Bailiff, to make a Pannel, who would not, by which the *Steward aſſeſſed a Fine* upon him of 40 s. and the Lord brought Action of Debt, and the Defendant demurred; Quære, and ſee Debt of Relief. Br. Debt pl. 85. (bis) cites 7 H. 6. 12.

6. Debt

6. Debt was brought *upon a Cuſtom, that if any break the Pound of the Lord* in his Manor of D. that *he ſhall forfeit* 3 *l.* and that ſuch a one broke it &c. Unde Actio accrevit &c. And by the Juſtices; it the Cuſtom was good as they thought it was not, becauſe it cannot bind Strangers, then the Action ſhall lie well, Quod Nota. And yet he cannot preſcribe in the Action. Br. Dette. pl. 127. cites 21 H. 7. 40.

7. In Debt brought for a *Fine impoſed by a Corporation againſt one elected Baily, for refuſing to take the Declaration impoſed by the Statute* of Corporations, whereby the Election became void. After Judgment for the Plaintiff, it was aſſigned for Error, that the Statute (13 *Car.* 2) did not enable the impoſing any Fine, but only made the Office void. But the Court held, that the Refuſal of the Oath is, by a Means, the Refuſal of the Office, and conſequently within their Power given by the Charter to fine for Refuſal to accept the Office; And ſo Judment was affirmed. 3 Lev. 116. Paſch. 35 Car. 2. C. B. Starr v. The Mayor &c. of Exeter.

(M) *Upon what Judgment or* other *Record* it lies.

1. A Man may have an Action of Debt upon a Statute-Merchant, for it is in Nature of an Obligation, and the Seal of the Party is put thereto. * 43 E. 3. 2. b. † 3 E. 4. 27. 15 H. 7. 16.

* Br. Debt. pl. 33. cites S. C.
† Br. Debt, pl. 149. cites S. C. Dubitatur.

2. But no Action of Debt lies upon a Statute-Staple, for the Seal of the Party is not put thereto, and this is a Duty made by a Special Law, which was not by the Common Law, and therefore he ſhall not have other Remedy for it than the Statute hath provided. 15 H. 7. 16.

3. But quære whether an Action of Debt lies upon a Recognizance in Nature of a Statute-Staple, inaſmuch as the Seal of the Conuſor is put thereto.

4. An Action of Debt lies upon a Recognizance taken in Chancery. D. 22 El. 369. 52.

Br. Debt, pl. 128. S. P. cites 36 H. 6. 2.

5. So an Action of Debt lies upon the Tenour of ſuch Recognizance. D. 12 El. 369. 52.

6. An Action of Debt lies upon a Recognizance taken before the Mayor of London. D. 4, 5 El. 219. S. 9.

Fol. 600.

Cro. E 186, 187. pl. 11. Trin. 32 Eliz. B. R. in Caſe of Chamberlain v. Thorp. S. P. appears.—Le. 130. pl. 178. S. C. & S. P. appears.

7. If A. be Bail for B. in Banco by Recognizance acknowledged by him, and after Judgment is given againſt B. for the Damages and Coſts, and after a Scire Facias is ſued upon the Recognizance againſt A. and Judgment is had thereupon againſt him, an Action of Debt lies upon this Judgment againſt A. and if he hath Judgment therein, he may take his Body in Execution thereupon, though he could not take his Body in Execution upon the Judgment in the Scire Facias. Mich. 10 Car. B. R. between *Rigault and Carrick*, adjudged upon

Debt was brought on a Recognizance in Chancery, and the Declaration was, that

Cognovit ſe deberi, and the Plaintiff had Judgment.

upon a Demurrer per Curiam, and the Defendant taken in Execution accordingly, and this afterwards affirmed in a Writ of Error.

8. If A. be Bail for B. in a Recognizance of 100 l. in Banco, in an Action againſt B. in which A. acknowledges himſelf to be bound in 100 l. that if B. be condemned in the Action, then he ſhall pay the Money, or render his Body to Priſon, or he will pay it for him; An Action of Debt lies upon this Recognizance, alleging, that Judgment was had in the ſaid Action againſt B. for 100 l. and that B. did not pay it, nor render his Body to Priſon, and that A. had not paid it, for A. may aid himſelf by Plea in this Action, as well as he may upon the Scire Facias upon the Recognizance. Hill. 14 Car. B. R. between *Holmes and Faldoe.* Intratur, Mich. 14 Car. Rot. 463. a Writ of Error was brought upon a Judgment given in Banco, in an Action of Debt upon ſuch Recognizance; but the Parties after agreed. But Maſter Hoddesden ſaid ſuch Actions are uſual.

9. *Debt for* 40 *l. upon Account, and* 20 *l. upon Loan*; the *Defendant pleaded that he granted to the Plaintiff to levy it upon his Land in D. and C.* which he has levied; and per Belk it is no Plea; For the Grant is void; For he cannot levy it, Quod Non Negatur, by which he pleaded ut ſupra, and *concluded, And So he owed him nothing*, and a good Plea now, per Thorp. Br. Dette pl. 29. cites 41 E. 3. 7.

10. *So* to *plead Payment, and conclude Nihil debet*, and this upon *Contracts*; contrary in Debt upon *Specialty*. Ibid.

Br. Debt, pl. 132. S. P. and cites S. C.

11. If a Man *recovers Land and Damages in Aſſiſe in Ancient Demeſne*, and the *Defendant has nothing in the Franchiſe to render Damages*, as in London &c. there the *Plaintiff may have Debt in C. B. of the Damages, and count upon the Recovery, or may remove the Record into Chancery and ſend it into Banco by Mittimus, and ſhall have Scire Facias thereupon, and ſo to have Execution in Bank upon the Record of another Court*, Quod Nota. Br. Executions. pl. 75. cites 39 H. 6. 3. 4.

12. Debt was brought in Bank upon Recovery at E. *in the Court of Piepowders*, and the *Tenor of the Record was ſent* into Chancery by Certiorari and ſent into Bank by Mittimus, and the Plaintiff declared upon it. Rolf tendered to demur for the not ſhewing of the Record and it was held peremptory. And by the Opinion of the Court the Plaintiff has well declared, by which he paſſed over, and *pleaded Nul tiel Record*, and ſo it was agreed that he may do notwithſtanding the Certificate of the Tenor of the Record Br. Dette. pl. 85. (bis) cites 7 H. 6. 18.

13. If in a *Scire Facias to have Execution of an Annuity* the *Paintiff has Judgment*, upon ſuch Judgment he ſhall he have an Action of Debt. Per Wray Ch. J. 4 Le. 186. pl. 287. Mich. 17 & 18 Eliz. B. R. in Caſe of Barnard v. Tuſſer.

14. B. *recovered in a Scire Facias upon a Recognizance* againſt T. and afterwards brought an Action of Debt upon the ſame Recovery, and it was adjudged maintainable, notwithſtanding that it was *objected, that the Judgment* in ſuch Scire Facias *is not to recover Debt but to have Execution of the Judgment*. 4 Le. 186. pl. 287 Mich. 17 & 18 Eliz. B. R. Barnard v. Tuſſer.

4 Le. 182. pl. 281. S C. in totidem Verbis.

15. The Plaintiff brought a *Scire Facias upon a Recognizance taken in the Chamber of London, and had Judgment* in the Scire Facias, and now he brought an Action of Debt upon that Judgment; and upon a Demurrer to the Declaration, it was objected that it was ill, becauſe the Plaintiff did not ſhew, that the Chamber of London was a Court of Record, but the Court ſaid, they well knew that thoſe of London have a Court of Record, and

and that they have uſed to take Recognizances there; And Ld. Anderſon ſaid, that admitting the Recognizance was not well taken, yet becauſe in the Scire Facias upon it, the Defendant did not then take Advantage thereof, he ſhall be bound by his ſaid Admitance of it; and he ſaid that it was in a Manner agreed by the whole Court, that if upon this Demurrer here, the Judgment in London, upon the Scire Facias, be reverſed; yet the Court here muſt proceed, and not take Notice of the ſaid Reverſal. Le 284. pl. 384. Hill. 29 Eliz. C. B. Hollingſhed v. King.

16. Debt *upon a Judgment* in B. R. The Defendant *pleads a Writ of Error depending* in the Exchequer, to which the Plaintiff demurred, and per Curiam Judgment pro Plaintiff on Worſley's Caſe. 2 Keb. 659. pl. 13. Trin. 22. Car. 2. B. R. Holmes v. Chamberlain.

(N) *For what* Thing *the Judgment being*, Debt lies upon it.

[And in what Court. pl. 9, 10.]

1. IF a Man recovers Damages in a real Action, as in a Writ of Ayel, * Coſinage, or Entry ſur Diſſeiſin, he may bring Debt upon the Judgment for the Damages, for by the Recovery they are in the Perſonalty. || 43 E. 3. 2.

* Br. Debt, pl. 33. cites S. C.

|| Upon Default in Writ of Coſinage, Damages were found to 40 l. upon a Writ of Inquiry of Damages, and one was received, and Damages were found againſt the Tenant by Receipt to 10 l. and Debt was brought of the 40 l. Br. Debt, pl. 230 cites 39 E. 3. 8.

2. So he may have Debt for the Damages recovered in a Writ of Waſte. 43 E. 3. 2. adjudged.

Br. Debt, pl. 33. cites S. C.

3. If a Man recovers the Arrearages of a Rent-Service, he ſhall not have Debt for them upon the Judgment, becauſe theſe continue a Freehold. * 43 E. 3. 2. Contra, 9 E. 4. 50. b.

*Br. Debt, pl. 33. cites S. C. & S. P. For the Thing is certain.

4. So a Man ſhall not have Debt for the Arrearages recovered in a Writ of Annuity. 43 E. 3. 2.

Br. Debt pl. 33. cites S. C. S. P.

5. Debt lies for Damages recovered in a Mortdanceſtor, as Arrearages of a Rent. 46 E. 3. 25.

Br. Debt, pl. 41. cites S. C Per Finch, clearly, though it was objected, that it was of the Nature of the Rent, which is Frank tenement.

6. Debt lies for Arrearages recovered in a Writ of Account. 43 E. 3. 2. b. 11 H. 4. 79. b.

In Debt upon Arrearages of Account, the Defendant pleaded Arbitrement, and held no Plea; For the Account before Auditors is in a Manner a Record. Br. Debt, pl. 108. cites 4 H. 6. 17.

7. If a Man recovers a Debt, Debt upon this Judgment. 43 E. 3. 2. b.

8. If a Man recovers Debt or Damages in London, in an Action brought there by the Cuſtom of the City, which lies not at Common Law,

Law in the Courts of Weſtminſter, yet when this is become a Debt by the Judgment, an Action of Debt lies in Banco or Banco Regis upon this Judgment. Mich. 15 Car. B. R. in an Action between *Maſon and Nichols*, adjudged upon a Demurrer to the Declaration.

Mo. 410. pl. 559 S. C. held at firſt by 3 Juſtices that the Action did not lie, * Fol. 601. but Fenner, e contra; but at another Day three of the Juſtices held the Action maintainable, becauſe the Court Baron cannot hold Plea, nor award Execution of ſo much Damages, and yet the Damages were well aſſeſſed there——Cro. E. 426. pl. 25. S. C. but the only Point there, was, Whether ſhe might recover Damages to 50 l. in the Court Baron, where they cannot hold Plea for more than 40 s. and the whole Court held, that ſhe might, and that the Damages were well awarded; but the other Point does not appear there. Sed adjornatur.

9. If a Woman be endowed of Copyhold Land by the Cuſtom of the Manor, and ſhe recovers Dower within the Manor, and Damages to 50 l. for the Profits of the Land from the Death of her Huſband, by the Statute of Merton, cap. 1. the Husband dying ſeiſed, yet ſhe ſhall not have an Action of Debt at the Common Law for the Damages, for upon ſuch Judgment no Writ of Error or Falſe Judgment lies; but the Remedy is in the Court of the (*) Manor, or in Chancery. Co. 4. 30. b. between *Shaw and Thompſon* reſolved.

10. But if a Man recovers Damages in a Writ of Right-Cloſe, in Nature of an Aſſiſe, in a Court of Ancient Demeſn, he may have an Action of Debt for theſe Damages at the Common Law. 8 E. 4. 6.

11 *Debt* lies of Execution *of Damages recovered in* Writ of *Waſte or Action Real*; for the Damages are Perſonal. Br. Execution, pl. 17. cites 43 E. 3. 2.

12. Where a Man recovers in Writ of Annuity or Aſſiſe, or has Avowry for *Rent which is Frank-Tenement*, and *recovers the Arrears without Coſts and Damages*, he ſhall not have Action of Debt of it, but *Scire Facias*; For it is Real *but* where he has Judgment of it *with Coſts and Damages*, which goes together, ſo that it be mixed with the Perſonalty, there lies Writ of Debt; note the Diverſity per Cur. Br. Dette, pl. 212. cites 23 H. 8.

As to the Plea of Writ of Error pending, See more at Tit. Superſedeas, (A) to (F.)

13. In an Action of Debt for 90 l. The Plaintiff *declared Quod cum recuperaſſet coram Juſticiariis de Banco* apud Weſtm' 90 *l. pro Dam'* againſt the Defendant, *Prout per Record' & Proceſs' quæ Dom' Rex & Regina coram eis Cauſa Erroris in eiſdem corrigend. venire fac.* & quæ in Cur. dicti Domini Regis & Dom' Reginæ in pleno Robore & Vigore remanent minime revocat' plen' apparet per quod Actio accrevit &c. To this the *Defendant demurred, ſuppoſing that the Judgment was ſuſpended* ſo far that an Action of Debt could not be brought upon it, pending the Writ of Error. But the Court held, if the Defendant could inſiſt upon this, *he ought* not to have Demurred; but *to have pleaded ſpecially, and demanded Judgment*; if the Plaintiff ſhould be anſwered pending the Writ of Error; ſo Judgment was given for the Plaintiff. So if he had pleaded in Bar of Abatement, that a Writ of Error had been pending, the Plea had not been good. 2 Vent. 261. Mich. 2 W. & M. in C. B. Biddulph v. Daſhwood.

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1. At Common Law, if a Man had recovered a Debt, he might have had an Action of Debt upon this Judgment after the Year. 43 E. 3. 2. b.

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2. If a Man ſues a Scire Facias upon a Recognizance in Chancery, and has Judgment thereupon, and an Elegit is awarded thereupon, it ſeems he cannot have an Action of Debt upon the Recognizance afterwards, inaſmuch as he hath elected another Courſe to have his Debt. Contra, P. 40 El. B. R. between *Cowper and Langworth*, adjudged. Cro. E. 608. pl. 10. S. C. and all the Juſtices held, that he might wave the Elegit, and the Judgment in the Scire Facias, on the Recognizance being in Force, he might have new Action of Debt. So if one recovers in Debt upon an Obligation, yet that remaining in Force, he may have a new Action; For Popham ſaid, the Difference is where one recovers in Treſpaſs, or other Action, wherein he recovers nothing certain, but Damages only; if he has Judgment in ſuch an Action, there, when that Judgment is in Force, he cannot have a new Action; but where the Thing which is demanded is certain, as Debt &c. it is otherwiſe. Wherefore it was adjudged for the Plaintiff.——Mo. 545. pl. 724. S. C. held accordingly by Popham and Fenner, abſentibus Gawdy and Clench.

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6. [So] if a Man recovers Debt, and hath the Party in Execution, and he eſcapes, he ſhall not have Debt upon the Judgment againſt him afterwards. Dubitatur, 11 H. 4. 45.

7. If a Man by Indenture acknowledges to J. S. that he hath ſo much of his Money due to him in his Hands, without limiting any Day of Payment, yet Debt lies preſently. 11 H. 6. 39.

8. If a Man bargains with another to enfeoff him of certain Land for a certain Sum, ſo that there is a full Bargain between them, he may demand the Money in a Writ of Debt preſently. 20 H. 6. 34. b. And the other has no Remedy but Action on the Caſe, for it was his Folly not to take better Security. Br. Debt, pl. 99. cites 2 H. 6. 44 by Newton.

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And ſee tit. Election, (B) pl. 1. S. C.

Week's Quarter before the other are incurred, for this is a Rent. Tr. 3 Ja. B. R. between the *Lord Denny and Parnel* adjudged.

3 Rep 22. a. S. P.— Co. Litt. 292. b. S. P. —10. Rep. 128. b. S. P.——Cro. J. 505. pl. 16. S. P.

11. But upon a Bill Obligatory for the Payment of ſeveral Sums at ſeveral Days, no Action lies till the laſt Day is paſt. Co. Lit. 47. b.

S P. per Coke Ch. J. Roll Rep. 221. Trin. 13 Jac. and agreed in Scarlett's Caſe.——5 Rep. 22. a. S. P.——As if a Sum is to be given in Marriage payable at ſeveral Days, Debt lies not till all the Days are paſt, though Caſe lies for Non-payment at the firſt Day. 4 Rep. 94 b. Per Cur. in Slade's Caſe. ——5 Rep 81. b. S. P.——Co. Litt. 292. b. S. P.——10 Rep. 128. b. S. P.——Cro. Car. 241. pl. 1. in Caſe of Mills v. Mills. S. P. agreed per Cur.

12. So upon a Contract Debt lies not till all the Days of Payment are paſt. Co. Lit. 47. b.

13. If a Man *leaſes for Years* rendering Rent, and the Rent *is arrear* and the *Term expires*, he cannot have Diſtreſs, but ſhall have Action of Debt for the Rent due before. Br. Dette. pl. 74. cites 14 H. 4. 30.

So it was ſaid *upon Capias ad Satisfaciendum*, Anno 37 H. 8. and not adjudged here.

14. *Scire Facias upon Recovery of Debt and Damages* the *Defendant ſaid that at another Time the Plaintiff ſued Scire Facias, and the Sheriff levied the Money*, Judgment &c. and it was ſaid there that Fi. Fa. is not of Record before the Return thereof. Br. Executions pl. 6. cites 20 H. 6. 24, 25, & 26. But in 21 H. 6. 5. it was rehears'd again, and there the *Plaintiff was compell'd to anſwer to the Plea of the Defendant*, and ſo he did, and therefore a good Plea. *So it ſeems upon a Taking of the Body by Capias ad Satiſfaciendum, where no Writ is return'd.* But it was ſaid in Anno 21 H. 6. 5. That in Anno 19 E. 3. it was adjudg'd no Plea. Quære. Br. Executions, pl. 6.

Note, that the Caſe of Sciré Facias, which commenced Anno 20 H. 6. was here adjudged a good Plea; That the Sheriff had levied by Fieri Facias, and the Plaintiff awarded to anſwer to it, by which he ſaid, that the Sheriff hrd not made thereof Levy, Priſt and the others e contra. But it was ſaid, that M. 19 E. 3. it was awarded *no Plea, becauſe the Roll did not make mention thereof, nor did he ſhew Acquittance nor Tally of the Sheriff*, by which Execution was awarded. Br. Executions, pl. 52. cites 21 H. 6. 5.

15. If a Man *ſells* to another Twenty Acres of *Land for* 10*l.* the *Vendor ſhall* Action of *Debt though he did not infeoff the other*, and the other has no Remedy, but Action upon his Caſe; for it is his Folly that he had not taken better Surety. Br. Dette. pl. 99. cites 22 H. 6. 44. Per Newton.

16. *And* by him in Debt of 20l. for Twenty Acres of Land ſold, it is a good *Plea that the Bargain was to pay at the Livery of Seiſin ſuch a Day*, and that *before the Day the Vendee prayed the Vendor to infeoff him*, and upon this we paid the 20l. and he refuſed, Judgment ſi Actio. Br. Ibid.

17. If a Man *recovers Damages in Treſpaſs in C. B.* and the *Record is removed for Error* into B. R. there by all the Juſtices the Plaintiff may bring of the Damages in C B. or in B. R. at his Pleaſure, and it lies notwithſtanding the Writ of Error; for as yet the firſt Record is not reverſed in Facto by the Writ of Error; *but* it was held that *he ſhall recite the Record in his Count, and that it is removed into B. R. by Writ of Error*, but he *ſhall not ſhew the Record to the Court*; but if the Defendant *pleads Nul tiel Record*, the Plaintiff ſhew it at his Peril Sub Pede Sigilli, quod Nota. Br. Dette. pl. 166. cites 18 E. 4. 6.

18. Bill of Debt was brought *upon Arrears of a Leaſe before Michaelmas*, and the Rent was not due before Michaelmas, and it was challenged becauſe it was brought *before it was due.* And per Tremaile, yet

yet the Bill is good; Quære, for it ſeems that theſe Words) *Debet & Injuſte detinet*) *were not true at the Time of the Teſte of the Bill*; for he cannot detain it till the Day of Payment be come, nor upon a Leaſe it is no Debt before. *But upon an Obligation* it is a Debt before, but it ſeems that all is one; for though it may be releaſed before, yet it is not detained till the Day of Payment be come. Br. Dette pl. 126. cites 21 H. 7. 33.

19. L. Serjeant brought a *Scire Facias upon a Recognizance*, and had *Judgment upon Default*, *Quod habeat Bxecutionem*; and afterwards he *brought* an Action of *Debt upon the ſaid Judgment*, and Exception was taken to the Action; for that he ought to proceed upon the Judgment given upon the Scire Facias, and ought to ſue Execution according to the ſaid Judgment by Elegit, or Scire Facias, but not by Capias; but the Exception was not allowed; for *the Recognizance is a Judgment in itſelf, and an Action of Debt will lie upon it, without any Judgment in the Scire Facias*; and Debt lies as well upon the Judgment as upon the Recognizance itſelf; and ſo was the Opinion of the whole Court. 2 Le. 14. pl. 24. 19 Eliz. C. B. Loveleſſe's Caſe.

20. *Debt on Bond* was brought *before the Day* of Payment, and Judgment was given for the Plaintiff. Then Defendant brought Error, and *pending the Writ of Error the Day of Payment happened.* Now the Action is become good which was not ſo before. 2 Le 20. pl. 26. Trin. 29 Eliz. B. R. Thurkettle v. Teys. Cro E. 110. pl. 7. Thirkettle v. Reeve S. C.

21. If a Man be bound *to pay* 10 *l. ſuch a Day, and* 10 *l. ſuch a Day.* Here the Obligee ſhall have his Action for the firſt, becauſe the Duty was in itſelf ſeveral; Per Periam. Owen, Hill. 30 Eliz. Hunt v. Torney. For being payable at ſeveral Days they become ſeveral Debts in Effect. 2 Inſt. 395.——Cited Hard. 27.

22. If a Man be bound in a *Bond of* 100 *l. to pay* 20 *l. for ſo many Years*; he ſhall not have Debt till the laſt Year expired; Per Periam. Owen, 42. Hill. 30 Eliz. Hunt's Caſe.

23. A. made a *Bill* of Debt to *B. for the Payment of* 20 *l. at Four Days, ſcilicet,* 5 *l. at every of the ſaid Four Days*, and in the End of the Deed, *covenanted* and granted *with B. his Executors*, and Adminiſtrators, *that if he make Default* in the Payment *of any of the ſaid Payments*, that *then he he will pay the Reſidue that then ſhall be unpaid*; and afterwards *A. fails in the firſt Payment, and before the Second Day B. brought an Action for the whole* 20 l. By the whole Court the Action does well lie for the Manner, for if one covenants to pay me 100 l. at ſuch a Day, an Action of Debt lies; a Fortiori, when the Words of the Deed are Covenant and Grant, for the Word Covenant ſometimes ſounds in Covenant, ſometimes in Contract Secundum Subjectam Materiam. Le 208. pl. 290. Mich 32 & 33 Eliz. C. B. Anon.

24. *Covenant* to pay 5 *l. per Annum for Five Years*, and declares on a Bill ſealed; *Debt* lies for Non-Payment of the 5 l. 3 Lev. 383. Mich. 5 W. & M. in C. B. March v. Freeman. Cites Hard. 178 that Covenant lies at the firſt Day, but Quære of Debt. Norris's Caſe.

25. A. by Bill ſealed *covenanted to pay* the Plaintiff 5 *l. a Year for five Years at Two Payments*, viz. 24 *June and* 25 *December.* The Court upon the firſt and ſecond Argument inclined that Debt lay not till all the Days are paſt. But it was inſiſted, that this is not like to Bills of Debt, but is a Covenant to pay at ſeveral Days, and Covenant lies on Breach at every Day, as in Caſe of a Promiſe; and in this Caſe the 5 l. a Year is *for Maintenance of a Daughter*, ſo that without Payment ſhe cannot be maintained in the mean Time. And afterwards Judgment was Ibid. at the End of the Caſe, the Reporter cites Hardr. 178. Flower's Caſe, that Covenant lies at the firſt Day,

but Quære of Debt.

was given for the Plaintiff Per tot. Cur. 3 Lev. 383. Trin. 5 W. & M. in C. B. March v. Freeman.

26. 8 *Ann. cap.* 14. *S.* 6. *Enacts, that it ſhall be lawful for any Perſon, having Rent due upon any Leaſe for Life, for Years, or at Will determined, to diſtrein for ſuch Arrears after the Determination of the Leaſes.*

27. Covenant *to pay* 50 *l. at* 5 *l. per Ann.* till the whole 50 l. be paid, and *in Failure* of Payment of any 5 l. then to pay the whole; Action lies for the whole unpaid, at any Time, after Failure. 8 Mod. 56. Trin. 7 Geo. Anon.

(O. 2) At what Time; before Performance of the Conſideration.

1. IF I *ſells* my *Land in D. for* 100 *l.* Debt lies, and yet he has not the Land, nor *can he take it without Livery.* Br. Contract, pl. 17. cites 37 H. 6. 18.

2. *And* where a Man is *retained to be of Counſel for* 10 *l. per Ann.* he may have Debt, and yet it may be that the other *did not demand Counſel of him*, but there he *ſhall ſay that he was ready* if &c. Ibid.

Fol. 602.

(P.) *How* it ſhall be brought; In what Caſes *in the Detinet*; *in Reſpect of the Perſons.*

Lane. 79. S. C. adjudg'd accordingly. ——Lutw. 893. Trin. 2 Jac. 2. in Writ of Error in the Exchequer Chamber. Glover v. Kendall, on a Judgment in B. R. where the

1. IF A. be in Execution upon a Judgment for B. **and after** B. dies, **and after** A. brings an Audita Querela againſt C. the Executor of B. and has a Scire Facias, and **thereupon** puts in Bail by Recognizance in Chancery, according to the Statute of 11 H. 6. cap. and after **upon this Audita Querela** Judgment is given againſt A. and **afterwards a** Scire Facias iſſues againſt the Bail, **and after Judgment the** Bail is taken in Execution upon the Recognizance, **and the** Sheriff ſuffers him to eſcape, upon which **Eſcape the** Executor brings **an Action of** Debt; **this Action ought to be brought in the Detinet only, and not in the Debet and Detinet, for this** Recognizance is in Nature of the firſt Debt, **this being in a legal Courſe. M. 8 Ja. Scaccario, between** *Carew and Broughton* **adjudged.**

Caſe was, that K. brought a Bill in Debt for 602 l. and 6 s. againſt the Marſhal of the Marſhalſea, in the Debet & Detinet for an Eſcape, and declar'd, that the Plaintiff, as Executor of E. B. had recover'd againſt J. F 600 l. Debt, and 2 l. 6 s. for Damages, and that J. F. was committed in Execution, and the Defendant ſuffered him to eſcape. The Plaintiff had Judgment by Nihil Dicit. But the Judgment was revers'd, becauſe the Action was brought in the Debet & Detinet, where it ſhould have been in the Detinet only, the Recovery in the firſt Action being as Executor in the Detinet only.

S. P. Whether the Money became due in Teſtator's Life, or after his Death. Br. Debt, pl. 1. cites 19 H. 8. 8.

2. **If an** Executor **brings Debt upon an** Obligation **made** to the Teſtator, **where the Day of** Payment incurred after the Death of the Teſtator, **yet the Writ ſhall be in the Detinet only, for he brings the Action as Executor.** 20 H. 6. 5. b.

3. So

3. So if a Man binds himself to the Teſtator to pay him 100 l. when ſuch a Thing ſhall happen; if it happens after the Death of the Teſtator, yet the Writ of Debt by the Executor ſhall be in the Detinet only. 20 H. 6. 6. b.

4. When *Debt* is brought *by Executors*, and Recovery had, and after the *Defendant eſcapes*, and Debt is brought upon this Eſcape, this ſhall be in the Detinet according to the firſt Cauſe of Action. Hutt. 79. Hill. 1 Car. in Caſe of Townley v. Steele.

5. M. brought an Action of *Debt againſt* H. *a Sheriff for an Eſcape*, and had a Verdict againſt him. The Defendant moved in Arreſt of Judgment, that *the Action was brought by the Plaintiff, as an Adminiſtrator, for the Eſcape, which was made in the Life of the Inteſtate only.* The Action ought to be brought in the Detinet only, the Plaintiff being but an Adminiſtrator, who recovers not to his own Uſe. Therefore ſtay Judgment till the Plaintiff move. Sty. 232. Mich. 1650. Martin v. Hendlye.

6. *Debt by an Executor for an Eſcape of one in Execution on a Judgment of Teſtator*, and declared in the *Debet and Detinet*; and after Verdict this moved in Arreſt of Judgment; and it being doubted whether it was helped by the general Words of *(Matters of the like Nature)* in the Stat. of 16 *and* 17 *Car.* 2. to maintain it. At another Day were quoted 1 Sid. 379. 341. 2 Keb. 407. which is that it was helped after Verdict; but Holt Ch. J. ſaid, that *Debet always is where the Action is in the Party's own Right.* Et adjornatur, 12 Mod. 565. Mich. 13 W. 3. Holden v. Sutton. Ld. Raym. Rep. 698. S. C. and it was admitted, that after Demurrer it would be ill; and the Court ſeem'd of Opinion, that it was not aided after Verdict by 16 & 17 Car. 2. cap. 8. becauſe it would alter the Nature of the Action, and therefore the Right was not tried, and Judgment was ſtay'd, Niſi &c.

(Q) In the *Detinet only*.
[In Reſpect of the Plaintiff Executor.]

1. If the Action be of ſuch a Nature that he ought to name himſelf Executor, it ſhall be in the Detinet only, otherwiſe e contra. 20 H. 6. 5. 5 Rep. 31. b. Mich. 41 & 42 Eliz. B. R. in Hargrave's Caſe. S. P. laid down as a general Rule; becauſe the Thing or Damages ſhall be Aſſets.

2. If an Executor recovers in Treſpaſs for Goods taken out of his Poſſeſſion, in Debt for the Damages recovered, the Writ ſhall be in the Debet and Detinet. 20 H. 6. 5. b. for he need not name himſelf Executor. But if the Goods were carried away in the Life of the Teſtator, &c. and the Executor brings an Action and has Judgment to recover 20 l. and Damages for them, and upon this Judgment brings Debt, it ſhall be in the Detinet; Per Snig B. Lane 80. Mich. 7 Jac. in the Exchequer.

3. If a Man poſſeſſed for Years makes an Under-Leaſe, rendring Rent, if his Executor brings Debt for Rent incurred after his Death, the Writ ſhall be in the Detinet only. 20 H. 6. 5. b. Clayt. 134. pl. 241. Auguſt 1639 before Thorpe Judge of Aſſiſe; It was held, that it ought to be in the Detinet only. Jennings v Ingerſon.

4. If the Executor ſues a Scire Facias out of a Recognizance made to his Teſtator, it ſhall be in the Detinet. 20 H. 6. 5. b.

S. P. accordingly; and so if the Executor sells Goods of the Testator, it shall be Debet & Detinet, because the Commencement of the Action was in the Executor. F. N. B. 119. (M) in the new Notes there, (a) ad finem, cites 20. H. 6. 415. b. [but it seems misprinted, and that it should be as in Roll.] But adds, that it was adjudged, that it shall be in the Detinet, and cites 17 E. 3. Brief 87. [but it is 17 E. 3. 66. at Fitzh. Brief, pl. 287]

5. If an Executor takes an Obligation for a Debt due to his Testator by Contract, in Debt upon this Obligation the Writ shall be in the Debet and Detinet. 20 H. 6. 4. b. 5. b. Contra 25 E. 3. 40. adjudged.

6. But in *Debt by Executors upon Obligation made to themselves*, by which it appear'd that the Bond was *for the Goods of the Testator sold to the Defendant*, the Writ was in the Detinet only, and adjudg'd good. Dig. 113. Lib. 10. cap. 23. S. 5. cites Mich. 17 E. 3. 66. and Pasch. 25 E. 3. 40.

(R) *By* whom. [*How* in the *Detinet or* in the *Debet and Detinet.*]

Cro. E. 326. in pl. 4. Arg. cites all the same Cases, and 10 H. 7. 5. b. that where Executor brings Debt for Arrearages of an Account found before Auditors assign'd by himself, and so in all Cases where an Executor sues for any Thing due to the Testator, or by Reason of any such Thing, As if an Executor recovers Damages in Trespass De Bonis Testatoris asportatis, and recovers, and then brings Debt for the Damages, it must be in the Detinet.———Thel Dig 114 Lib 10. cap. 23. S. 20. cites Hill. 11 H. 6. 21, and 20 H. 6. 5.———S. P. per Cur. Cro. J. 545. in pl. 5.

1. If in an Account an Executor recovers a Debt due to his Testator, in Debt for the Arrearages thereupon the Writ shall be in the Detinet only; for though the Action is converted into a Debt by the Account, yet it is the same Thing which was received in the Life of the Testator. 11 H. 6. 17. b. dubitatur. 20 H. 6. 4. b. 5. b. adjudged. Contra, 11 H. 6. 36. b.

Br. Debt, pl. 177. S. P. cites 11 H. 6 7. and 16. by Newton.

2. If a Rent be granted to another for Years, the Executor of the Grantee shall have Debt for the Arrearages of this Rent incurred after the Death of the Testator in the Detinet only; for he had it as Executor. 11 H. 6. 36.

3. If an Executor recovers in Debt upon a Contract due to the Testator, and after brings a Writ upon the Judgment, the Writ shall be in the Detinet only. Contra, 20 H. 6. 5.

Fol. 603.

4. If the Executor sells the Goods of the Testator for a certain Sum, he shall have Debt for this in the Debet and Detinet. 20 H. 6. 5. b. Contra, 17 E. 3. 66. adjudged.

So if there are two Executors, one of his own sells Testator's Good, he alone shall have Debt in the Debet & Detinet. For it is Contract. Br. Debt, pl. 177. cites 11 H. 6. 7. and 16.

5. Writ of Debt *by a Successor* shall be in the Debet and Detinet. Thel. Dig. 113. Lib. 10. cap. 23. S. 13. cites 47 E. 3. 23. and 9 E. 4. 25.

6. So *against a Successor*. Thel. Dig. 113. Lib. 10. cap. 23. S. 13. cites Mich. 13 H. 7. 3.

7. *Executors* shall have Action of Debt *of Arrears of Annuity due to their Testator*, and the Writ shall be in the Detinet. Br. Dette, pl. 191. cites Vet. N. B. Annuity.

8. If an *Account be stated after Intestate's Death*, Debt on this Account must be in the Detinet; per Holt Ch. J. Cumb. 304. Mich. 6. W. and M. in B. R. Anon.

(S) *Against*

(S) *Againſt Whom.* [In the Debet and Detinet.]

1. DEBT **againſt an** Executor **ſhall be in the Detinet only.** 11 H. 4. 46.

This ſeems to be miſprinted for 11 H. 4. 56.——F. N. B. 119. (M) S. P. although by the Writ he demands Money, viz. 20l. or other Sum of Money.

2. [And] **if a Debt be** recovered againſt Executors **of the Goods of the Deceas'd, and the Recoveror brings** Debt upon the Judgment, **the Writ ſhall not be in the Debet and Detinet, but** in the Detinet only, 11 H. 4. 56. b. 11 H. 6. 3. b.

So in Caſe of an Adminiſtrator, and the Writ was abated, becauſe it was not in the Detinet only. Br. Debt, pl. 229. cites S. C.—— Ibid. pl. 237. cites 10 H. 7. 5. S. P..

In Debt *againſt Adminiſtrators, upon Recovery had againſt them* before, the Writ was in the Debet and Detinet, and was abated by Judgment. Thel. Dig. 114. Lib. 10. cap. 23. S. 18. cites Paſch. 11 H. 4. 56, and ſays, That ſo is the Opinion of 11 H. 6. 9. 20. 43. But that there the Plaintiff would maintain the Writ, by ſuggeſting that the Defendant had *aliened the Goods of the Deceaſed, and had converted them to his own Uſe* &c. by reaſon of which Suggeſtion ſome of the Juſtices were in Opinion that the Writ was good, Sed non Adjudicatur.

Lev. 230, 231. Hill. 19 & 20 Car 2. B R. Wheatley v. Lane. S. P. Action was in the Detinet only, and the Defendant demurr'd on the Declaration, but the Defendant did not come at the Day and maintain his Demurrer, and therefore Judgment was given for the Plaintiff.—— Ibid. 255, 256. Mich. 20 Car. 2. B R between the ſame Parties, but there the Executor was charged in the Debet & Detinet upon a Devaſtavit, and Judgment for the Plaintiff, though it was inſiſted that it lay not in the Debet & Detinet; For if ſo, it would then charge the Executor of the Executor, which cannot be, becauſe it is only a Perſonal Tort, and cited 9 H. 6. 9. 3 Cro. 530. and 11 H. 4. 56——Sid. 397. pl. 5. S. C. in the Debet & Detinet, and Judgment for the Plaintiff. —— Saund. 216. S. C. accordingly, and Judgment for the Plaintiff. The Reporter adds a Nota, that this was argued twice and much debated, and as he thinks is now ſettled, but as to the Conveniencies or Inconveniences that may follow, they are not as yet known &c.

3. **But** otherwiſe **it is if it be brought** upon a Judgment de Bonis propriis. 11 H. 4. 56. b.

4. **A Writ of Debt in the Debet and Detinet does not lie againſt an Executor,** upon a Suggeſtion that he hath waſted **or converted the Goods of the Deceaſed,** without a Writ depending. 11 H. 6. 7. b.

A *Devaſtavit without a Judgment* will not make an Action of Debt, but both do; If Executors waſte, they that have Right cannot bring Debt upon the Waſte, but *there muſt be a Judgment.* It is the Whole that makes the Action; Per Cur. Cart. 2. Mich. 16 Car. 2. C. B. Burrel v. Richmond.

Debt was brought in the Debet & Detinet againſt an Adminiſtrator, on a Suggeſtion of a Devaſtavit; The Defendant demurr'd to the Declaration. Pollexfen argued, that ſuch Action doth not lie againſt an Adminiſtrator in the Debet & Detinet; and ſo it was adjudged in the Caſe of Ent and Withers. The Ch. J. ſaid, that here is a Suggeſtion of a Devaſtavit by the Adminiſtrator, before an Action brought againſt him as Adminiſtrator, and admitting the Declaration true, yet there may be no Wrong to you; for beſides the Goods waſted, the Adminiſtrator may have ſufficient to pay you; and this is a new Practice not to be countenanced. Judicium pro Defendente. Comb. 47. Paſch. 3 Jac. 2. B R. Davenport v. Calne.

5. So **if a** Man recovers **in a Writ of Debt againſt an Executor,** and in a Fieri Facias **thereupon the** Sheriff returns **that he hath** no Goods of the Deceaſed, **the Recoveror, upon a** Suggeſtion that he hath waſted the Goods, **ſhall not have a Writ of Debt in the Debet and Detinet againſt him, for upon this Return and Suggeſtion he is to have a** Conditional Writ of Scire Facias **to the Sheriff, ſcilicet, Si**

The Caſe was, Debt was brought againſt B. H. upon an Obligation, and *counted, that at another*

Time he brought Debt upon the ſame Obligation

Si ita ſit, to make Execution of his own proper Goods. Dubitatur, 11 H. 6. 7. b. 16, 35. b.

againſt him and two others, who were Adminiſtrators, who came and *ſaid, that the Adminiſtration was committed to them, and to another in full Life not named* &c. Judgment of the Writ; and the Plaintiff *ſaid, that the other never had Adminiſtration*, upon which they were at Iſſue, and *found for the Plaintiff*, by which he had *Judgment to recover of the Goods of the Deceaſed, and* that *after he ſued Fieri Facias to have Execution, and the Sheriff returned, that they had nothing of the Goods of the Deceaſed &c. and* the Plaintiff ſaid further, *that after the Judgment and Execution* ſued the *Defendant aliened the Goods* of the Deceaſed, and ſhew'd what, and converted the Goods to his own Uſe; *and ſo Action accrued for the demanding this Debt of the Defendant of his own Goods*, and was *in the Debet & Detinet*, and the beſt Opinion was, that the Action ought to be againſt all three, and not againſt the one only upon Suggeſtion as above. Quære, if the *Sheriff had returned, that the one Devaſtavit* Bona &c. it ſhould be againſt him to have Execution of the Goods of the Deceaſed, if there be any, and if not, of the proper Goods of him who waſted &c. But this ſhall not give *new Action againſt the one only*; For the principal Cauſe of the Debt aroſe by the Inteſtate, which cannot be changed by the Act of the one Executor or Adminiſtrator, therefore it ſhall not be againſt him alone *in the Debet & Detinet, but againſt all in the Detinet only.* Br. Debt pl. 177. cites 11 H. 6. 7. 16.

It was agreed, that if a Man *recovers againſt Executor*, and upon the Fieri Facias, the *Sheriff returns Devaſtavit*, that upon this the *Plaintiff ſhall have Debt* againſt the Executor if he will, *or Special Writ of Execution, de bonis propriis*; But it is not agreed if the Writ ſhall be Debet & Detinet upon this Suggeſtion and Return, or Detinet only. But if Debt lies againſt him for this Cauſe, then it ſeems, that it ſhall be in the Debet & Detinet. Br. Debt, pl. 184. cites 11 H. 6. 7.

6. But if **upon the Fieri Facias the Sheriff** returns a Devaſtavit **made by the Executor, the Plaintiff may have Debt thereupon in the Debet and Detinet. (It ſeems there ought to be a Judgment upon the Return)** 11 H. 6. 16. b.

See (Q) pl. 3. S. P. and the Notes there.——Cro. E. 840. pl. 17.

7. If Leſſee for 20 Years leaſes for 10 Years, **rendring Rent, and dies, his Executor or Adminiſtrator ſhall have Debt for the** Rent incurred after the Death of the Teſtator **in the Detinet only.** Tr. 43 El. B. R. between *Sparke and Sparke*, **per Curiam.**

S. C. upon a Leaſe made by Inteſtate to commence after his Death; Reſolv'd clearly, that it ought to be in the Detinet only; For the Title to the Action is deriv'd from the Inteſtate, and by his Contract only, and the Adminiſtrator is to have it in the Inteſtate's Right, and when it is recovered it ſhall be Aſſets in his Hands; and in proof hereof were cited 19 H. 8. 8. 11 H. 6. 36. and 9 H. 6. 11. ——Noy. 32 S. C. ſtated ſhort, but ſays, that the Action was well brought, and cites the two firſt Caſes cited above, and 20 H. 6. 4 ——The Adminiſtrator ſhall ſue in ſuch Caſe in the Detinet only; but where Executor in ſuch Caſe is ſued, he in reſpect of the Poſſeſſion and the Profits of the Land taken by himſelf ſhall be charged De Bonis Propriis, [and the Writ ſhall be in the Debet & Detinet.] Lev. 250, 251. Frevin v. Paynton.——2 Keb. 407. pl. 26. Fruin v. Paynter. S. C. ſays the Action was in the Debet & Detinet, but there being a Verdict, it is aided by the Statute of 16 Car. 2. cap. 8. and Judgment for the Plaintiff.——Sid. 379. pl. 10. Fruen v. Porter. S. C. ſtates it, that the Adminiſtrator was Defendant.

8. **If the** Executor obliges himſelf to pay **a Debt due by Contract by the Teſtator, in Debt upon this Obligation the Writ may be in the Debet and Detinet, becauſe the Obligation** made it his own Debt. 11 H. 6. 8. 17. b.

S. P. Br. Debt, pl. 177. cites 11 H. 6. 7. and 16. Per Babington and Newton.

9. **In an Action of Debt againſt the Executor for** Rent incurred in the Life of the Teſtator, **the Writ ſhall be in the Detinet only.** 11 H. 6. 36.

——Ibid. pl. 237. S. P. cites 10 H. 7. 5.

In Writ of Debt *againſt Executors for Rent Arrear in their own Time, where the Leaſe was*

10 **In an Action of Debt againſt an Executor for the Arrearages of a Rent, reſerving upon a Leaſe for Years, and** incurred after the Death of the Teſtator, **the Writ ſhall be in the Debet and Detinet, becauſe the Executor is charged of his own Poſſeſſion.** 11 H. 6. 36. H. 41, 42 El. B. R. between * *Hargrave and Boddy* **adjudged. But it was reverſed for the ſame Cauſe in a Writ of Error in Camera Scaccarii.**

Scaccarii. Co. 5. 31. ſame Caſe. M. 9 Ja. R. Rot. 146. between *Rone and Sir Henry Cary* adjudged, that it lay in the Debet and Detinet, cited M. 41, 42 El. B. R. 7 Ja. B. R. between the *Lord †Rich and Frank* adjudged, cited M. 41, 42 El. B. R.

made to their Teſtator, it ſhall be Debet & Detinet. Thel. Dig. 114.

Lib. 10. cap. 23. S. 19. cites Paſch 11 H. 6. 44.

But *otherwiſe* it is for Rent, *due in the Time of the Teſtator.* Thel. Dig. 114. Lib. 10. cap. 23. S. 19 cites 10 H. 7 5.

In Debt brought *by Executors againſt Leſſee for Years, of the Leaſe of the Teſtator*, of which *Parcel* is *due in the Time of his Teſtator, and Parcel after his Death*, the Writ ſhall be in the Detinet only, per Englefield. Thel. Dig. 114. Lib. 10. cap 23. S 21. cites Paſch. 19 H. 8. 8.

* Cro. E. 711. pl. 35. **Body v. Hargrave.** S C. adjudg'd for the Plaintiff. But adds a Note, That afterwards this Judgment was reverſed in the Exchequer Chamber, for the Point in Law; For they all held, that it ought to be in the Detinet only, becauſe he is charged only by the Contract of the Inteſtate.——Mo 566. pl. 771. S. C. againſt Adminiſtrator, and adjudg'd good in the Debet & Detinet; and diſtinguiſh'd between Action brought, by or againſt an Executor or Adminiſtrator.——Brownl. 56. S. C. and Judgment reverſed in Cam. Scacc.——Cro J 546. in a Note added at the End of pl. 5 that in the Argument of the Caſe there of **Reynell v. Langcaſtle**, it was then delivered by the Court, that Hargrave's Caſe 5 Rep 31 was afterwards reverſed in Cam. Scacc. in the Point of Debet & Detinet, according to the Book of 10 H. 7 5.——Bulſt. 23. S. C. cited by Williams J. to be ſo adjudged, but that the ſame was afterwards reverſed upon another Matter, and for other Reaſons.——2 Brownl. 706. S. C. cited by Counſel Arg who ſaid, that they were of Counſel with Hargrave, when the Judgment in B. R. was reverſed in the Exchequer Chamber for this very Point, and for this Reaſon, becauſe it was brought in the Debet & Detinet, whereas it ſhould be in the Detinet only.—— S. C. cited Cro. C. 225, 226. pl. 3. and by three Juſtices denied to be Law; and Jones J. ſaid, that he knew it to be reverſed in Point of Judgment for this Cauſe. But Mr. Danvers, in 2 Danv. 504. pl. 10. makes a Quære if the Book is not miſprinted, otherwiſe the Caſe is miſapplied there, the Action there being brought by an Adminiſtrator, and not againſt one, for Rent incurr'd in the Time of the Inteſtate.

† Cro. J 238. pl. 1 S. C. adjudg'd well brought in the Debet & Detinet.——Bulſt. 22. S. C. & S. P. agreed by all, and Judgment for the Plaintiff.——2 Brownl. 202. S. C. adjudged per tot. Cur. præter Yelverton.—— S C cited Brownl. 56.——Palm. 116. S. C. cited.—— Cro J. 411. pl. 11. Mich. 14 Jac. B. R. Ipſwich Bailiffs &c v. Martin. S P. adjudged for the Plaintiff.——3 Bulſt. 211. S C. adjudged. ——Cro. J. 549. pl. 10 Mich. 17 Jac. B. R. Mawle v. Cacyfyr. S. P.—— Palm. 116. Moule v. Moodie. S. C. and S. P. adjudged for the Plaintiff, —— 2 Roll. Rep 131. Paul v. Moodie. S. C. —— All. 42, 43. Hill. 23 Car. B. R. Royſton v. Cordrye, the Court ſaid, it was never doubted but that the Action might be brought in the Detinet only; but it had been much doubted if it might be brought in the Debet & Detinet.——Poph. 121. Paſch. 39 Eliz. Popham ſaid, that in ſuch Caſe it ſhall be in the Debet & Detinet; For though they have the Lands as Executors, yet nothing thereof ſhall be imployed to the Execution of the Will, but ſuch Profits as are above that which was to make the Rent, and therefore ſo much of the Profits as is to make or anſwer the Rent, they ſhall have to their own Uſe to anſwer the Rent, and therefore they have Quid pro Quo, viz. ſo much of the Profits for the Rent, the Action ought to be brought againſt them in ſuch Caſes, but where they are to be charged in Debt for Rent, upon a Leaſe made to the Teſtator, and have not the Profits of the Leaſe itſelf, nor Means, nor Default in them to come to it; the Action of Debt ought to be againſt them in the Detinet only, and this is the Caſe here, and therefore the Action being in the Debet & Detinet, doth not lie. ——Sty. 61. **Kale v. Joceline.** S. C. Bacon J. held it good in the Debet & Detinet. Roll J. ſaid, it had been held Pro & Con to be good and bad; but that it muſt be in the Debet & Detinet, or elſe it will be miſchievous to the Plaintiff, and Judgment for the Plaintiff, Niſi &c.——S. C. cited All. 34. and other Caſes, and ſays, that the *Reaſons of theſe contrary Opinions*, were *the Inconveniency of the one Side and the other*; for inaſmuch as the Executors cannot waive the Term, it were hard if the Rent ſhould exceed the Value of the Land, and they have no Aſſets, that they ſhould be charged in the Debet of their own proper Goods, and yet, if the Action muſt be brought in the Detinet only, where fully Adminiſtred were a good Plea, then may they retain the Land, and with the Profits thereof ſatisfy Debts upon Specialty, whereby the Leſſor ſhould be defeated of his Rent; for the avoiding of which Inconveniencies, it was reſolved, that they may be charged in the Debet & Detinet, for Prima Facie, the Land ſhall be intended to be of greater Value than the Rent is, if it be otherwiſe.

11. In Debt *againſt an Heir*; the Writ ſhall be in the Debet & Detinet. Thel. Dig. 113. Lib. 10. cap. 23. S. 7. cites Paſch 32 E. 3. Brief 294. and Mich. 10 H. 7. 8. and the Regiſter fol. 140.

12. Writ of Debt brought *againſt Executor upon his own Contract* with Quas ei Injuſte detinet only, was abated; for it ought to be Debet & Detinet. Thel. Dig. 113 Lib. 10. cap. 23. S. 11. cites Mich. 41 E. 3. Brief 545.

13. Writ of Debt *againſt Baron and Feme, upon Recovery had againſt the Feme when ſhe was ſole*, ſhall be in the Debet & Detinet. Thel. Dig. 113. Lib. 10. cap. S. 12. cites Mich. 47 E. 3. 23. & 9 E. 4 25.

14. Debt *againſt the Heir upon the Deed of his Anceſtor* ſhall be in the Debet & Detinet. Br. Dette. pl. 237. cites 18 H. 7. 8.

15. Debt *againſt the Executors* of P. in the Debet & Detinet *for Rent incurred upon a Term after the Death of the Teſtator*; they *pleaded that Part of the Land was evicted in the Life of the Teſtator*, and for the Reſidue that they tendered &c. Et uncore priſt, &c. Plaintiff demurred, but afterwards they agreed, and the Plaintiff accepted according to the ſaid Apportionment without Coſts or Damages of either Side. Dy. 81. b. pl. 67. Hill. 6 & 7 E. 6 Barrington v. Potter.

3 Le. 206. pl. 263. Walcot v. Powell. S. C.

16. If an Action of *Debt* is brought *againſt Baron* and *Feme upon an Obligation* entered into *by the Feme before Marriage* it ſhall be in the Debet & Detinet, for by the Marriage all the Perſonal Goods, and a Power of diſpoſing of the Real, are by Law given the Husband, which he has to his own Uſe, and not as Executor to the Uſe of another; and reſolved per tot. Cur. that this was Matter of Subſtance and the very Point of the Action. 5 Rep. 36. a. Trin 30 Eliz. B. P. Lloyd v. Walcot.

S. P. becauſe the Heir is bound by Special Words in the Obligation, per Gawdy. Cro E. 712. in pl. 35. Mich. 41 & 42 Eliz. B. R. —— It ought to be in the Debet & Detinet; But after Verdict, it is cured by the Oxford Act of Jeofails. Lev. 224. Mich. 19 Car. B. R. Combers v. Watton. —— Sid. 342. pl 6. S C. but doubted if it might be amended by Stat. 16 & 17 Car. 2. cap. 8. —— The Writ againſt the Heir is in the Debet & Detinet, which proves, that in Law it is his own Debt; Per Dyer, and he ſaid, that he could ſhew a Precedent were ſuch an Action was maintainable againſt the Executors of the Heir. 2 Le. 11. pl. 16. Hill. 20 Eliz. C. B.

17. *So* if an Action is brought upon a Bond *againſt the Heir of the Obligor*, it ſhall be in the Debet & Detinet, becauſe he hath the Aſſets in his own Right, as the Baron has the Goods and Chattles of the Wife. 5 Rep. 36. a.

18. Debt in the Detinet *againſt Adminiſtratrix* of her Husband *for Arrearages of a Leaſe for Years* viz. *for a Quarters Rent due in the Life of the Inteſtate, and two Quarter in her own Time.* It was moved that the Action ought to have been brought in the Debet & Detinet, according to Hargrave's Caſe, 5 Rep. 31. but reſolved, that the Action was well brought in the Detinet, ſhe having the Intereſt only as Adminiſtratrix; and Hargrave's Caſe was ſaid to be no Law, and that that Judgment was reverſed. Cro. C. 225. pl. 2. Mich. 7 Car. B. R. Smith v. Norfolk.

19. An Action of Debt was brought upon an *Obligation made to a Biſhop and his Commiſſary for Payment of Debts and Legacies*; the *Action was brought by an Executor*, and Judgment given by Default againſt the Defendant, the Judgment was reverſed by a Writ of Error, becauſe the Action was brought in the Debet & Detinet; whereas it *ought to have been brought in the Detinet only*, becauſe it was brought by an Executor. Sty. 278. Trin. 1651. Lydale v. Lyſter.

(T) How it ſhall be brought in the Debet and Detinet.

Br. Debt, pl. 44. cites S. C. though objected, that as to the Baron it ought not to be in the Debet, becauſe it was not of his own Contract, but of the Feme's.

1. **If Debt be brought** againſt Baron and Feme **upon a Recovery of Damages** againſt the Feme dum ſola **fuit, it is good in the Debet and Detinet.** 47 E. 3. 23. b.

2. If

2. If the Succeſſor Prior brings Debt upon an Obligation made to his Predeceſſor, the Writ ſhall be in the Debet and Detinet. 47 E. 3. 23. b. Br. Debt, pl. 44. cites S. C.—— Ibid. pl. 45. cites S. C.

for where it is to his own Uſe it ſhall be Debet, as it ſeems, contra of Executor, for this is to another's Uſe.

3. Debt ſhall not be in the Debet, but of *Money only*. Br. Ley Gager. pl. 26. cites 50 E. 3. 16.

4. *Debt* was brought *againſt Adminiſtrators*, the *Plaintiff recovered* and brought another Writ of *Debt upon the ſame Record in the Debet & Detinet*, where the Defendants were convicted of this Plea of Plene Adminiſtravit, and becauſe in this Caſe they are only charged as Adminiſtrators, therefore they took nothing by their Writ, Quod Nota. But ſee if they had been convicted upon ſuch Plea, where they ſhould be charged de bonis propriis, as in 11 H. 6. 35. Br. Faux Latin pl. 20. cites 11 H. 4. 59. [but it ſhould be 56. a. pl. 2. and the other Edit. is 56.]

5. Debt againſt Baron and Feme *of the Contract of the Feme during Coverture*, the Writ ſhall be Debent & Detinent; for the Baron is Debtor by the taking of the Feme, and both ought to wage their Law. Br. Faux Latin pl. 52. cites 9 E. 4. 24. Br. Debt, pl. 110. cites S. C.

6. If a *Feme be indebted and takes Baron*, the Writ of Debt againſt the Baron and Feme ſhall be *Debent*; for the Baron is Debtor by the Eſpouſals. Br. Dette pl. 142. cites 7 H. 7. 1.

7. *And* if *Debt* be *due to a Feme*, who takes Baron, and they bring Debt, the Writ ſhall be, Quod *Debet to both*, and *ſhall count how the Debt accrued to the Feme Dum ſola* fuit *and that after they inter-married*. Ibid.

8. If an *Annuity is granted to one for Years*, ſo long as the Term continues, a Writ of Annuity lies for the ſame, but *when the Leaſe is determined* an Action of *Debt lies* for the ſame; Per Williams J. Bulſt. 152. cites 9 H. 7. 16, 17. and ſays, that ſo is the Old Book of Entries, Fol. 151. in Debt for an Annuity.

9. Debt againſt Executors, *upon Arrears due in the Time of the Executors*, *upon a Leaſe made to the Teſtator*, the Writ ſhall be in the Detinet and not in the Debet. Br. Dette. pl. 237 cites 10 H. 7. 5.

10. So where a Man *recovers againſt Executors and brings Action thereof*, this ſhall be in the Detinet. And ſo of Action of *Debt upon Arrears of Account* brought by Executors of Account made to them. Br. Dette pl. 237. cites 10 H. 7. 5.

11. Tanfield Ch. B. took this *Difference*, where the *Action is grounded upon Privity of Contract* it ought to be in the Detinet as 11 H. 6. 37. 11. H. 4. 46. 10 H. 7. 5. But otherwiſe it is, when *grounded on a Tort*, as 41. Aſſ. 15. Cro. J. 546. pl. 5. Mich. 17 Jac. in Cam. Scacc. in Caſe of Reynell v. Lancaſtle.

12. Where the *Thing demanded is Current Coin*, there the *the Thing itſelf ought to be demanded* and not the Value, and the Count ought to be in the Debet & Detinet; *but* where a *Foreign Coin* is demanded, there it ought to be *in the Detinet*, and they may count to the Value; but of the *Coin of the Realm* they ought to *take Notice what Value it bears*, and to that Value it ought to be demanded; as in this Caſe, 100 nummi Aurei, vocat Guineas, Valoris vigint' unius ſolid. & 4d. for to this Value they were coined at the Mint, which is their legal Value, and therefore their proper Denomination is 20 s. Pieces of Gold, Vocat' Guineas. Per Holt Ch. J. Skin. 573. pl. 16. Mich. 6 W. & M. in B. R. in Caſe of Saint Leiger v. Pope. Carth. 322. S. C. and held well enough in the Debet & Detinet. —— Comb. 327. S C. and per Holt Ch. J. as to Foreign or Medal Coin, having no certain legal Value, the

Plaintiff may elect whether to declare in the Detinet, as for Guineas in Specie, or in the Debet & Detinet for the Value in Engliſh Money; But the Court agreed, that in that Caſe there muſt be a Default in Payment of the Foreign or Medal Coin in Specie, before the Party can bring Debt in the Debet & Detinet for the Value.—— Where Foreign Coin itſelf is demanded, the Action is in the Detinet;

tinet; but if the Value be demanded, it is in the Debet & Detinet; and the Averment always is, that the Defendant has neither rendred the Foreign Coin nor the Value; Per Holt Ch. J. 12 Mod. 81. S. C.——Lutw. 488. S. C and S. P. to which Holt Ch. J. and Eyre J. seem'd to agree.

(U) How it shall be brought. In the Debet and Detinet; and where in the Detinet only. In Respect of the Thing.

Fol. 604.

The Chancery will never make a Writ in the Debet but of Money only, and therefore where Debt was brought for certain *Rent-Corn, and Rent-Fowl*, reserved on a Lease for Years of Lands, the Writ, though in the Detinet only, was held good. Per tot. Cur. Br. Debt, pl. 50. cites S. C.

1. **If the Action be brought** for Money, **it shall be in the Debet and Detinet**, 50 E. 3. 16. b.

As if a Man sells 20 Quarters of Wheat, or a Horse.

2. But **if the Action be brought** for dead Chattels or living, **and not for Money, it shall be in the Detinet only.** 50 E. 3. 16. b. **Contra, M. 41, 42 El. B. R. Barham's Case.**

F. N. B. 119. (H)—In Debt of Things which are not Money, as *Corn, Grain* &c. the Writ shall be in the Detinet only, and he shall recover the Price or Value of the Thing, and not the Thing itself; Quære. Br. Debt, pl. 211. cites 9 E 4. 10. 15. 41.

3. The Writ was *Quod reddat* 10 *l. quas ei debet & injuste Detinet & bona & cattalla ad valenc' &c. quæ ei injuste detinet*, and held good. Thel. Dig. 113. Lib. cap. 23. S. 9. cites Hill. 33 E. 3. Brief 913. And that so agrees the Register fol. 139. and Nat. brev. 152. where the *Writ* is *brought in Banco, but* when it is *Vicontiel*, it *shall be quod reddat* 10 *l. quas ei Debet & Cattalla ad Valenc' &c. quæ ei injuste Detinet*; for of Debt in the County the Writ shall say quas ei Debet only.

But the Action may be in the Debet & Detinet for the *Foreign Money*, if it be *made a currant Coin*, as by Proclamation. Noy. 13. Pasch. 44 Eliz. B. R. in Case of Drapes v. Rastal.

4. Debt in the Detinet; for that the Defendant owed him 600 *Gilders, Monetæ Poloniæ*; and *declares upon a Bill Obligatory*, wherein the Defendant was bound to pay him 600 Gilders of legal Money Polonish, *viz. ad valorem* 220 *l. legalis Monetæ Angliæ.* It was said the Action ought not to have been in Detinet, because it is upon a Bill Obligatory; the Opinion of the Court was that forasmuch as he *is not to recover the Gilders, but the Value* of them found by the Jury, *and the Demand is not of any Sum certain, and the Value is not known to the Court* that the Demand is good enough in the Detinet. It was adjudged for the Plaintiff. Cro. J. 617. pl. 2. Mich. 19 Jac. B. R. Rand v. Peck.

5. If Debt *for* 48 *s. in Debet and Detinet, and for two Shirts in the Detinet only*; and he declared, that the Defendant such a Year *retained the Plaintiff to be his Servant in Husbandry, giving him* 48 *s. and a Shirt by the Year*; the Court said it was clear, that he may bring his Action so by several Precipes in one Writ. Win. 75. Pasch. 22 Jac. C. B. Weaver v. Best.

6. Debt upon a *Bill, bearing Date in the Parish of St. Mary le Bow*, London, which *upon Oyer appeared to be dated at Hamborough*, and the Plaintiff *declared in the Detinet only, for* 6 *l. Hamborough Money*; it was objected against this Declaration, that the Action ought to be brought in Debet and Detinet; but adjudged 'tis well brought in the Detinet, because 'tis not for a certain Sum, but for 6 l. Hamborough Money, which

which in Engliſh Coin is 40 s. Value, and the Value of the Hamborough Money not being well known amongſt us by common Intendment, it ought therefore to be demanded in the Detinet only; and Judgment for the Plaintiff. Lat. 4. Paſch. 1 Car. Ward's Caſe.

(X) What ſhall be a good Plea in Bar [*Of Debt on Judgments.*]

1. IN Debt upon a Recovery in another Court, it is no good Plea that the Court where &c. had taken him in Execution, if he does not ſay that it was at the Inſtance of the Plaintiff. 7 H. 6. 19.

2. But if he ſays ſo, it is a good Plea in Bar. 7 H. 6. 19.

3. In Debt upon a Judgment, it is no Plea that there is an Error in the Original Proceſs, or Record of the firſt Judgment, for he is put to his Writ of Error for that. 7 H. 6. 19

4. In Debt upon a Judgment it is no Plea in Bar, that after the Judgment the Parties put themſelves to an Arbitrament by Award of the Lord Chancellor &c. and that the Arbitrator had made ſuch Award &c. and that he himſelf had brought an Audita Querela to be relieved upon this Award, for this Matter is not ſufficient to maintain an Audita Querela, and if it was, yet he could not plead it, but is put to his Audita Querela. Tr. 7 Jac. B. *Miles Fale's* Caſe adjudged.

5. In Debt the Plaintiff *counted upon a Recovery of Debt and Damages in the Court of Record at Kingſton upon Hull*, and the Defendant *pleaded, that they were diſmiſſed by the Court of Hull in the ſame Action, by Aſſent of the Plaintiff, becauſe it appeared to the Court that the Parties had put themſelves in Arbitrament*, and therefore to ſay Quod dimittitur Judgment Si Actio, and it was awarded by the Court that the Plaintiff ſhall take nothing by his Writ, and ſo a Bar. And per Hank and Thirn, *Arbitrament made*, or Arbitrament *pending and not finiſhed*, is a good Bar in Action Perſonal; and per Hank, ſo in Action Real; But Skrene contra. Br. Dette, pl. 61. cites 11 H. 4. 12.

6. In *Debt of* 10 *l.* the Plaintiff *counted that he recovered againſt the Defendant in a Special Aſſiſe* 10 *l. in Damages* before ſuch Juſtices; the *Defendant ſaid, that within the Year he ſued Fieri Facias to the Sheriff, by which he levied it, and paid to the Plaintiff Judgment Si Actio*; and the Payment over to the Plaintiff was of little Regard but only the levying by the Sheriff. And Hill and Hank held the Plea no Plea, and that the Defendant ſhall render to the Plaintiff, and ſhall have his Remedy againſt the Sheriff; But Thirne was ſtrongly contra, and that the Debt is of Record, and by the Fieri Facias is levied of Record by an Officer of Authority, and if he pays it to the Plaintiff, or ſends it into Court or not, this is no Default in the Defendant, and that the Levying was good, and the Defendant cannot compel the Sheriff to ſend them into Court, nor deliver them to the Plaintiff, and therefore no Default in him, and he is excuſed, which is the beſt Opinion, and the Reporter concordat. And after the Parties agreed; and the Writ will'd Quod Denarios illos habeas hic in Cur. tali Die &c. Et ſi ſit Coram Juſticiarios Aſſ. tunc Denarios illos habeas ad Proximam Seſſion' &c. Br. Executions, pl. 35. cites 11 H. 4. 58. And ſays, ſee * 26 H. 6. 25. tit. and Lib. Intrac. 170. that it is admitted for a good Plea in Scire Facias, and Iſſue taken thereupon, and the *Plaintiff may have Ac-*

* Br. Debt pl. 63. S. P. cites 20 H. 6. 24. 25. [and there is no Year of 26 in the Year Book.]

count thereupon againſt the Sheriff who levied it, and did not deliver them to the Court, nor to the Plaintiff, as it ſeems there.

7. If the *Plaintiff who has recovered the Debt* had *brought* Writ of *Debt upon the firſt Judgment*, there the bringing *Writ of Error* upon the firſt Judgment is no Plea. Br. Executions, pl. 136. cites 10 H. 6. 6.

See tit. Condition (E d) per totum.

(Y) What Thing will *extinguiſh* a Debt. [*Acceptance of*] a higher Thing.

Dal. 53 pl. 28. Anno 5 Eliz.——

1. IF a Man accepts an Obligation for a Debt by Contract, this extinguiſhes the Contract. 13 H. 4. 1.

S. P. agreed per Cur, and that in ſuch Caſe the Obligor might with a ſafe Conſcience wage his Law. But if one who was a Stranger to the Contract enters into Bond afterwards to pay the Debt at a Day certain, and the Debtor gives a Counter-Bond to the Stranger, this does not determine the Contract, and ſo the Debtor by Contract cannot wage his Law. 2 Le. 110 pl 142. Trin. 29 Eliz. C. B. Hooper's Caſe.—— But if a Stranger to the Contract, being preſent at the Time of making, makes a Promiſe to enter into a Bond unto the Party &c. for Payment of the Money agreed for upon the Contract, and afterwards becomes bound accordingly, the Contract by this is determined, becauſe the Obligation is purſuant to the Contract. Ibid. cites it as adjudg'd in one Pudſoy's Caſe.

* D. 21. b. pl. 132. Trin. 28 H. 8. cites S. C. and Ibid. 51 a. pl. 14 Mich 33 H. 8. cites S. C. but takes no Notice whether they were aſſigned en Pais, or of Record.——See (A. a) pl. 1.

2. [So] If a Man accepts an Obligation for the Arrearages of an Account before Auditors aſſigned in Pais, this extinguiſhes the Arrears; for the Auditors are not of Record; for of this the Law lies, and for that the Obligation is higher. Contra * 11 H. 4. 79. b. 13 H. 4. 1. adjudged.

S. P. as to a Contract by an Infant for a Coach and Horſes, and a Bond afterwards entered into during his Infancy, the Contract is extinguiſh'd; and though afterwards at full Age he aſſumed, yet in Aſſumpſit brought he may plead, Non Aſſumpſit, and his Infancy is ſufficient Evidence; And Judgment for him Niſi. 3 Keb. 798. pl. 55. Trin. 29 Car. 2. B. R. Tapper v. Davenant.

3. If an Infant makes a Contract for his Diet and Clothing, and after enters into an Obligation with a Penalty to pay it, and after the Infant avoids this Obligation, as he may for his Infancy, yet it ſeems the Contract ſhall not be revived. Dubitatur, P. 32 El. B. R.

4. It is a good *Plea that the Plaintiff took Obligation of the Parcel of the Sum for the whole Debt*; for Contract is intire. And the Plaintiff ſaid that the Obligation was for a Debt due by another Contract &c. and the others e contra. Br. Dette, pl. 57. cites 3 H. 4. 17.

5. Debt upon *Arrearages of Account before Auditors*, the Defendant *ſaid that after the Account the Defendant had taken Obligation of the ſame Sum*, and no Plea by Award; for it *was a Duty by Record before*, in which the Defendant cannot wage his Law. Br. Dette, pl. 64. cites 11 H. 4. 79.

6. One who hath *a Debt due* to him *by Simple Contract*, *takes an Obligation for the ſame* Debt, *or any Part* of it, the Contract is determined. 6 Rep. 45. a. in Higgins's Caſe, cites 3 H. 4. 17. b. 11 H. 4. 79. b. 9 E. 3 50. b. 51. a.

7. *So* when a Man hath a *Debt by Obligation*, and *gets Judgment* upon it, the Contract by Specialty is chang'd into a Matter of Record. 6 Rep. 44. b. in Higgins's Caſe.

(Z) [*Extin-*

(Z) [*Extinguiſhment by*] Acceptance of a Thing *of equal Altitude.*

1. THE Acceptance of an Obligation for a Debt due by another Obligation is no Bar of the firſt Obligation. 11 H. 4. 79. b. 13 H. 4. 1.

S. P. *But taking of an Obligation of the ſame Duty, is a Determination of a Contract of the ſame Duty due before*; For there he might have waged his Law. Br. Debt, pl. 64. cites 11 H. 4. 79 ——— One Choſe en Action cannot be diſcharg'd by another Choſe en Action of the ſame Nature, As one Obligation is not diſcharg'd by acceptance of another Obligation in lieu of it. 3 Lev. 237, 238. Mich. 1 Jac. 2. C. B. in Caſe of Scarborough (Mayor &c.) v. Butler. — See tit. Conditions (E. d) pl. 1. and the Notes there.

2. Where an *Award creates a New Duty*, the Old is extinguiſhed thereby; But where it only ordains a Releaſe to diſcharge the Old Duty, 'tis otherwiſe. 1 Salk. 69. Hill. 8 W. 3. B. R. Freeman v. Bernard.

Carth. 379. S. C. & S. P. —— 12 Mod. 130. S. C. & S. P. —— 3 Salk. 45. S. C. & S. P.

(A. a) [*Extinguiſhed by*] Acceptance of a *lower Thing*.

1. IF a Man accepts an Obligation for the Arrears of an Account before Auditors aſſigned of Record, this does not extinguiſh the Arrears, becauſe they are higher. 20 H. 6. 45. b. (It does not appear whether the Auditors were of Record.)

See (Y) pl. 2. the Difference between Auditors aſſign'd en Pais, and as here of Record.

2. If the Leſſor accepts an Obligation for Rent due upon a Leaſe for Years, this does not extinguiſh the Rent, becauſe the Rent is higher, being Real, for of this the Law does not lie. 11 H. 4. 79. b. 13 H. 4. 1. 20 H. 6. 45. b.

Fol. 605.

(B. a) In what Caſes a *Collateral Thing* may be given *in Satisfaction without a Deed.*

See tit Conditions, (S. c) and (E. d) per totum.

1. IF a Rent be reverſed by Deed upon a Leaſe for Years, it is no good Plea without a Deed, that by the Command of the Leſſor he retained the Rent in Satisfaction of the Reparation of the Houſe, which he had done, whereas the Leſſor ought to have done it. 14 H. 4. 27.

Br. Debt, pl. 72. cites S. C. though there was a Covenant in the Indenture, of Leaſe for the Leſſor to repair; and the Houſe was ruinous. Per Hill and Hank.

2. The ſame Law is if the Rent was reſerved without Deed, for he hath acknowledged the Duty by the Pleading. 14 H. 4. 27.

3. So

3. So if I lend Money to you, if you pay the Money to another by my Command, yet this is not a good Satisfaction without Deed. 14 H. 4. 27.

See tit. miſcaſting (A) and ſee tit. Rent (H. c)

(B. a. 2) Declaration &c. in Debt.

1. THE Plaintiff in his Count muſt *ſhew Deed* in Debt and Annuity, and there the Writ and Specialty ought to agree; Per Finch. Br. Monſtrans &c. pl. 15 cites 41 E. 3. 23.

2. In *Debt upon a Contract*, Hull ſaid, you had thereof Obligation after, Cul. ſaid No, but of another Contract, and *the Iſſue* was, *if the Obligation was for this Contract or not.* Br. Iſſues joins, pl. 50. cites 3 H. 4. 18.

Br. Noſme pl. 65. cites S. C.

3. Debt upon an *Obligation by J. F.* the *Defendant ſaid, that he made and delivered the Obligation to another J. F. and not to the Plaintiff*, and a good Plea, and the Plaintiff was compelled to anſwer to it, Quod Nota; and ſo it ſeems that there were two J. F and the wrong J. F. got the Obligation and brought the Action. Br. Obligation pl. 82. cites 12 H. 6. 7. and Fitzh. Barr. 17.

4. If *in Debt upon a Bond*, A. *counts that B. alone was bound, B. ſhall ſay that he and H. were jointly bound*, Judgment of the Writ and a good Plea, *without any Sans ceo*, and the other may ſay that he was ſole bound &c. Br. Traverſe per &c. pl. 82. cites 21 H. 6. 3.

5. *Debt* upon a Bond *of* 40 *l.* the Defendant *pleaded Receipt* by the Plaintiff *of* 10 *l. Parcel* of the Demand *after the laſt Continuance*, Judgment of the Writ and a good Plea without Acquittance, or other Specialty, *where it is pleaded to the Writ, contra where it is pleaded in Bar*, there it ought to be by Specialty againſt Specialty. Br. Brief pl. 337. cites 5 E. 4. 138, and after fol. 140. by four Juſtices againſt three, it is no Plea to the Writ, without ſhewing Specialty. Ibid.

6. Where a Man is bound with Condition in the Obligation *for the Advantage of the Obligee*, he *ſhall ſhew it in his Count*, and otherwiſe it is ill; *contra, where* it is *to his Diſadvantage, or if it be indorſed*, and is not in the Obligation. Br. Obligation pl. 58. cites 21 E. 4. 36. per Vaviſor.

Br. Debt, pl. 208. cites S. C. Contra, that it is no Plea without *ſhewing Acquittance*, per Cur. and cites 3 H. 7. 3. and T. 15 H. 7. 10.

7. *Debt upon a Bond of* 40 *l. to pay* 20 *l.* the *Defendant ſaid, that the Plaintiff had received Part of the ſaid leſſer Sum, pending the Writ*; And per Cur. the Plea is good of this leſſer Sum of which the Condition was made, Quære Cauſam, for the Reporter contra, and that he ought to allege Payment of the whole at his Day, or to ſhew Specialty of the Receipt, becauſe the Action is upon Specialty, but if he was paid, he ought to ſay, that it was paid after the laſt Continuance, otherwiſe ill. Br. Brief pl. 318. cites 5 H. 7. 41.

8. Debt upon an Obligation brought *by J. P.* the *Defendant ſaid, that there were J. P. the Father and J. P. the Son, and he made the Obligation to J. the Father who is Dead, and he who brought the Action is J. P. the Son*, Judgment ſi Actio, and a good Plea, and ſhall not be compelled to ſay Quod non eſt Factum, for this is falſe. Br. Obligation pl. 95. cites 16 H. 7. 7.

9. Error of Judgment in an Action of Debt on a *Bond for Performance of Covenants* in an Indenture, which was, *that if the Plaintiff paid the Defendant*

fendant 100 *l. at Michaelmas next*, then the *Defendant would pay to the Plaintiff* 10 *l. Yearly afterwards during his Life*; and the *Breach aſſigned* was, *that the Defendant had not paid the* 10 *l. yearly without mentioning the Payment of the* 100 *l. firſt by the Plaintiff*, and this was aſſigned for Error; but adjudged that it is no Error, and the firſt Judgment affirmed; becauſe the *Defendant* in the firſt Action *by pleading Conditions performed, had confeſſed the Payment of the* 100 *l. to him by the Plaintiff*; and the Default of the Payment thereof ought to have been ſhewn on the Part of the Defendant, and not on the Part of the Plaintiff. Mo. 365. pl. 497. Mich. 36 & 37 Eliz. B. R. Goodwin v. Iſham.

10. In Error of a Judgment in Debt in C. B. upon an Obligation, it was aſſigned, becauſe the Count was *per Scriptum ſuum Obligatorium conceſſit ſe teneri &c.* without ſaying *Sigillo ſuo Sigillat'* as the Courſe is in B. R. though otherwiſe in C B. But Gawdy ſaid, the Declaration was well enough though not according to Precedents; for by ſaying Per Scriptum ſuum Obligatorium, *All the neceſſary Circumſtances are intended to concar* viz. the ſealing and Delivery of the Deed; becauſe it is not otherwiſe a Writing Obligatory, and *Delivery is never alleged*, which proves that it is not neceſſary to allege the Sealing, for the one is as neceſſary as the other. And accordingly the Judgment was affirmed. Cro. E. 737. Hill. 42 Eliz. B. R. Penſon v. Hodges.

11. Plaintiff *declared* in Debt for *that the Defendant retained him* ſuch a Year, Day, and Place *to embroider a Satten Gown* for a Maid Servant of her Daughter's, and *to take for the ſame* 40 *s.* It was alleged that Debt lies not in this Caſe becauſe there is *not any Place alleged, where* he ſhould embroider it; *nor that it was done before the Action brought*, and it was traverſeable, that he did not embroider it, and then there is not Place for the Venue, wherefore the Declaration is not good. Sed non allocatur. For he cannot traverſe but ought to have pleaded, Non Debet, and he need not allege the Place where he did it, for it may be done in diverſe Places; and it ſhall be intended to be done where the Retainment was, and it is not requiſite that the Time of embroidering thereof ought to be preciſely alleged; For it ſhall be intended to be before the Action brogh; otherwiſe he could not have had his Action; And the Prothonotaries of C. B. certified, that it was not their Courſe to allege the Day or Place of the Performance of a Contract. Wherefore the Court held it to be well enough, eſpecially as the Caſe is here, where the Party Defendant did not take Iſſue thereupon; but let paſs the Advantage thereof, and is condemned by a Nihil Dicit, as here ſhe was. Cro. E. 880. pl. 11. Paſch. 44. Eliz. B. R. Lady Shandois v. Simpſon.

12. Where a *Man* was *indebted* to another *in* 20 *l.* he *came to the Party and deſired him to forbear this for a certain Time and that he would pay the ſame to him at a Day certain by him prefixed*, there *if he ſues him for this* 20 *l. after the Day, he needs not ſhew how this grew due*, for the taking of a Day certain to pay the ſame, this proves the Verity and Certainty of the Duty; *but if a Man be indebted to another upon a Simple Contract*, and *ſues for it upon a Promiſe to pay it*, be it upon ſuch a Promiſe, or the like, the *Plaintiff ought* to ſhew the Cauſe of this, *in his Declaration, to ſpecify how, and in what Manner the ſame grew due*; for in the latter it was due preſently, but a Day given for Payment but in the other Caſe, not ſo; therefore he ought there to ſhew the Special Cauſe how the ſame grew due, and ſo is the Difference, which was agreed to be ſo by Yelverton and by the Court, Quod Nota. Bulſt. 153. Trin. 9 Jac. Dean v. Newby.

13. Debt &c. in which the Plaintiff *declared upon Two Bonds, one to pay* 100 *l.* and *the other* 110 *l, and the Action was brought generally for* 200 *l.* on theſe Bonds, *and Satisfaction was acknowledged for the* 10 *l.* After

3 Bulſt. 244. Meletine v. Hall. S. C. adjudg'd for the Plaintiff.

After a Verdict and Judgment for the Plaintiff, Error was brought, the Error aſſigned was, that it did *not appear on which of the Bonds the Plaintiff did acknowledge Satisfaction of this* 10 *l.* but the Judgment was affirmed; becauſe the Plaintiff might lawfully put both Bonds in Suit, and therefore he might acknowledge Satisfaction of Part generally, without ſhewing of which it is. Roll. Rep. 423. pl. 13. Mich. 14 Jac. B. R. Hall v. Malyn.

14. If a *Bond* be made to one, and he *doth not ſay* in the Bond *that it ſhall be paid to the Obligee*, in this Caſe the *Plaintiff muſt ſhew that it is to be paid to him*, though not expreſſed in the Bond. Brownl. 72. Hill. 14 Jac. Anon.

15. W. brought an Action of Debt againſt M. and *declared that the Defendant bought Timber of him for* 10 *l. Solvend'* Modo & Forma ſequenti viz. 5 *l. ad feſtum Paſch. proxime ſequentem*, and *ſays nothing when the other* 5 *l. ſhould be paid*, and the Plaintiff recovered the whole 10 l. by Verdict, and now it was ſpoken in Arreſt of Judgment for the Cauſe aforeſaid, but yet by all the Court it was good enough; for the *Law intends the other Part of the Money to be due preſently, if no certain Day of Payment be alleged.* Golsb. 116. pl. 11. Willoughby v. Milward.

Hetl. 137. S. C but S. P. does not appear. —Litt Rep. 245. S. C. but S. P. does not appear.

16. If one brings *Debt for Part of a Debe due upon a Contract*, or Obligation, *and does not acknowledge Satisfaction of the Reſidue*, the Action is not well commenced; Arg. and Judgment accordingly, by which a Judgment in C. B. was reverſed. Cro. C. 436. pl. 6. Hill. 11 Car. B. R. in Caſe of Clothworthy v. Clothworthy.

17. The Plaintiff obtained a *Judgment in an Hundred Court for* 58 *s.* 4 *d.* and brought an Action of *Debt upon that Judgment* in this Court *for* 58 *s. only*, and did *not ſhew that the* 4 *d. was diſcharged*, and upon Nul tiel Record pleaded, and a Demurrer to that Plea, the Declaration was held to be naught for that very Reaſon; for if a Debt upon a Specialty be demanded, the Declaration muſt be for the whole Sum; if for leſs you *muſt ſhew how the other was ſatisfied.* 3 Mod. 41. Paſch. 36 Car 2. B. R. Marſh v. Cutler.

18. Debt *on Covenant to pay ſo much Quarterly for four Quarterly Payments* Arrear, *without ſaying when due* and ending is naught, and ſo a Judgment in B. R. was reverſed. Show. 8. Mich. 4 Jac. 2. in Cam. Scacc. Piltarſe v. Darby.

19. Error upon a Judgment in C. B. where the Action was *Debt upon a Bond of* 1090 *l. Penalty, conditioned that if ſuch* an one, being an *Apprentice, ſhould purloin*, or embezzle any Thing *to his Maſter's Damage, that then he ſhould make it good. Breach aſſigned* was, *that he did* embezzle and *purloin* 200 *l.* Upon this Iſſue was joined, and Verdict for the Plaintiff and Judgment accordingly. Now upon Error brought it was inſiſted, that this Breach was not well aſſigned; for the Condition of the Bond, tying it up to ſuch purloining as ſhould be to the Damage of the Maſter, the Plaintiff in the original Action ſhould have averred, that this was a purloining to the Damage of the Maſter. But the whole Court thought the Judgment of C. B. was well given. For the Words purloining and embezzling are always taken in a bad Senſe, Et ex vi Termini import Damage to the Maſter; and what appears plainly need not be averred, according to that Maxim of Law, Quod conſtat clare non debet verificari. Judgment niſi. 10 Mod. 149, 150. Hill. 11. Ann. B. R. Thornicraft v. Barns.

(C. a) What

(C. a) What ſhall be a good *Bar* in Debt. *Eviction.* [Diſſeiſin &c.]

In what Caſe Eviction ſhall be a good Diſcharge of Rent. See tit. Rent. (O)

1. **If a Man** ſells Land **to another for a certain Sum of Money, in an Action of Debt for the Money, it is no Plea in Bar that the Land is evicted. H. 37 El. B. per Curiam.**

So if a Man ſells Goods for Money, to be paid at ſeveral Days, in this Caſe, though the Goods are re-taken by one that has Right to them, before the Day, yet the Vendor ſhall have Action of Debt, in reſpect of the Contract. 3 Rep. 22. a. Arg.

2. [But] **If a Man poſſeſſed of a** Ward **ſells it to another for a certain Sum, in Debt for the Sum, it is a good Bar that the Ward is** evicted by a Stranger. **H. 37 El. B. per Curiam.**

3. If Leſſee **for Years,** rendring Rent, cauſes a Stranger to enter upon him, and ouſt him, **by which the Stranger devests the Reverſion by Diſſeiſin, yet the Leſſor may have an Action of** Debt **for the Rent arrear after, for this** lies upon the Contract, **notwithſtanding the Diſſeiſin. M. 3 Ja. B. R. between** *Carpenter and Collins*, **cited to be adjudg'd in B.**

4. **If a Man** leaſes **for Years** to commence at Mich. rendring Rent, **and the** Leſſee enters before Mich. **by which he is a Diſſeiſor,** and ſo continues after Mich. and the Rent incurs, **the Leſſor may have Debt for this Rent; and this** Diſſeiſin ſhall not be any Impediment by Reaſon of the Privity of Contract **which is between them. M. 32 El. B. R. between** *Alexander and Dier* **adjudged.**

Cro E 169. pl. 6 S. C. adjudg'd accordingly. —— 2 Le. 99. pl. 121. S. C. adjudg'd accordingly. ——— See D 89. a. Marg. pl. 111. S. C. and other Caſes cited, as to the Leſſee's Entry before the Day. ——— S. C. cited Lit. Rep 17. by the Name of Alexander v Sexie, adjudged for the Plaintiff; but ſays, that if the Leſſee had claimed Fee, it would be otherwiſe, and Ibid cites 2 Jac. C. B. Carton's Caſe, where the Leſſee enter'd before the Day, and made Feoffment after the Day, yet Debt lies for the Rent.

5. [So] If Leſſee for Years, **rendring Rent,** makes a Feoffment in Fee, **yet this ſhall not be any Bar of the Rent Arrear after, for the Privity of Contract continues, notwithſtanding the Feoffment, and the Eſtate is not determined but at the Election of the Leſſor.**

D. 4. b. pl. 1. &c. Trin. 24 H. 8. in the Exchequer **Ruſhden's** Caſe. S. P. argued. ——— Ibid. Marg. pl. 1. it a Nota, that it was ruled for Law in C. B. that if Leſſee for Years, yielding a competent Rent, makes Feoffment in Fee, that yet the Privity of Contract is not ſo gone, but that the Leſſor may have Debt againſt his Leſſee; For otherwiſe three or four Years Rent may be Arrear, and the Leſſor without Remedy by a private Feoffment, which is not reaſonable. ——— Ibid Marg. pl. 5 ſays, it is in Experience held at this Day, that if the Leſſee makes Feoffment, the Leſſor ſhall have Debt againſt him; or otherwiſe the Leſſee by his own Act may determine the Leaſe, and compel the Leſſor to enter for a Forfeiture, which is inconvenient.

6. **If** Leſſee **for Years, rendring Rent,** never enters **into the Land, yet if the** Leſſor waives the Poſſeſſion, **an Action of** Debt **for the Rent** lies upon the Contract. **D. 24 H. 8. 4, 3. 28 H. 8. 14.**

D. 4 b. pl. 3 Trin. 24 H. 8. S. P. cited as adjudged, 18 H. 6 ——— Ibid. 14 a. pl. 70 Trin. 28 H. 8. Goodale's Caſe. S. P. But by Fitzherbert, it is otherwiſe of a Leaſe at Will. ——— And in Debt againſt Leſſee for Years, for the Arrearages of Rent reſerv'd upon it, he need not declare that the Leſſee had entered; for the Contract is the Ground of the Action. 4 Le. 18. pl. 61. Per Dyer cites 44 Eliz. 3. 5. ——— The Occupation is not material, where the Leaſe is for Years or Life; But otherwiſe of a Leaſe at Will. Hetl. 54. Mich. 3 Car. C. B. Jeakil v Linne ——— Vent 41. Mich. 21 Car. 2. B. R. Anon. S. P that in Caſe of a Leaſe at Will, there muſt be an Averment that the Leſſee occupied the Lands. ——— Ibid. 108. Hill. 22 & 23 Car. 2. S. P. in Calthorpe's Caſe.

Br. Debt. pl. 84. cites 21 E 3. 12. S. P.

7. A Man brought Debt, and ſhewed an Obligation in which A. was *bound to him for Tithes, bought* of the Plaintiff, in 10 l. and 'twas adjudged a good Anſwer, that *another had recover'd the Tithe by an elder Right*, ſo that he cannot have the Tithes, and therefore 'twas adjudged that he ſhall not have the Debt. Br. Contract, pl. 12. cites 21 E. 3. 11.

8. If a *Man who has Eſtate Conditional*, or Defeaſible, *makes a Leaſe for Years, rendring Rent*, and a Man enters by former Title, or for Condition broken, this is a good Bar for the Leſſee to plead. Br. Debt, pl. 225. cites 45 E. 3. 8.

Br. Debt, pl. 176. cites S. C.

9. Where a Man leaſes Land for Years, rendring Rent, and is bound by Obligation to pay the Rent, there in Debt upon Obligation it is a good Plea that *a Stranger enter'd by Title*, which Matter ſhall diſcharge the Obligation, quod nota. Br. Dette, pl. 178. cites 20 H. 6. 23.

Br. Obligations, pl. 39. cites S. C.

10. Debt upon an Obligation, the Condition was for *Performance of Covenants contain'd in certain Indentures*, the Defendant *ſaid that* the Place of St. A. with *Oblations, was leas'd to him by the ſame Indentures* for Term of Years, *rendring certain Rent, and* that within the Term, and *before this Day of Payment, the Pope had annulled the Privilege*, and the Pardon of St. A. *ſo that he is ouſted of the Profits by Force of the Leaſe*. Frowicke Ch. J. ſaid, the Plea would have been the better, if he had ſaid, that the Pope, by Writing proclaim'd and publiſh'd at ſuch a Place, had reſumed the Pardon; for otherwiſe it cannot be try'd in England &c. Brooke ſays Quære; for it is admitted a good Plea, if it may be try'd. Br. Dette, pl. 123. cites 21 H. 7. 6.

11. *So* it ſeems clear of *a Thing leaſed*, and after is *revoked by Act of Parliament, as Wears in Rivers* &c. Br. Dette, pl. 123. cites 21 H. 7. 6.

12. Eviction or Expulſion *may be given in Evidence on Nil Debet*; held per Cur. But the Reporter adds a Nota, that this Point was formerly controverted. Sid. 151. pl. 18. Trin. 15 Car. 2. B. R. in Caſe of Drake v. Beere.

(D. a) Pleadings. Nil Debet, or Nil Detinet &c.

1. UPON *a Leaſe for Twenty Years* expired if he counts for Eight Years, he need not to *confeſs himſelf ſatisfied of the Reſt, but in Debt upon an Obligation of* 10 *l.* and he counts of 5 l. he ought to confeſs Payment of the reſt, for it is one *entire Debt*; but upon a Leaſe, every Term is a *Diſtinct Debt*, and in the Caſe of the Leaſe, Entry into any Parcel of the Land leaſed is a good Plea for all; for the Rent cannot be apportioned. Br. Dette pl. 87. cites 7 H. 6. 26.

2. In Debt *upon Arbitrement* the *Defendant ſaid, that No ſuch Submiſſion*, and the beſt Opinion was, that becauſe in this Caſe the Defendant may wage his Law, and where he may wage his Law he ſhall not traverſe the Contract, nor the Cauſe of the Debt, as to ſay that he did not buy of the Plaintiff, nor borrow of him &c. But in Debt upon a Leaſe for Years of Land, or upon Arrears of Account before Auditors he may ſay Non Demiſit, or no ſuch Account; for there he cannot wage his Law, therefore he cannot wage his Law, therefore the Plea above ought to be Nihil Debet, and give the Matter in Evidence. Br. Dette pl. 88. cites 8 H. 6. 5.

3. Debt *by a Servant againſt his Maſter*, who was retained *for 20 s. by the Year and every Year a Robe or 5 s. for the Robe*, and that the Salary was arrear by ſo many Years, and the Robe by Four Years and the Action accrued to demand ſo much for the Salary and 20 s. for the Robes; the *Defendant ſaid, that he paid the Roles at D. in the County of S. according to the Retainer*; and per Moyle, this is only Nihil Debet Argumentive, but by others the Plea is good; for if he pleads Payment of the Money this is no Plea, but ſhall ſay Nihil Debet, but where he pleads Delivery of another Thing. Per Littleton, Choke, and Needham. J. Br. Dette. pl. 112. cites 9 E. 4 36.

4. *Payment or Nihil Debet*, is no Plea in *Debt upon Arrears of Annuity*, contrary to the Specialty Br. Dette. pl 114. cites 9 E. 4. 48. 53. Br. Annuity. pl. 23. cites S. C.

5. In Debt *by Executors for the Arrears of an Annuity*, the Defendant *pleaded Nil Debet* (ſuppoſing that by the Death of the Grantee the Deed has loſt its Force, and that the Action is founded upon the Debet only, and not upon the Deed. But per Frowike *this Action is founded merely on the Deed*; for without the Deed the Action fails, ſo though the Nature of the Action is changed, and the Annuity determined, this does not prove but that the Action is founded on the Deed; Quod tota Curia conceſſit. Keilw. 47. b. pl. 4. Mich. 18 H. 7. Anon.

6. In Debt for *taking of a Savage Contra Formam Statuti*, the Defendant may plead *Nihil Debet per Patriam*, per Tremail & Fineux notwithſtanding that it be founded on a Statute; for *it is not only upon the Statute, but upon the Statute and upon Matter in Fact*. Br. Iſſues join, pl. 23. cites 21 H. 7. 14. Br. Debt pl. 124. cites S. C.

7. *But* in *Debt upon Eſcape againſt Warden of the Fleet*, or upon Recovery of Damages, it is no Plea as it his ſaid; Quære, for they were in Doubt of the Iſſue, Et Rede e contra, and that it is no Plea. Ibid.

8. In Debt upon a Pain given by Statute, *Nil Debet per Patriam*, is a good Plea; but doubted in Debt againſt a Gaoler. Heath's Max. 82. cites 3 & 4 Mariæ. D. 145. & 50 Ed. 3.

9. An Action of *Debt* was brought *upon the Statute of Purveyors, becauſe he had cut down Trees againſt the Form of the Statute of 5 Eliz.* The Defendant *pleaded Not Guilty*; and it was moved that this was an evil Iſſue; for he *ought to have pleaded Nil Debet*; and the Court commanded him to plead Nil Debet. Goldsb. 39 pl. 16. Mich. 29 Eliz. Anon.

10. In Debt upon the Statute of 32 H. 8. cap. *for the Arrears of an Annuity deviſed to M.* the Plaintiff's Wife for Life (but ſhe died before the Action brought) *againſt the Adminiſtrator of the Terre-Tenant.* The Defendant *pleaded Nil Detinet.* Per Hale Ch B. a Will is not a Deed, though it is as effectual to paſs a Thing as a Deed is, yet it is not a Deed in its own Nature; becauſe there needs no Sealing nor Delivery to a Will, which is eſſential to a Deed; and therefore Nil Detinet is a good Plea to an Action of Debt grounded *on a Will*, as well as to an Action of Debt grounded *on a Tally*. And the Action here is not ſo much grounded on the Will itſelf, as upon a Statute Law, which enables Men to diſpoſe of their Lands, and Rents out of their Lands, by Will. Hard. 332. Mic. 15 Car. 2. in the Exchequer. Wilſon's Caſe.

11. *Nil Detinet* is no good Plea to a Deed; as in Caſe of *Debt on a Bond, or otherwiſe upon Specialty*; *but* where an Action of Debt is *grounded upon Matter in Pais only, as* upon *Preſcription, or upon a Deed that is not requiſite to maintain the Action*, as for Rent reſerved upon a Leaſe by Deed there it is a good Plea; Arg. and cites ſeveral Books which go upon this Difference. Hardr. 332. Mich. 15 Car. 2. in Wilſon's Caſe.

12. In Debt *upon a Grant of a Rent, Nil Detinet* is a good Plea, becauſe the *Plaintiff has other Remedy to levy it* viz. *by Diſtreſs*; *but to an Action grounded upon a Grant of a bare Annuity, it is not a good Plea*; be-

cauſe the Grantee in ſuch Caſe has no Remedy by Diſtreſs; and therefore in that Caſe the Defendant muſt avoid it by Matter of as high a Nature, as by Acquittance under Seal, or the like. Per Hale Ch. B. Hardr. 333. Mich. 15 Car. 2. in Wilſon's Caſe.

13. Upon Nil Debet pleaded, *Entry and Suſpenſion* may be given in *Evidence*. Arg. which the Court did not deny. Mod. 118. Paſch. 26 Car. 2. B. R. Brown v. .....

14. Debt *on a Bill ſealed for Payment of 500 l. and Intereſt*. The Count was for 500 l. without taking any Notice of the Intereſt, and held good; for the direct Obligation is to pay 500 l. 2 Show. 32. pl. 23. Hill. 30 & 31 Car. 2. B. R. Hinton v. Wilmore.

15. A *Leaſe* was made *of Tithes for Three Years, rendering Rent at Michaelmas and Lady-Day*; and an *Action was brought for Rent Arrear for Two Years*; upon Nil Debet the Plaintiff had a Verdict, and it was now *moved in Arreſt* of Judgment, *that* the Declaration was too general, for *the Rent being reſerved at Two Feaſts, the Plaintiff ought to have ſhewed at which of thoſe Feaſts it was due.* But the Council for the Plaintiff ſaid, that it appears by the Declaration that Two Years of the Three were expired; ſo that there is but one to come, which makes it certain enough. Curia, This is *helped by the Verdict*. but it had not been good upon a Demurrer. 3 Mod. 70. Trin. 1 Jac. 2. B. R. Pye v. Brereton.

16. In Debt againſt a Sheriff, the *Plaintiff declared upon a Judgment* obtained againſt J. S. and had ſued out a *Fieri Facias*, and delivered it to the Defendant, who Virtute thereof had levied the Money. The Defendant pleads Nihil Debet and adjudged a good Plea. And this Difference was taken, that where the Writ has not been *returned*, the Plea is good becauſe it is Matter of Fact, whether he has levied the Money or not; *ſecus* where the Writ is *returned Fieri Feci*. 12 Mod. 604. Mich. 13 W. 3. Cole v. Acorn.

2 Salk. 659. pl. 5. S. C. the Court held this to be no Variance; For Payment to the Plaintiff or his Attorney, is the ſame Thing; The teneri made it a Debt to the Plaintiff; and in Conſequence it may be paid to him; and a Solvendum to any body elſe would be Repugnant; But Payment to the Plaintiff's Attorney or Aſſignee, is the ſame Thing.

17. Debt on a *Bond ſolvend' ſo much* Money *to the Plaintiff himſelf, his Attorney, or Aſſigns*, and *upon Oyer* of this Bond it appeared to be *Solvendum to his Attorney or Aſſigns*, without mention of himſelf; on Demurrer, Exception was taken to the Variance between the Bond on which the Plaintiff had declared, and the Bond ſet forth, upon the Oyer; but to this it was anſwered, that the Declaration need not be according to the Letter of the Bond, but according to the Operation of Law upon it; as if A. gives a Bond to B. *ſolvendum to* C. who is a Stranger, a Payment to C. is Payment to B. and the Count muſt be upon a Bond ſolvendum to B. and per Cur. if A gives *Bond to B. if B. appoints one, Payment to him is Payment to B.* And *if B. does not appoint one*, then *it ſhall be paid to B. himſelf*. 6 Mod. 228. Mich. 3 Ann. B. R. Roberts v. Harnage.

18. Wherever *Matter of Fact is mingled with a Specialty*, or with a *Record*, Nil Debet is a *good Plea*, as in Debt before *Auditors*, it is a good Plea. Arg. 8 Mod. 107. Mich. 9 Geo. Warren v. Conſett.

It is no good Plea to an Action *on a Policy of Inſurance*, nor to an Action *on a*

19. Nil Debet is no good *Plea* to an Action of *Annuity*, nor to an Action of *Debt on Bond brought brought by Adminiſtrator*, it is true, ir is a good Plea to an Action of *Debt for Rent on a Leaſe for Years*, but the Reaſon is becauſe the Demiſe is the Foundation of the Action, and the Deed is only an Evidence of the Demiſe, and ſo it is a good Plea to an Action of *Debt on Penal Statutes*, and to Actions of Debt *upon Awards* or to *Accounts*

counts before Auditors, and the Reaſon is, becauſe theſe are not the Deeds of the Parties. Arg. 8 Mod. 107. Mich. 9 Geo. in Caſe of Warren v. Conſett. *Bail Bond*, though there is ſomething to be done, to charge the Inſurers and Bail. Ibid. 108.——It is not good to an Action *on a Bond*, becauſe the Debt is immediately due; Admitted. Ibid. 323.

20. Plaintiff brought Debt and declared upon an Indenture by which he *covenanted to transfer &c. and Defendant covenanted that he would receive and pay* for the Transfer &c. and *bound himſelf in* 2800 *l. Penalty to perform* the ſame, and for Non-Performance Plaintiff brought his Action, adjudged in C. B. and affirmed in Error, that Nil Debet is no good Plea. 8 Mod. 106. Mich. 9 Geo. Warren v. Conſett. Becauſe this Action being founded on the Articles, and the particular Facts being but auxiliary to the Deed, the Plea of Nil Debet was no good Plea. Ibid. 382. Paſch. 1 Geo. 2. S. C.

21. It is a good Plea, where the *Action is founded on Collateral Matter* and *not comprized in the Deed.* Agreed. As in Actions of *Eſcape*, and in all Actions *founded on Acts of Parliament.* 8 Mod. 324. Arg. Mich. 11 Geo.

(E. a) Pleadings in General.

1. IN Debt upon *a Leaſe of Tithes levied by Diſtreſs* is no Plea, Per Skrene; becauſe it is not Land, in which he may diſtrain by the Tithes ſever'd; for it is the Thing leaſed. Contra Till. Br. Dette, pl. 234. cites 11 H. 4. 46.

2. In Debt upon an Obligation the Defendant *pleaded Condition if any Goods which the Plaintiff delivered to J.* Hillary *are Eſloign'd that then J.* Hillary *ſhould pay and ſatisfy the Value, and ſaid that the Goods were Eſloign'd, and* the *Plaintiff* brought Action in London againſt J. Hillary, and *recover'd* 20 *l. Damages, and had his Body in Execution*; and no Plea; for *Body in Execution, is no Payment nor Satisfaction.* Br. Dette, pl. 26. cites 33 H. 6. 47. Br. Condition, pl. 14. cites S. C.

3. *Debt upon Leaſe of four Acres for* 3 *l.* &c. The Defendant *ſaid* that *he leaſed the four Acres and a Rectory, and a Rent, and a View of Frank-Pledge for the* 3 *l.* Judgment of the Count. And ſo ſee that he pleaded to the Count; but the Matter is argued if he ought to traverſe or not. Br. Count, pl. 23. cites 35 H. 6. 38.

4. Debt *upon an Obligation* the *Defendant pleaded, that the Plaintiff had received Part of him pending the Writ*, and the Opinion of the Juſtices was, that it is no Plea *without Specialty*, quod Mirum; for Plea to the Writ may be without Specialty; Contra of Plea in Bar; but this was held to be in Bar for the Parcel. Br. Dette, pl. 153. cites 7 E. 4. 15.

5. In Debt the Plaintiff counted that the *Defendant put his Feme and Son to the Plaintiff to board, and* the *Plaintiff leaſed to the Defendant a Chamber for the Feme and Son, rendring* for the Chamber and Board *for every Week* 6 *s.* the *Defendant ſaid, that Non Dimiſit Cameram* &c. and the beſt Opinion was, that it is a good Plea to all, without anſwering to the Boarding; for *Contract* is intire, and therefore *deſtroy it in Part*, and *it is deſtroy'd in all.* Br. Dette, pl. 108. cites 9 E. 4. 1.

6. In Debt the *Defendant ſaid, that he has infeoff'd him in certain Land in Pledge, and if he will re-infeoff him, he is ready, and always has been, to pay him*; and the beſt Opinion was, that it is a good Plea. But Br. Pledges pl. 10 cites S. C.

ſeveral

ſeveral were of Opinion, that where the Contract is ſingle at the Commencement, and after Pledge is given for the Debt, that it ſhall be no Plea in Debt that the Plaintiff has pledg'd &c. Contra, where Pledge is deliver'd for the Debt at the making of the Contract; for in the other Caſe, the one ſhall have Debt, and the other Detinue of the Goods; Contra where it is put in Pledge at the making of the Contract. Br. Dette, pl. 111. cites 9 E. 4. 25.

7. It is a good Plea for the Maſter, *that the Servant departed out of Service the firſt Year*, and ſhall not be compell'd to the General Iſſue. Br. Dette, pl. 112. cites 9 E. 4. 36

8. Debt *upon Arrears of Account before Auditors aſſign'd*, where a Man pleads *Nihil Debet*, or *Payment in a Foreign County*, this is a good Plea, and yet the *Action* is *founded upon* Matter of *Record* by Authority of the Stat. Weſt. 2. 11 quod non negatur. Br. Dette, pl. 141. cites 5. H. 7. 33.

9. In Debt *upon an Inſimul Computaverunt*, the Defendant pleads, *that he did not account & hoc paratus &c. per Patriam*; it was objected, that this was no Plea; For in ſuch Caſes where the Party may wage his Law, the Contract is not traverſable; But that he ought to ſay, *that He ow'd him nothing, and is ready to aver by his Law, or by the Country*; For this is the Point of the Writ, or otherwiſe the Plea is not good; and after the Defendant, by Advice of the Court, waiv'd his Plea. Keilw. 39 a. pl. 4. Trin. 13 H. 7. Anon.

10. In Debt the Plaintiff *counted of a Horſe ſold* &c. It is no *Plea* for the Defendant to ſay, *that he did not buy the ſame Horſe*, becauſe he may wage his Law. Keilw. 39. a. pl. 4. Trin. 13. H. 7.

11. In Debt *upon Arbitrement*, the Defendant may *plead No ſuch Arbitrement*; *and yet he may wage his Law in the ſame Action*; but the Reaſon is, becauſe this Arbitrement lies in the Notice of a third Perſon, and ſo the Lay-Gents may have Conuſance of it, and for that Reaſon the Plea has been held good. Keilw. 39. in pl. 4. Trin. 13 H. 7. Anon.

Dal. 49. pl. 11. Anon. S. C.

12. In *Debt* the Plaintiff *counted of a Contract*; the Defendant *pleaded* that he made a Contract for *a leſs Sum, Abſque hoc, that he made any Contract for the Sum compris'd in the Writ* as the Plaintiff has ſuppoſed. The Court held that he ſhall not have the Plea, becauſe he may wage his Law. Mo. 49. pl. 148. Paſch. 5 Eliz. Anon.

Dal. 49. pl. 11. S. C.

13. So in Debt the Plaintiff *counted of the buying of a Horſe*, and the Defendant *pleaded, that the Buying was of two* for the ſame Money. Ibid.

Dal. 49. pl. S. C.

14. Or where the Plaintiff ſuppoſed the *Contract* to be *between him and the Defendant*, and the Defendant *pleaded, that it was made between them and another*. Ibid.

Dal. 49. pl. 11. S. C. but miſ-printed as to the Word (Ox)

15. So where the Plaintiff ſuppoſed the *Buying of an Oxe*, and the Defendant *ſaid, that it was a Horſe*; in theſe Caſes the Defendant may wage his Law, and ought not to traverſe the Contract. Ibid.

16. In Debt *on a Bill for 5 l.* in which were theſe Words, *to be paid as I pay my other Creditors*. The Declaration ought to be Special, according to the Bill. Cro. E. 256. pl. 30. Mich. 33 and 34 Eliz. B. R. Bright v. Metcalfe.

S. P. Contra. Arg. Cro. E. 778. pl. 11. ——If in ſuch Caſe there be a Verdict for the Plaintiff, it ſhall be aided by the Statute, becauſe being an ill Plea, and a falſe one, the Plaintiff ought to have his Judgment, but if the Verdict be for the Defendant, yet the Plaintiff ſhall have Judgment, becauſe the Deed is not anſwer'd by the Bar. Gilb. Hiſt. of C. B. 124. cites S. C.

17. In Debt, *Not Guilty* is not a good Plea; but *if* Iſſue is join'd thereupon, and a *Verdict is given*, it is now good, and help'd by the Statute of Jeofails, becauſe it is only miſ-joining of the Iſſue; per Cur. Noy. 56. Anon.

18. Debt on a *Bond* conditioned *to ſave the Plaintiff harmleſs* of and from an Obligation, in which the Plaintiff, at the Requeſt of the Defendant ſtood bound with him for the Payment of the 11 l. on ſuch a Day in May, which was before the Date of the Obligation; the Defendant *pleaded Payment Secundum Formam & effectum Conditionis*; Plaintiff demurred and Judgment was given for him; for the Defendant *ought to have pleaded Non Damnificatus*. Gouldsb. 159. pl. 90. Hill 43 Eliz. Allen v. Abraham.

19. A Debt *due by Promiſe* is not diſcharged by *Account*. 3 Lev. 237. Mich. 1 Jac. 2. C. B. Mayor &c. of Scarborough v. Butler.

20. Debt was brought upon *a Bond for Performance of Covenants*; Defendant pleaded in Bar, that for all the Breaches till ſuch a Time, he *had brought Covenant and recovered Damages*, and that there were no Breaches ſince that Time; and Demurrer, and Judgment for Plaintiff; for the very Plea the Bond is forfeited. Though Carthew objected, one might wave the Benefit of a Forfeiture of a Bond, as well as the Forfeiture of a Copyhold Eſtate &c. and the bringing of Covenant was a *Waver* of the Forfeiture of the Bond and ſo a Bar. But per Cur. even in Equity it would be *no Bar till Satisfaction*; as if two be bound in a Bond, Judgment againſt one is no Diſcharge to the other before Satisfaction. 12 Mod. 321. Mich. 11 W. 3. Pierce v. Hutcheſon.

21. Debt *upon a Judgment*, Defendant pleads in Bar, that a *Capias ad Satisfaciendum* was taken out againſt him at ſuch a Time, by Virtue whereof he *was taken in Execution*; and that the ſaid Capias was *returned on Record*, but did *not aver that the Execution continued*, or that the Debt was paid; and on Demurrer, Holt Ch. J. ſaid, If he was once in Execution, it muſt be intended he continues ſo, if he has not paid the Money; for if he has eſcaped, you ſhould reply that of your Side that are Plaintiffs, for this is a Plea in Bar, and good to Common Intent. And he quoted two Caſes, where he had known *Eſcape replied* to ſuch a Plea; and a taking in Execution is a Bar to all other Remedies while it laſts, and we cannot intend an Eſcape. 12 Mod. 541. Trin. 3 W. 3. Redmond v. Joſeph.

22 *Solvit ante Diem* is no Plea in Bar to *Debt upon Bond*, becauſe no material Iſſue can be joined upon it. 10 Mod. 147. Hill. 11 Ann. B. R. Merril v. Joſſelyn.

S. C. cited, and ſaid, that in ſuch Caſes there is no Way for the Plaintiff to help himſelf but by Demurrer. 10 Mod. 167. Mich. 1 Geo. 1. B. R. Arg. cites alſo the Caſe of Atwood and Coleman.——Arg. cites S. C. 10 Mod. 304. Paſch. 1 Geo. 1. B. R. and cites alſo the Caſe of Hill and Manby.

23. *But* there is no Doubt that *Accord with Satisfaction before the Day* may be pleaded in Bar of Debt upon Bond, becauſe being pleaded by Way of Excuſe it ſuppoſes Non-performance, and the *Defendant muſt prove his Plea*. Arg. 10 Mod. 304. Paſch. 1 Geo. B. R. and per Prat J. 306. & vide 307 in Caſe of Weddall and Manucaptors of Jocar.

For more of Debt in General, See **Actions** and the ſeveral Kinds of Actions &c. throughout this Work.

Decies Tantum.

See F. N. B. 171, and See Hawk. Pl. Cr. 260. cap. 85. S. 10 to the End.

(A) For what Act or Thing it lies. What ſhall be ſaid a Taking.

Br. Decies Tantum, pl. 5. cites S. C. but ſays, the Caſe is ſo ill reported, that it is not eaſy to underſtand it.—— Fitzh. Decies Tantum, pl. 9. cites S. C. clearly, according to Roll.

1. A Man buys Lands of one Party, and has the better Bargain to maintain the Suit, this is a Taking, for which he ſhall be puniſhed by this Writ. Adjudged. 41 Ed. 3. 9. b.

2. 34 *Ed.* 3. *cap.* 8. *If either of the Parties to the Suit will proſecute a Juror that has taken a Bribe on either Side to give his Verdict, he ſhall have his Plaint by Bill preſented before the ſame Juſtices, and the Juror ſhall anſwer without Delay; and if any other ſhall proſecute ſuch Juror, the Offence ſhall be heard and determined as aforeſaid, and ſuch Proſecutor ſhall have Half the Fine; and the Parties to the Plaint ſhall recover their Damages by Aſſeſſment of the Inqueſt, and the Offender ſhall be impriſoned for a Year, and be incapable of a Pardon; and if the Party will proſecute before other Juſtices, he ſhall have the Suit as aforeſaid.*

Decies Tantum was brought before Juſtices of Niſi Prius, of taking Money in Quare Impedit, and the Inqueſt found againſt them, by which the Juſtices awarded them to Priſon, and gave Day over in Bank, and it was awarded, that the King and Party recover 10 Times ſo much &c. *the one Moiety to the King, the other to the Party*, and the *Jury awarded to Priſon*, and the *Party was firſt ſatisfied, and after the King*; for per Morris, the *King has not this as a Debt, but as a Fine*; and where the King has Fine, the Party ſhall be always firſt ſerv'd, by which they ſatisfied the Party, and found Surety to ſatisfy the King, and were deliver'd out of Priſon. Quod Nota. Br. Decies Tantum, pl. 6. cites 41 E. 3. 15.——Fitzh. Decies Tantum, pl. 10. cites S. C.

3. 38 *E.* 3. *cap.* 12. *If a Juror takes any of either Party to give his Verdict, and be attainted thereof by Proceſs contained in the Article of Jurors of the* 34 *E.* 3. *cap.* 8. *be it at the Suit of the Party that will ſue for himſelf, or for the King, or at the Suit of any other, he ſhall pay ten times ſo much as he hath taken, to be divided betwixt the King and the Proſecutor, and all Embraceors that procure ſuch Inqueſt, ſhall incur the like Puniſhment.*

If the Juror or Embraceor have not whereof to make Gree, he ſhall ſuffer a Year's Impriſonment.

But no Juſtice, or other Officer, ſhall inquire of this Offence ex Officio.

Decies Tantum *againſt an Embraceor, for taking of Money for Embracery*, and the Count is ill, becauſe *it is not alledged whether he embraced in fact, or did not embrace*, per Cur. Quod Nota; For the Effect of the Statute is, that a Man ſhall not Embrace; For if he takes Money to Embrace, *and does not Embrace*, the Action does not lie, per Cur. And per Priſot, the Statute is againſt Embraceors, ſo that it ought to be the Plural Number; But Jurors are Jurors as ſoon as they are Sworn, and therefore if they *take Money for ſaying their Verdict, and after the Plaintiff is Nonſuited before Verdict*, yet the Action lies; But *otherwiſe* it ſeems, *if the Juror be ſtruck out before that he be Sworn*, for then he is no Juror. And after *Iſſue was taken, whether the Embraceor did not take the Money*, and the others e contra, Quod Nota, notwitſtanding the Opinion aforeſaid. Br. Decies Tantum, pl. 14. cites 37 H. 6. 31.——Fitzh. Decies Tantum, pl. 2. cites S. C.

Certain Jurors *took Money of the Pacty after their Verdict*, given *without Covenant thereof made before*, viz. Every one half a Mark, and where thereof convicted by Verdict, and *were put to Fine*, viz. Every one half a Mark. And ſo ſee that it is out of the Caſe of the Statute of Decies Tantum. But the Statute wills, that they ſhall be Impriſoned for a Year, without making a Fine, and this ſeems to be where they take Contra Formam Statuti. Br. Decies Tantum, pl. 15. cites 39 Aſſ. 19.

4. Note,

4. Note, by the Statute of * 27 *E.* 3. *cap.* 3. That where *Jurors take Money to give their Verdict*, the *Party may have Bill againſt them immediately before the Juſtices of Niſi Prius, or other Juſtices*; But per Thorp, they can't award them to Priſon before Judgment. Br. Bill. pl. 46. cites 41 E. 3. 15.

* So are all the Editions of Brook. The Year Book does not mention the Statute.

But it ſeems it ſhould be the Statute of 34 E. 3. cap. 8.

5. If *a Man impannell'd and return'd* upon Iſſue *takes Money* of the one Party *for his Verdict, and after is no Juror upon the Iſſue*, yet Decies Tantum lies, by ſome Juſtices, but others e contra, and that Action of Maintenance lies, quod nota inde. Br. Maintenance, pl. 15. cites 21 H. 6. 54.

6. Upon Iſſue of *Decies Tantum* in Middleſex, the Jury may give their *Verdict generally* quod *receperunt Denarios prout* &c. *though the giving* of the Money *was in another County*; for the Matter is not local, and this by Conſcience, and the Attaint does not lie; for it is true quod ceperunt Argentum &c. but *they cannot ſay* that *Guilty in the County of Norfolk expreſly*, by Starky and ſome of the Juſtices, and ſeveral Apprentices; But Brian J. contra; for then the Defendants ſhall be doubly charg'd, if the Plaintiff brings another Decies Tantum in another County, this Recovery will not be a Bar, which ſeems not to be Law; for he may aver, that it was all of one and the ſame Receipt, and the *Place nor County is not traverſable* where it is *not of Things local, as of Trees cut, Graſs trampled*, or the like. Br. Attaint, pl. 120. cites 22 E. 4. 19.

7. *So* in Iſſue upon *Aſſets enter Mains.* Ibid.

(B) Writ. Pleadings and Proceedings.

1. DECIES Tantum *againſt ſeveral*, and *ſuppoſed that J. N. and W. received* where the Receipt of the one is not the Receipt of the other, Judgment of the Writ Et non Allocatur, by which they pleaded Not Guilty; Nota Not Guilty after Iſſue. Br. Decies Tantum pl. 4. cites 40 E. 3. 33.

2. A Writ of Decies Tantum was maintained *againſt the Jurors and Embraceors.* Thel. Dig. 106. Lib. 10. Cap. 15. S. 8. cites Paſch. 41 E. 3. 9.

3. Decies Tantum *by the Baron and Feme*, and *becauſe the Feme was named the Writ was abated.* Br. Decies Tantum pl. 20. cites 43 E. 3. 16.

4. Decies Tantum againſt Jurors, whereof *the one had taken* 10 *s.* and *another* 8 *s.* 8 *d.* and the *Third a Coat of the Price of* 40 *d. to the Damage of Ten Marks*, and were thereof attainted, and beauſe the Plaintiff *had not ſevered his Damages* the Court was of Opinion to have taken the Inqueſt de Novo, and the Plaintiff releaſed his Damages, by which it was awarded, that the King recover the Moiety of ſo much as they had taken, and the Party the other Moiety, Et quod capiatur. And after the Three came and tendered Ten Times as much &c. Per Mombray they ought to go into the Receipt [of the Exchequer] and there to pay it, and they ſhall ſend Writ to them, and then they ſhall be delivered out of the Fleet, and after Eſtreats were delivered into the Exchequer by the Command of the Court. And the Serjeants of the King or one of the Juſtices, ſhall go into the Receipt of the King with the Money

Br. Damages, pl. 30. cites S. C.

Money adjudged to him, and there pay it, and have Tally to the Barons of the Exchequer, Et ſic Vide. Br. Decies Tantum pl. 8. cites 44 E. 3. 36.

S. P and ſo ſee that a Man may have *as many Pluries Capias's as he will.* Br. Exigent, pl. 9. cites S. C.

5. In Decies Tantum, the Sheriff *returned Nihil*, the *Plaintiff prayed Capias in a Foreign County and could not have it*, contra in Action upon the Statute of Labourers; for in the one Caſe the Law preſumes that he is ſufficient, and in the other not. Br. Proceſs pl. 128. cites 47 E. 3. 4.

Br. Exigent pl. 9. cites S. C.

6. In Decies Tantum the Proceſs may be *Capias infinite*, or *Diſtreſs Infinite*; But *not Capias in a Foreign County*. Br. Decies Tantum pl. 9. cites 47 E. 3. 4.

Fitzh. Decies Tantum, pl. 7 cites 7 H. 4. 3. S. P.

7. Decies Tantum is well brought *by Baron alone*, *though* it be *founded upon Cui in Vita brought by him and his Feme*; the Reaſon ſeems to be that he is to recover only a Chattel, and he *counted of a Receipt and did not ſay by whoſe Hands*, and yet good. Br. Decies Tantum pl. 10. cites 7 H. 4. 2.

8. In Decies Tantum the Writ was *in Loquela quæ fuit inter J. P. Plaintiff and W. T. Deforceant per Breve Noſtrum de Judicio de uno Meſſuagio* &c. And the Defendant pleaded to the Writ, becauſe he *did not ſhew by what Writ of Judgment*. Per Aſhton it appears, but let that be ſaved to you, therefore anſwer Quod Nota. And the beſt Opinion was, that the Writ was good. Br. Decies Tantum, pl. 2. cites * 3 H. 6. 23. And ſuch a Writ of Diſceit was ſued Anno ‖ 20 H. 6. 10. upon caſting of Protection, and the Writ awarded good notwithſtanding ſuch Exception.

* It ſhould be 35 H 6. 23. b. 24. pl. 29.

‖ Br. Diſceit, pl. 1. cites S. C.

Br. Decies Tantum, pl. 19. S P. cites 8 H. 6. 12.

9. In Decies Tantum, *Not Guilty* is no Plea, but *that he did not take any Thing for giving his Verdict*. Br. Action ſur le Stat. pl. 14. cites 8 H. 6. 9. & 10.

Br. Decies Tantum, pl. 1. cites S. C.——Thel. Dig 77. Lib 9. cap. 1. S. 12. cites S. C.

10. If Decies Tantum *varies from the Record* it is not good, *as* if the *firſt Record is J. D. of A. Yeoman*, and the *Decies Tantum is J. D. only*; by the beſt Opinion. Br. Variance pl. 6. cites 9 H. 6. 1.

Fitzh. Decies Tantum, pl. 6. cites S. C.

11. In Decies Tantum it is no Plea *that no Verdict was given*; for if they *take Money they offend* againſt the Statute, if they give Verdict or not, and ſo if they take Money and give true Verdict; by which they ſaid that they did not take any Money for ſaying their Verdict, Priſt. Per Newton, you ought to plead this *ſeverally* for every one of them, and ſo he did. Br. Decies Tantum, pl. 11 cites 21 H. 6. 20.

* The other Editions of Br. are pl. 11. and cites 21 H. 6. 5. but it ſhould be 21 H 6. 54. b.

12. In Decies Tantum againſt J. N. of D. he *ſaid that he was converſant and dwelling at S. the Day of the Writ purchaſed and at all Times after*; And the beſt Opinion was, that this is a good Plea and is at Common Law, though it be in Action in which Proceſs of Outlawry does not lie, and ſhall ſerve at this Day after the Statute. Br. Decies Tantum, pl. 12 cites * 21 H. 6. 52.

Br. Replication, pl 26. cites 21 H. 6. 54. S. C.

13. And by ſome of the Juſtices, No ſuch Record by which he was ſworn is no Plea, for the *Action lies though he was not ſworn*. And ſome e contra, therefore ſee the Statute, and that *where he takes Money and is not ſworn*, Action of *Maintenunce lies*. Ibid.

Br. Decies Tantum pl. 12 cites 21 H. 6. 52.——

14. Decies Tantum *ad Grave Damnum, and in our Contempt*, and *did not ſay ad Grave Damnum of the Plaintiff*, and yet the Writ awarded good, for it is Action Popular, which every Perſon may have who will, and

and therefore *it is not more (grievous) to the Plaintiff than to another.* Br. Action Pop. pl. 2 cites 21 H. 6. 54.

Br. The other Editions of Br. is pl. 11. and cites 21 H. 6. 5. but it ſhould be 21 H. 6. 54. b.

15. *Decies Tantum* againſt J. N. who *ſaid, there is Nul tiel Record in he was ſworn*, and by ſome Juſtices the Action lies though he was not ſworn, and ſome e contra, and that Writ of Maintenance lies, and the Defendant demurred upon the Plea. Br. Record pl. 26. cites 21 H. 6. 54.

16. In Decies Tantum, the Writ was *ad Grave Damnum* &c. *without ſaying Querentis*, and yet adjudged good. Thel. Dig. 96. Lib. 10. Cap. 6. S. 40. cites 21 H. 6. 59.

17. Writ of Decies Tantum was *ad Grave Damnum* & in noſtri Contemptum &c. *without ſaying ad cujus Damnum*, and yet adjudged good. Thel. Dig. 115. Lib. 10. Cap. 25. S. 4. cites Trin. 21 H. 6. 59.

18. Decies Tantum againſt Jurors for taking of Money for giving his Verdict, who *ſaid that he did not take any Money for giving his Verdict*, Priſt; and a good Iſſue, and ſo Note that it is not Pregnant. Br. Negativa &c. pl. 20. cites 22 H. 6. 20.

19. Decies Tantum, and the *Writ was in Loquela; which was between J. P. Plaintiff and W. D. Deforceant, per breve noſtrum de Judicio de uno Meſuagio* &c. and *did not ſhew what Writ of Judgment*; and the Opinion was that it is well. Br. Brief pl. 35. cites 35 H. 6. 36.

20. In Decies Tantum by W. M. the Defendant pleaded an Ill Bar, and the Plaintiff replied, and would not demur; the King cannot demur, for he is not intitled but by the Party, and to this the Reporter agreed, for the King is not intitled before Judgment, But he is intitled immediately by the Judgment upon a Cap. Utlagary, and therefore by him the King there may demur. Br. Utlagary. pl. 33. cites 38 H. 6. 1.

21. If the *Party grieved releaſes to the Jury* who have taken Money, this is not good, but *a Stranger may have Decies Tantum*, and ſhall not be barred by the Releaſe. *But if the King had releaſed*, all ſhould have been barred. Br. Decies Tantum pl. 16. cites 5. E. 4. 2.

22. Decies Tantum for *embracing and taking of* 10 *l.* for the Embracery the Defendant ſaid, *that he is learned in the Law, and* at N. *was retained to be of Counſel* with the Party, by which &c. *and took of him* 6 *s.* 8 *d.* and gave Evidence to the Jury, and prayed them that if his Evidence proved true to paſs with his Client, which is the ſame Embracery &c. and no Plea, becauſe he did not *anſwer to the Reſt of the* 10 *l.* by which he ſaid as above *Abſque hoc, that he took more than* 6 *s.* 8 *d.* &c. Br. Decies Tantum pl. 17. cites 6 E. 4. 5.

Fitzh. Decies Tantum, pl. 3. cites S. C.

23. Decies Tantum was found for the Plaintiff, who prayed Judgment; Fairfax prayed for the King that they would not give Judgment; for there is *another Decies Tantum pending of taking of greater Sums*, and *this Suit is by Covin.* Pigot ſaid, it may be that the Parties agreed in the other Suit, and this may be by Covin, by which Judgment was given that the Plaintiff recover. Br. Decies Tantum pl. 13. cites 9 E. 4. 4.

Fitzh Decies Tantum, pl. 4. cites S. C.

(C) Puniſhment.

1. JURORS who are convicted in Decies Tantum, *ſhall be impriſoned*, and ſo they were, *and ſatisfy'd the Party, and found Surety for the Part of the King*, upon Deliverance out of Priſon, quod nota. Br. Impriſonment, pl. 4. cites 41 E. 3. 15.

2. In Writ upon the Statute againſt Juries, the *Sheriff return'd Nihil at the Grand Diſtreſs*, and prayed Exigent, and could not have it, and after he prayed that they ſhall be diſtrained by all the Lands which they had the Day of the Inqueſt, and could not have it but only the Day of this Writ purchaſed. Quod nota. Br. Decies Tantum, pl. 7. cites 44 E. 3. 12.

For more of Decies Tantum in General, See other Proper Titles.

Declaration.

(A) Want of Form. And what is Form; and what is Matter.

Br. Brief, pl. 261. cites S. C.

1. PLAINT in Aſſiſe was challeng'd, becauſe *Wood* was *put before Paſture*, & non Allocatur. Br. Plaint, pl. 27. cites 8. Aſſ. 24.

2. *Quod ei deforceat by two, as Heirs to the Tail in Gavelkind*, the *Demandant alleged Eſplees in the Donees, and alſo in themſelves*, which is *Surpluſage*, and yet becauſe the Statute of 34 *E.* 3. *cap. Ultimo is that the Count ſhall not abate for Want of Form, if it has Matter ſufficient*, the Count was awarded good, notwithſtanding this Surpluſage. Br. Count, pl. 31. cites 46 E. 3. 21.

3. *Formedon of the Moiety of* 30 *Acres of Land, which B. together with another Moiety of* 30 *Acres of Land, gave* &c. and becauſe he did *not ſay with another Moiety of the aforeſaid Acres of Land*, therefore the Writ was abated. Br. Demand, pl. 6. cites 5 H. 5. 8.

4. The *Form ſhall be obſerved in Matters which are not traverſable*, as Attachment on Prohibition and Eſplees in Formedon &c. and yet they are not traverſable. Br. Count, pl. 11. cites 9 H. 6. 61.

5. Count or Declaration muſt be *formal*, containing, 1. Plaintiff's and Defendant's *Names*. 2. The *Nature of the Action*. 3. *Time, Place, and Act*. 4. The ſumming up *the Grievance* or Concluſion, viz. Per quod

Actio accrevit ad Exigendum &c. or Unde dicit quod Deterioratus eſt & damnum habet ad &c. Brown's Anal. 3.

6. Declaration muſt be Good 1. *In Subſtance to every Intent.* 2. Sometimes *by Inducement.* Doubted, if hurt by Surpluſage. Brown's Anal. 3.

(B) Good, or Not. Certainty. In what Caſes it muſt be Formal and Certain; and what ſhall be ſaid to be ſo.

1. IT ſeems by ſeveral Books, that *nothing* ſhall be forepriſed *in Præcipe quod* reddat, *but that which lies in Demand by Præcipe quod reddat.* Br. Demand, pl. 40. cites Tempore E. 1. and Fitzh. Brief 866.

2. *And therefore Advowſon ſhall not* be forepris'd in Præcipe quod reddat; for Præcipe does not lie thereof. Ibid.

3. *Treſpaſs in uno Tenemento with a Toft adjacent, containing four Acres of Land,* there it was agreed, that this Word *Tenementum* is uncertain, but becauſe *the four Acres ſhall be intended to be the Tenement,* as here, therefore well, *otherwiſe it is in a Demand.* Br. Demand, pl. 27. cites 3 H. 4. 17. Ld. Raym. Rep. 191. Paſch. 9. W. 3. Per the Powells Juſtices, and ſays, that *Ejectment de uno Tenemento,* is ill for the Uncertainty, becauſe in that Action the Thing itſelf muſt be recovered, and Tenementum may ſignify a Thing for which Ejectment will not lie, as an Advowſon &c. but in Treſpaſs, where Damages only are recoverable, the Word will ſerve well enough.

4. In *Debt* the *Plaintiff counted upon an Obligation made at D. where it bore Date at the Manor of D.* and yet well by the beſt Opinion; for the Manor of D. may be in D. and may extend into D. C. and E. and then *at* the Manor of D. ſhall be uncertain. Br. Lieu, pl. 4. cites 34 H. 6. 1.

5. Where a Man *demands Land,* he *ſhall ſhew the Certainty of the Acres*; *But* where he brings *Debt upon a Leaſe* or *Treſpaſs,* e contra; For in the one Caſe he *ſhall recover the Land, and in the* others not, and ſo no Plea to the Bill. Br. Brief, pl. 244. cites 36 H. 6. 26.

6. If *the Manor of B. extends into B. and S.* and is *demanded by Name of the Manor of B. in B.* he *ſhall recover only that which is in B.* and ſome e contra, and that Forepriſe ſhall be made, Quære. Br. Demand, pl. 50. cites 9 E. 4. 17.

7. Declaration muſt be *certain,* containing, 1. Such a ſufficient *Certainty whereby the Court may give a Peremptory and Final Judgment* upon the Matter in Controverſy. 2. *That Defendant may make a Direct Anſwer* to the Matter contained therein. 3. *That the Jury,* after the Iſſue join'd, *may give a Compleat Verdict* thereupon. 4. *No Blank or* Space *to be left* therein. Brown's Anal. 3.

8. Though the Rule of Law is, that Declarations ſhall *not be taken by Intendment,* but ought to have Certainty; yet this has an *Expoſition* and a Meaning, viz. *That where the Uncertainty is ſo great, that it is indifferent to take it either Way*; But *where one Way is more ſtrong, and the Intendment this Way much exceeds the Intendment the other Way,* ſuch Intendment ſhall be allowed, and Declarations ſhall by adjudg'd good by ſuch Intendment. As *in Debt againſt an Heir,* the *Count ſhall be good, notwithſtanding the Plaintiff does not ſhew that the Executors have no Aſſets*; for it ſhall be intended; becauſe it ſhall be *preſumed, that otherwiſe the Plaintiff would not have brought his Action.* Pl. C. 193. a. b. 1 Eliz. Wroteſley v. Adams.

9. A Declaration ought to contain two Things, viz. *Certainty and Verity*; for that is the Foundation of the Suit whereunto the adverſe Party muſt anſwer, and whereupon the Court is to give Judgment. Co. Litt. 303. a.

10. In the Book of Entries is ſet forth, that *Treſpaſs was* brought *for Heaps of Stones*, without mentioning any Certainty; cited Arg. But Doderidge ſaid, that the Counſel who cited it, never ſaw an Action for a Heap of Stones; but *perhaps it might be for a Cart-Load*, or the like, of Stones. Palm. 447. Hill. 2 Car. B. R. in Caſe of Clapham v. Middleton.

11. An Action of *Treſpaſs* was brought *Quare teſtas diverſas (Anglice) (Earthen Pots) ipſius querentis cepit.* And moved that it is naught for the Uncertainty, and ſo was the Opinion of the Court, as 5. Rep. 34. Treſpaſs was brought quare *piſces ſuos cepit*, without ſhewing the Number, or what Nature they were, and therefore naught. Noy. 91. Mich. 2 Car. B. R. Clapham v. Middleton.

12. Action ſur le *Caſe*, and declares that *whereas A. was indebted to him* 20 *s. & ultra B. in Conſideration he would forbear it, promiſed to pay him.* After Verdict, Judgment was arreſted, becauſe of the Uncertainty of the Sum in the Declaration. Frem. Rep. 443. pl. 601. Mich. 1676. Canſon's Caſe.

13. In *Caſe againſt a Phyſician*, it is ſufficient to *ſay, that he adminiſtred Phyſick unskilfully* &c. *without ſhewing the particular Defect in his Skill.* Per Holt Ch. J. in delivering the Opinion of the Court. Lord Raym. Rep. 471. Paſch. 11 W. 3. in the Caſe of Groenvelt v. Burwell, & al'.

1 Salk. 287. pl. 22 Martyn v Hendrickſon. S C accordingly.

14. In *Caſe for negligently managing his Ship, that it run over the Plaintiff's Barge.* The Plaintiff *declar'd, that he was poſſeſs'd of a Barge laden with diverſe Goods* and Merchandizes Generally &c. The Declaration is too General, and the Particular Goods ought to have been mention'd, as in Caſe for Burning a Houſe of Goods, or otherwiſe no Damages ſhall be recover'd; per Holt Ch. J. at the Sittings at Guild-Hall. Hill. 2 Ann. Martin v. Henrickſon.

(C) Good. Purſuant to a Defective Deed.

1. ANnuity, the *Plaintiff counted upon a Grant bearing Date Anno Dom.* 1200 &c. and *not Anno Dom. Regis*, and Execution taken, and the Count awarded good, becauſe it purſues the Deed. Br. Count, pl. 41. cites 24 E. 3. 53, 54.

2. In Annuity the Count was, that the *Prior of M. in Southwark, granted to the Plaintiff in London*, ſuch a Day and Year &c. *& Profert* hic in Curia *the Writing* aforeſaid, *whoſe Date is in the Chapter-Houſe of the ſaid Houſe*, which can't be intended to be made in L. becauſe the Chapter-Houſe is in S. which is another County, Judgment of Count, and yet good. Br. Count, pl. 60. cites 5 E. 4. 6.

3. *For* Danby Ch. J. Laycon and Brian, the *Chapter-Houſe is where the Chapter aſſembles*; for the ancient Chapter-Houſe may be thrown to the Ground, and then where they make their Congregation in another Houſe, this is their Chapter-Houſe *for the Time*, and the Prior and Covent may come into London and ſeal the Deed there. Ibid.

4. *But*

4. *But* it was held, that where the Deed *bears Date at a Place certain*, as above, *it ſhall be intended that it was made there, if Special Matter be not ſhewn to the contrary*, As where *Obligation bears Date* 1 *May*, and *Acquittance* 2 *May*, and the *Obligation was not delivered till* 4 *May*, this Special Matter ſhall be alleged to avoid the Acquittance, and ſo in the Caſe ſupra. Br. Count, pl. 60. cites 5 E. 4. 6.

(D) Good.

Without ſetting forth what will make againſt himſelf.

1. *Annuity* granted by R. *till he promoted the Plaintiff to a Benefice*, the *Plaintiff counted of Simple Grant and of Arrearages for five Years*, and well, without making mention of the Condition, and the *Defendant may ſay, that it was granted till* he was promoted &c. *and that he tender'd to him a Competent Benefice, and the Plaintiff refuſed*, and the Plaintiff need not ſay, that he is not yet advanced, becauſe the Condition goes in Defeaſance of the Annuity, and in his Diſ-Profit which ſhall come of the Part of the Defendant to ſhew, but where Annuity is granted, if the Grantee does ſuch Act, there the Plaintiff ſhall ſhew the Performance of the Act, for by this his Annuity commenced. Br. Count, pl. 43. cites 14 H. 7. 31. and 15 H. 7. 1.

(E) Declaration. Repugnancy, or Supluſage.

1. ERROR to reverſe a Judgment given in the Court of Hull, in an Action on the *Caſe*, where the Plaintiff *declared that he was ſeiſed of a Meſſuage, and that the Defendant built another near it, and continued the ſaid Building from ſuch a Day to the Time of the Levying of the Plaint*, by Reaſon whereof he ſtopped up his Lights & adhuc obſtupavit. There was Judgment for the Plaintiff and entire Damages given; and now the Error aſſigned was, that by Reaſon of the Words *adhuc obſtupavit*, Damages were given for ſomething after the Plaint levied. To which it was anſwered, that the Word *Adhuc* doth refer only to the Time of bringing the Plaint, and not to any Thing which happens afterwards; it is to ſhew, that the Defendant has not abated the Nuſance; they are Words only of Form, and uſed in moſt Declarations viz. *Solvere contradixit & adhuc contradicit* &c. And ſo are the Pleadings in the Entries in this very Caſe viz. that the Defendant built a New Houſe, by Reaſon whereof the greateſt Part of the Plaintiff's Houſe Magna Tenebritate Obſcurata fuit & adhuc exiſtit; and for this Reaſon the Plaintiff had Judgment. 4 Mod. 152, 153. Mich. 4 W. & M. in B. R. Carter v. Calthorp.

2. *Treſpaſs for* taking and *carrying away his Timber and Brick, Super Terram ſuam jacent'* erga Confectionem Domus de novo ædificat.' And the Court held this inſenſible, for they could not be Materials towards the Building of a Houſe already built. Sed Quære, if that was not Supluſage? 1 Salk. 213. in pl. 4. cites Hill. 8 W. 3. B. R. Lawley v. Arnold.

3. In *Covenant againſt an Apprentice*, the Plaintiff aſſigned for *Breach, that the Apprentice before the Time of his Apprenticeſhip expired, Et durante tempore quo ſervivit, departed from his Maſter's Service*; The Defendant demurred and had Judgment, becauſe the Declaration was repugnant, for it ſhould have been *durante Tempore quo ſervire debuit.* 1 Salk. 213 pl. 4. Trin. 10 W. 3 B. R. Nevil v. Soper.

(F) Amended. At what Time.

Br. Charters pl. 1. cites S. C.

1. THE *Defendant pleaded to the Count*, by which the *Plaintiff amended it*, and *Defendant pleaded to it again* for other Default, and the *Plaintiff amended it again*, and ſo it ſeems that *in one and the ſame Term*, the Defendant may plead ſeveral Times to the Count. Br. Count. pl. 4 cites 3 H. 6. 19.

2. Holt Ch. Juſtice declared, that by the Courſe of the Court a Man may amend his Declaration the *Second Term*, but that when the Declaration is amended, *new Rules for Pleading muſt be given*; for the Plaintiff perhaps muſt thereby be put to a New Defence. 11 Mod. 198. Mich. 7 Ann. B. R. Withers v. Baker.

3. Declaration was allowed to be *amended after Iſſue* joined *and Notice of a Tryal*, in a Caſe, *where the Nature of the Action was not thereby changed.* Gibb. 193. Hill. 4 Geo. 2. B. Dutcheſs of Marlborough v. Wigmore.

(G) Abated.

1. IN Treſpaſs, the *Writ was to the Damage of* 40 *s.* and the *Count* 40 *l. Damages*, by which the Defendant demurred upon the Count. Per Thorpe this is a good Cauſe to abate the Count. pl. 34. cites 38 E. 3. 21.

2. In Quare impedit, the *King counted upon Two Preſentments*, by which the *Defendant pleaded it in Abatement of the Count*, Et non Allocatur, *contra* in Caſe *of a Common Perſon.* Br. Count pl. 27. cites 43 E. 3. 14.

3. In *Account againſt* a Man as his *Bailiff and Receiver in Kirby*, the *Defendant ſaid, that there are Two Kirbies in the ſame County*, and the *Plaintiff counted in Kirby Skirke*, and therefore the Defendant pleaded it to the *Count not warranted by of the Writ*, Et non allocatur. Br. Count pl. 28. cites 44 E. 3. 1.

4. In *Treſpaſs againſt one N. and one W.* the *Plaintiff firſt counted againſt N.* and *he pleaded Not Guilty*, and after the Plaintiff *counted againſt W. that he with N. did the Treſpaſs at another Day than was ſuppoſed in the firſt Count*, and *W. pleaded in Bar*, and at another Term W. would have abated the Count for the *Variance between the Two Counts*, and was not received, inaſmuch as he was a Stranger to the laſt Count. Thel. Dig. 193. Lib. 13. cap. 1. S. 6. cites Mich. 46 E. 3. 25.

5. Treſpaſs of *Battery in Middleſex*, and the *Plaintiff counted in the Palace of Weſtminſter, where the Sheriff has no Juriſdiction*, and per Marten the Count ſhall abate; for *it is Infra* and *not De*; for the *Palace*

lace is no Part of the County, for *Proceſs ſhall iſſue* immediately from the Court *to the Warden of the Palace*, and *not the Sheriff*; and therefore he cannot direct Mandate to the *Warden* as in Caſe of a Liberty within the County. Br, Count pl. 77. cites 2 H. 6. 7.

6. Count ſhall dot abate for *Surpluſage*. Per Rolfe. Br. Count pl. 10. cites 9 H. 6. 25.

7. Nor *for Want of Form*, if it has *Matter ſufficient*. Ibid.

8. If Writ of *Dower*, or the like, be brought of *a Manor*, and *Four Acres of it are in the Cinque Ports*, all the Writ ſhall abate, if the Demandant does not make Forprize; Per Taverner Br. Brief pl. 246. cites 36 H. 6. 32.

9. In forcible Entry, the *Count did not expreſs the Certainty of the Land, as twelve Acres of Land, four Acres of Meadow* &c. and therefore the Writ was abated, and here ſee always that for Default in the Count the Writ ſhall abate. Br. Count pl. 54 cites 38 H. 6. 1.

10. In an Action upon the *Caſe for Beer and Wages*, the Defendant *pleaded in Abatement, Et pet. Judicium de Billa et quod Billa prædicta caſſetur for Uncertainty in the Declaration*; Upon Demurrer the Defendant's Counſel inſiſted upon many Faults in the Declaration, Et per Cur'. the *Defendant ſhall not take Advantage of Miſtakes in the Declaration upon a Plea in Abatement*; *but* if he would do that, he *muſt demur* to the Declaration, Per Quod a Reſpondeas Ouſter was awarded. 1 Salk. 212. pl. 1. Paſch. 4 W. & M. in B. R. Haſtrop v. Haſtings.

(H) Declaration. Neceſſary in what Caſes.

1. ENTRY in the Quibus *againſt two*, the *one appear'd at the Grand Cape*, and the *other made Default after Default*; there the Demandant ſhall not Count, for he *ſhall not Count againſt him who comes by the Grand Cape, before he has ſaved his Default*, Quod Nota. Br. Count, pl. 48. cites 14 H. 6. 3.

2. *But* where it is brought *againſt three*, the *one always appears, and ther makes Default after Default*, and the *third appears at the Grand Cape*, there the Demandant *ſhall Count againſt him who always appear'd, that he with the others diſſeiſed him*, and againſt the other pray Seiſin of the Land. Ibid.

3. *Scire Facias in Dower*, the *Tenant made Default*, yet the Demandant ſhall make his Demand; For the Writ does not comprehend Certainty, contra in Præcipe Quod Reddat, Cauſa patet. Contra in Aſſiſe by Default. Br. Count, pl. 55. cites 38 H. 6. 18, 19. Br. Demand, pl. 13. cites S. C.

(I) Neceſſary. Though Defendant makes Default.

1. THE Demandant ſhall not count *againſt the Prayee in Aid in Præcipe, quod reddat*, but he *ſhall have Oyer of the Writ and Count*, which was *made againſt the Tenant for Life*, and ſo he had, and Vouched. Br. Count, pl 6, 7. cites 11 H. 4. 11.

2. If *Aſſiſe* is *taken by Default*, yet the Plaintiff ſhall make Plaint; for the *Writ does not comprehend Certainty*, Quod Nota, and the ſame in S. P. Br. Plaint, pl. 26. cites 2 Aſſ.

4. and 30 Aſſ. 17. And ſays, it is the ſame in all Aſſiſes.

in *Dower*, Quod Nota; Contra in *Precipe*, *Quod reddat*. Br. Plaint, pl. 6. cites 38 H. 6. 18.

3. In *Waſt*, when the Defendant makes *Default at the Grand Diſtreſs*, or in a *Quare Impedit*, or in an *Avowry*, in ſuch Caſes the Plaintiff ought to count; *but* he has *no Occaſion to count of a Year and Day*; for the Defendant in one Caſe, and the Plaintiff in the other, where ſuch Default is, has no Day in Court to make a Defence; but in both Caſes a good Title ought to be ſhewn. Jenk. 124. in Caſe 51.

(K) De Novo.
In what Caſe the Plaintiff may declare De Novo.

1. FOrmedon *againſt Baron and Feme*, the *Demandant Counted*, and after the *Baron made Default*, by which *Petit Cape iſſued*, and the *Baron made Default again*, wherefore the *Feme* came and *prayed to be received*, *and pleaded to the Count*, *becauſe no Eſplees were alleged in the Anceſtor of the Demandant*, ſcilicet, in *the Donee*, and 'twas well argued, whether the Demandant ſhould count anew, and 'tis ſaid there, that Mich. 4 H. 6. the Demandant counted anew; for 'twas ſaid, that it was *New Tenancy given by the Statute*, and *New Tenancy ſhall have New Count*, and *at the Petit Cape if the Demandant releaſes the Default*, the Demandant ſhall count anew. Quod Nota. Br. Count, pl. 7. cites 3 H. 6. 41.

2. *And* if the *Plea be without Day by Protection*, there *at the Re-ſummons*, the Demandant ſhall count anew. Quod Nota. Ibid.

3. And *againſt Vouchee*, the Demandant ſhall count anew, Mutatis Mutandis. Ibid.

4. *But* 'tis ſaid elſewhere, that the *Prayee in Aid*, *nor* the *Garniſhee*, *ſhall not have but Oyer of the Count*. Ibid.

5. In Detinue the *Garniſhee* ſhall have Oyer of the Writ; But 'twas ſaid, that the Plaintiff ſhall not count anew againſt him; Nota. Br. Count, pl. 35. cites 8 H. 6. 16.

6. If the *Plaintiff counts in Debt or Treſpaſs*, and the *Defendant pleads to the Juriſdiction*, the *Count ſhall not be entred before the Juriſdiction be affirmed*, and if *Continuance be taken till the next Term*, it ſhall be upon the Writ, as if no Count had been, and at the next Term the Plaintiff ſhall count anew. Br. Count pl. 36. cites 8 H. 6. 18.

7. *Præcipe quod reddat* againſt *Tenant for Life*, who *prayed Aid of* him in *Reverſion*, *who appeared Gratis and joined* in Aid, and the Demandant counted anew againſt the Tenant and the Prayee, and they vouched the Common Vouchee, and ſuffered Recovery for Aſſurance, and yet it is ſaid, that the *Prayee ſhall not have but Oyer of the Count*. Br. Count pl. 87. cites 22 H. 7.

(L) Where a Second Declaration may vary from the Former.

1. SCI. Fa. was *Tenend' de Nobis & Hæred' noſtris*, and the *Prayee in Aid caſt Protection*, and after the Year the *Plaintiff ſu'd Regarniſhment*, which was *tenendum de dicto Patre noſtro*, and the Defendant pleaded to the Writ for the Variance; & non Allocatur; for *all is of one and the ſame Effect*. Br. Variance, pl. 11. cites 40 E. 3. 18.

2 If a Man *brings Replevin, and declares*, and is *Nonſuited after Declaration*, ſo that Certainty may appear, and *brings ſecond Deliverance*, he cannot vary in it, in Year, Day, Place, or Number of Acres, or the like. Br. Second Deliverance pl. 3 cites 3 H. 6. 9. Per Opinionem Curiæ.

But if he was *Nonſuited before Declaration* in the Replevin, he may count at large. Br. Variance, pl. 2. cites S. C.

(M) Double.

1. TReſpaſs, becauſe the *Deviſor* was *poſſeſſed of a Leaſe* for Years by Deed indented, and *deviſed to the Plaintiff*, and died, *and the Executors bailed to him, and the Defendant took it, and carried it away*, and the Defendant demanded Judgment of the Count, becauſe he alleged the *Deviſe* and the *Bailment* of the Executors, and ſo double, & non Allocatur; for 'tis *Conveyance*, and ſo well. Br. Count, pl. 14. cites 27 H. 6. 8.

2. The Plaintiff declared, that *whereas the Defendant 6 Maii* 1695, *for* 120 *Weeks Dyet then paſt, had promiſed to pay him* 7 *s. per Week, and that the Plaintiff Poſtea, viz. 5 Maii* 1695, *having found the Defendant Dyet* 120 *Weeks then paſt, the Defendant promiſed to pay the Worth*, and that it was worth 7 s. per Week; upon Non Aſſumpſit and Verdict pro Quer' it was now *moved* in Arreſt of Judgment, *that the Weeks in the Quantum Meruit are not ſaid to be aliæ than thoſe laid in the Special Promiſe*; ſo that the Defendant is twice charged for the ſame Thing. Sed non Allocatur; for they do not appear neceſſarily to be the ſame, and *without Neceſſity, the Court will not intend them to be the ſame*. 1 Salk. 213. pl. 3. Mich. 9 W. 3. B. R. Weſt v. Troles.

(N) Aided by Intendment.

1. IN Replevin, where a Man makes Avowry, or *counts for Annuity* granted for Term of his Life, *to be Steward of the Manors of A. B. and C.* and *ſays, that he exerciſed the Office*, it ſuffices, though he *does not ſay in all the Manors*; For it ſhall be ſo intended. Br. Count, pl. 12. cites 5 E. 4. 104.

2. The Plaintiff declared *of a Leaſe* made by one Chriſtmas, *the 6th of May Anno* 7, of one Meſſuage &c. in D. *by Reaſon whereof the Plaintiff* Yelv. 182. Davis v. Purdy.

S C. and Brownl. ſeems only a Tranſlation of Yelv.

tiff entred, and was poſſeſſed, until the Defendant afterwards, viz. 18*th of the ſame Month, Anno ſexto ſupradicto, did eject him.* And Not Guilty being pleaded, a Verdict was found againſt the Plaintiff. And Yelverton moved in arreſt of Judgment, (to ſave Coſts) that the Declaration was inſufficient. For that Action was grounded upon two Things; Firſt, upon the Leaſe; Secondly, upon the Ejectment, and both theſe out to concur one after another; and in this Caſe the Ejectment is ſuppoſed to be a Year before the Leaſe made; for the Leaſe is Anno. 7, and the Ejectment ſuppoſed to be Anno. 6, and therefore the Declaration naught. And Yelverton vouched the Caſe of **Powre v. Hawkins** Anno Septimo Termino Paſch. Where the Plaintiff declared upon the Leaſe of Edward Ewer, 27 April, Anno Sexto, and laid the Ejectment to be 26 April, Anno 6, and the Court held then, that the Declaration was naught; yet in the Caſe in Queſtion, the Declaration was adjudged good, and the Word (Sexto) to be void, for the Day of the *Ejectment being the* 18*th* of the ſame Month of May, it *cannot be intended but to be in the ſame Year, in which the Leaſe is ſuppoſed to be made*; by the Opinion of the whole Court. Brownl. 146. Mich. 8 Jac. Davis v. Pardy.

(O) Aided by Intendment. As to the Place where the Thing is ſuppoſed to be done, there being two ſeveral Counties &c. to which it may refer.

1. DEBT *in the County of N.* and *declared upon an Obligation made at H.* Rolſe demanded Judgment; for *H. extends into the County of N. and into the County of L.* and the *Plaintiff has not declared in what Part of the Vill the* Obligation was made, & non Allocatur; for it ſhall be intended in the County of N. by the bringing of the Writ there, As where there are two Vills of one and the ſame Name in two Counties, and he brings his Action in the one County, and counts there, and does not ſay in which County, yet it ſhall be intended in the County where the Writ is brought, Per Cur. by which he paſſed over. Br. Count, pl. 6. cites 3 H. 6. 35.

2. That which is alleged by way of Conveyance or *Inducement to the Subſtance of the Matter*, need not be ſo certainly alleged, as that which is the Subſtance itſelf. Co. Litt. 303. a.

3. Where a *Matter of Record* is the Foundation or *Ground of the Suit* of the Plaintiff, or of the Subſtance of the Plea there it ought to be *certainly and truly alleged, otherwiſe* it is *where it is but Conveyance.* But the Proceedings and *Sentences in the Eccleſiaſtical Courts may be alleged ſummarily*, As that a Divorce was had between ſuch Parties, for ſuch a Cauſe, and before ſuch a Judge, and Concurrentibus hiis quæ in jure requiruntur; for the Judge muſt be alleged, to the Intent the Court may write to him if it be denied. Co. Litt. 303. a.

(P) Names.

(P) Names. By what Names Things muſt be demanded, the Nature of them being changed from what they formerly were, as Lands into Houſes &c.

1. RECordare, the *Defendant avowed becauſe the Dean and Chapter of N. held two Houſes, four Acres of Land, two Acres of Meadow, twenty Acres of Paſture, and four Acres of Wood of the Father of the Defendant, whoſe Heir* &c. *by certain Rent and Services*, and *for ſo much Arrear he avow'd*, and the *Dean and Chapter join'd to the Plaintiff, becauſe they had leas'd to him for* Term of *Years yet continuing*, and both join'd, *and ſaid, that before the taking B. was ſeiſed of two Yard Lands there, of which the Place where* &c. *is Parcel in Fee, and* by Deed, which he ſhew'd, made before the Statute of Quia Emptores terrarum, and before the Statute de Religioſis, and after Time of Memory *gave the two Yard Lands to the Dean and Chapter, and their Succeſſors, to hold by Fealty, and leſs Rent for all Services, which Eſtate the Donor of the Avowant had in the Seigniory*, and demanded *Judgment if for more Services he ought to avow*, and becauſe the *Houſe, Meadow, Land-Paſture, and Wood, cannot be intended to be two Yard Lands*; therefore the *Plaintiff*, by the beſt Opinion of the Court, *ſhewed the Houſes were built after the Gift, and that Parcel was approved into Wood, and part into Meadow, and part into Paſture* &c. ſo that it may appear to be all one and the ſame Thing, for it *cannot be demanded now, but by Name as it is now*, quod fuit conceſſum, Quod Nota. Br. Pleadings, pl. 60. cites 39 H. 6. 8.

Br. Avowry, pl. 84. cites 39 H 6. 7. — Br. Demand, pl. 14. cites 39 H. 6. 8. S. C.

(Q) Special; though the Writ is General. And Vice Verſa.

1. A Man may have Writ of *Nuſance of a Mill levied* &c. And in his *Count* ſay, *that it is a Wind-Mill, or a Water-Mill.* Thel. Dig. 87. Lib. 9. cap. 7. S. 33. cites 4 E. 3. 150.

2. In *Replevin* the Plaintiff may count of divers ſeveral Takings at divers Days. Thel. Dig. 87. Lib. 9. cap. 7. S. 31. cites Paſch. 10 E. 3. 508.—And ſo he may at divers Places. Ibid. cites Paſch. 29 E. 3. 30.

3. In *Formedon* the *Writ was upon a Gift*, and the Gift maintain'd by the Count, by which it was *ſhewn that the Land was deviſeable by Teſtament, and that donor deviſed in Tail* &c. and held good, and the Tenant compell'd to traverſe the Deviſe, and not the Gift. Thel. Dig. 86. Lib. 9. cap. 7. S. 1. cites Mich. 15 E. 3. Brief. 324. And ſays, that ſo may a Man maintain by recovery in Value. Ibidem

4. In *Quare Impedit by the King of Diſturbance made to preſent to the Chapel of B.* and ſo was the Commencement of the Count, and afterwards in the Count the King *made Title for his Tenant to preſent* a Covenable Parſon *to an Abbey*, and that the Abbot ought to preſent this Parſon to the Ordinary &c. and inaſmuch as the Chapel was void, and the Heir within Age, the King preſented to the Abbot, and he refuſed &c. and held a good Special Count, and Special Diſturbance. Thel. Dig. 86. Lib. 9. cap. 7. S. 3. cites Mich. 24 E. 3. 39.

5. In

5. In *Treſpaſs* the *Writ was*, that the Defendant had committed *diverſe Extortions and Oppreſſions*, and the *Count was*, that he had committed *Extortions and Grievances*, viz. impark'd their Beaſts, and detain'd them till they made ſeveral Fines, and diſtrain'd them per Sovent Diſtreſs, by which &c. and held good. Thel Dig. 86. Lib. 9. cap. 7. S. 4. cites Hill. 31 E. 3. 335.

6. In *Treſpaſs* the Writ was, Quare *aſportavit bona et catalla*, and the *Count* was *de quinq; doliis Vini* and held good. Thel. Dig. 86. Lib. 9. Cap. 7. S. 5. cites Trin. 39 E. 3. 24.

7. But where the *Writ is Bona & Catalla*, a Man ſhall *not count de Denariis*. Thel. Dig. 86. Lib. 9 Cap. 7. S. 5. cites 39 E. 3. 30. And that ſo agrees Trin. 46 E. 3. 16.

8. *But* a Man ſhall count well *of Ten Quarters of Barley*. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites Trin. 46. E. 3. 16.

9. *So of dead Trees*, and Corn. Thel. Dig. 86. Lib. 9. cap. 7. S. 5. cites 43 E. 3. Brief 569.

10. *So* he ſhall not count of *Live Chattles*. Thel. Dig. 86. Lib. 9. Cap. 7. S. 5. cites 13 H. 6 Treſpaſs 70.

11. In Writ of Error by *Heir in Special* Tail per Formam &c. *By the Writ he may be ſuppoſed Heir General*, and *ſhew dehors how he is ſpecial Heir per Formam* &c. to this Land, *notwithſtanding that his Father has another General Heir*. Thel. Dig. 86. Lib. 9. Cap. 7. S. 9. cites Hill. 3 H. 4. 17.

12. The Writ was general *upon the Statute of Labourers for departing out of the Service* of the Plaintiff, and *counted ſpecially that he covenanted with him to ſerve him in the Office of Carpenter*, and held good. Thel. Dig. 86. Lib. 9. Cap. 7 S. 13. cites Mich 11 H. 4. 33.

13. Writ of *Cuſtodia Terræ & Hæred'* ſhall be *general* and the Count ſpecial. *But* in *Writ of Ward of the Land only*, it ſhall be Quod reddat Cuſtodiam *tot Acrarum Terræ*. Thel. Dig. 87. Lib. 9. Cap. 7. S. 29. cites Paſch. 11 H. 4. 64. and that ſo agrees the Regiſter, Fol. 161.

14. In Treſpaſs the Writ was, *Quare cepit Piſcem*, and the *Count was of diverſe Fiſhes*, and adjuded good; for *Piſcis is Nomen Collectivum*. Thel. Dig. 86. Lib. 9. Cap. 7. S. 15. cites Hill. 4 H. 6. 11.

15. In every *Writ founded upon the Caſe all the ſpecial Matter ought to be put in the Writ*; for it is not ſufficient to have General Writ and make ſpecial Count. Thel. Dig. 87. Lib. 2. Cap. 7. S. 27. cites Trin. 7 H. 6. 47.

16. In Action upon the *Caſe againſt one, who was retained*, by the Plaintiff, *to be of his Counſel to buy a Manor for the Plaintiff* in ſuch a County, *which Defendant had* falſly, and *in Deceit &c. purchaſed the* Manor *to himſelf* &c. The Writ was abated becauſe it did *not appear by the Writ of whom the Manor ſhould be brought*, notwithſtanding that it was ſhewn by the Count. Thel. Dig. 87. Lib. 9. Cap. 7. S. 28. cites Mich. 16 H. 6. Action ſur le Caſe 44.

17. In Writ of *Entry forcible*, upon the Statute of Anno 8 *H.* 6. the *Writ was of Entry into divers Lands and Tenements, and the Count alſo*, by which it abated; for the Count ſhall be certain. Thel. Dig. 87. Lib. 9. Cap. 7. S. 30 cites Mich. 38 H. 6. 1.

18. In Writ of *Entry upon the Statute of Rich.* The Writ was, Quod *ingreſſus eſt diverſa Terras & Tenementa, and by the Count the Certainty of the Lands appeared*, and it was held an ill Writ, and yet the Defendant paſſed over. Thel. Dig. 86. Lib. 9. Cap. 7. S. 19. cites Paſch. 4 E. 4. 19. and ſays ſee 38 H. 6. 1. & 5 E. 4. 26. & Regiſter 182.

19 In *Debt by the Heir of Ceſty que Uſe for Rent*, Arrear *upon a Leaſe for Years made by his Anceſtor*, he *ought to* make ſpecial Count, and *ſhew how the Anceſtor made Feoffment to his Uſe, and after Leaſed.* Thel. Dig. 87. Lib. 9. Cap. 7. S. 21. cites Trin. 21 H. 7. 25. per Opinionem.

20. Where

20. Where *Feoffment* is made in *Fee to the Uſe of the Feoffor in Tail after the Statute of* 27 *H.* 8. The *Writ of Formedon* for the Iſſue *ſhall be that the Feoffees gave to the Feoffor in Tail*, and *in the Count the ſpecial Matter ſhall be ſhewn*, But where *A. infeoffs B. in Fee to the Uſe of a Stranger in Tail*, the *Iſſue of Ceſty que Uſe ſhall have Formedon, that the Feoffor gave to Ceſty Uſe in Tail*, and the *Count ſhall be ſpecial.* Thel. Dig. 87. Lib. 9. cap. 7. S. 23. cites 7 E. 6. Plowd. 59. Agreed by Mountague.

21. So where *Feoffment in Fee* is made *to the Uſe of the Feoffor for Life*, and afterwards *to the Uſe of B. in Tail, before the ſaid Statute, and after the ſaid Statute the Tenant for Life had died, and B. diſcontinued and died*; his Iſſue in *Writ of Formedon ſhall ſay that the Feoffor was Donor &c.* and the *Count ſhall contain all the ſpecial Matter with ſhort mention of the Execution of the Eſtates by the ſaid Statute.* Thel. Dig. 87. Lib. 9. Cap. 7. S. 24.

22. And Bromley Ch. J. was of Opinion that the Demandant might *count generally, and if the Gift be traverſed, maintain the Count by the ſpecial Matter in the Replication.* Thel. Dig. 87. Lib. 9. Cap. 7. S. 25. cites 1 M. 1. and Br. Formedon pl. 46. 49. and ſays ſee 42 E. 3. 6.

(R) In Real Actions. Names. By what Names Things ſhall be demanded.

1. DEMAND was of a *Rod of Land*, and the Writ awarded good. Br. Demand, pl. 22. cites 3 E. 3. and Fitzh. Brief 740. Br. Demand, pl. 38. cites S. C.

2. *Mortdanceſtor* was brought *of eight Feet of Land in Breadth, and ſix in Length*, and good, notwithſtanding that he did not ſay of a Place containing ſo many Feet. Br. Demand, pl. 41. cites 6 E. 3. and Fitzh. Brief 650.

3. A *Carve of Land* is good, Per Herle; for it was ſaid there, that Carve is a Common Demand. Br. Demand, pl. 37. cites 6 E. 3. 42. and Fitzh. Brief 730. Br. Demand. pl. 21. cites S. C. but becauſe it was of an Acre where it was a Carve, therefore the Writ was abated.

4. Where Aſſiſe is brought *of the Hoſpital-Houſe*, there is no other Plaint, but *de uno Meſuagio cum pertinentiis*; for he cannot have it of Chapter, or ſuch like. Br. Demand, pl. 15. cites 8 Aſſ. 29. Br. Aſſiſe, pl. 138. cites S. C.

5. *Therefore* quære if a Man *diſſeiſes a Parſon of his Church* unde querela erit facta? Ibid.

6. *Hoſpital or Chappel*, the Demand or Plaint in Aſſiſe of them, ſhall be per nomen *Meſitagii*. Br. Demand, pl. 29. cites 8 Aſſ. 29.

7. Mortdanceſtor was challeng'd becauſe *two Parts of the Moiety of a Mill was demanded*, which is a third Part of the Whole, Judgment of the Writ & non Allocatur. Br. Demand, pl. 17. cites 11 Aſſ. 20.

8. *And* a Demand *of a Moiety of the Moiety of one Carve of Land*, is a good Demand. Ibid.

9. Præcipe quod reddat lies of an *Oxgange of Land*; contra of an *Oxgange of Marſh*; for this *cannot be plough'd*, Quod Nota Præcipe of one Oxgange of Land. Br. Demand, pl. 23. cites 13 E. 3. and Fitzh. Brief 241.

10. In Aſſiſe the Plaint was of a *Place containing* 40 *Feet in Length, and twenty in Breadth*, and found for the Plaintiff, and he recover'd, and yet Paſch. 15. E. 2. Plaint of a Croft was amended; for it was ſaid that S. P. But demand of a Place of Land without certain-

ty is not good. Br. Demand, pl. 34 cites 16. E. 3. and Vet. N. B.—— S. P. Br. Demand, pl. 4. cites 9. H. 4. 3.—— Br. Plaints, pl. 3. cites S. C.

Præcipe quod reddat does not lie of a Croft. Br. Demand, pl. 18. (bis) cites 14 Aſſ. 13.

11. A *Selion of Land* is no good Demand as it ſeems; for it was refus'd in a Forepriſe. Br. Demand, pl. 40. cites Tempore E. 3. and Fitzh. Brief 866.

12. *Tenement* is no Term to demand a Houſe, but in Treſpaſs of Nuſance to it, there Tenement is a Word ſufficient; Per Opinionem &c. Br. Demand, pl. 54. cites 11 H. 7. 25.

13. In Writ of Forfeiture of Marriage, the Count was, that the Anceſtor died in his Homage &c. And the Defendant ſaid, that the Anceſtor made Feoffment &c. Abſque hoc, that he died in the Homage &c. And the Plaintiff ſaid, that this Feoffment was made to the Uſe of the Anceſtor and of his Heirs &c. And held a good Maintenance of the Count by this Special Matter. Thel. Dig. 87. Lib. 9. cap. 7. S. 22. cites Paſch. 27 H. 8. 3.

For more of Declaration in General, See the ſeveral Titles of Actions throughout this Work, and other proper Titles.

Decree.

(A) Bound by Decree; Who Parties, or Not Parties.

1. A Decree was *againſt the Leſſee, and all claiming under him*; he *ſurrenders to him in Reverſion*, and he was adjudged to be bound by the Decree for ſo long Time as the Leaſe ſhould have endured. Toth. 123. 23 and 24 Eliz. Chapman v. Biſſow.

2. If an Infant ſuffers a Decree by Conſent, it is for ever reverſible, but otherwiſe of an adverſary Bill. 2 Freem. Rep. 127. pl. 147. Trin. 1667. Anon.

3. A Decree by Conſent for a Leaſe, or other Perſonal Eſtate, ſhall bind Purchaſors, or otherwiſe the Ld. Keeper ſaid, you will blow up the Court of Chancery. 2 Freem. Rep. 127. pl. 148. Trin. 1667. Windham v. Windham.

4. *Several Cauſes were brought to hearing together*, where ſome that were Parties to one Bill were not ſo to another; Finch. C. on hearing of them, ſaid, the Juſtice which was to be done on them all appeared, and it was decreed accordingly, and you ſhall not ſever them now, and ſo *decreed againſt one that was no Party* to that Suit. 2 Chan. Caſes 234. Trin. 29 Car. 2. Car. 2. Turney v. Daws and Mayor.

5. An Order that Defendant ſhall take no Advantage at the Hearing for *Want of Proper Parties* is *void* in itſelf and cannot take away the Defendants juſt Exceptions unleſs it had been *by Conſent*. Arg. Vern. R. 122. pl. 112. Hill. 1682. Curſon v. the African Company.

6. A Perſon indebted to Teſtator's Eſtate in 10000 l. by Mortgage not Party to a Suit having *Notice* of a Decree *by being preſent at the Hearing* &c. by which Decree a Co-Executrix was to receive no more Money, and the other Co-Executrix was to have a perpetual Injunction againſt her, and a Clauſe was inſerted in the Order, that no Creditor ſhould pay her any more Money; but before any thing further done thereupon, the Mortgagor paid the 10000 l. to the Co-Executor, and who delivered him up his Mortgage to be cancelled. Upon a Bill by the other Co-Executor, againſt the Mortgageor for *Repayment* of the 10000 l. and he having full Notice, and it being a pure voluntary Payment to avoid the Decree of the Court, it was decreed Per Lord Nottingham. Vern. 57. Trin. 34 Car. 2. Harvey v. Mountague.

7. None are *bound by* a Decree but ſuch as are *Parties* to the Suit. 2 Vern. 113. pl. 109. Mich. 1689. Natchbull v. Porter. Vern. 291. S. P. Fitton v. Macclesfield (E. of)——S. P. by the Maſter of the Rolls, and as to the Parties themſelves, it cannot be pleaded in Bar, unleſs it binds both Parties. Barnard. Rep. in Chan. 77. Paſch. 1740. in Caſe of Atkinſon v. Turner.

8. *But* decree 5 Car. 1. that *all the Miners* within the Pariſh of D. as well for the Time being, as to come, ſhall pay to the Vicar for *Tithe of Lead Bar*, the Tenth Diſh cleaned. Per Cur. the Decree *extends to* all Miners within the Pariſh, then or hereafter, ſo the Defendants are within the Letter, and expreſly bound by the Decree, and as long as the Decree ſtands in Force muſt obey. 2 Vern. R. 184. pl. 166. Mich. 1690. Brown v. Booth.

9. A *Bill* was brought by ſome few of Greyſtock Manor, *againſt the Lord to ſettle the Cuſtoms of the Manor, as to Fines* upon Deaths and Alienations; and an *Iſſue was directed* to be tried at Law, and *found that upon the Death of the Lord or Tenant, there was due an uncertain Fine, but not exceeding a Twenty-penny Fine, that is Twenty Years Old Rent; and upon Alienation* of the Tenant, *a Fine altogether uncertain and arbitrary*; and it was inſiſted upon, that there being but ſome of the Tenants Parties to this Bill, the reſt would not be bound by this Trial; but my Ld. Keeper held they would; he ſaid, he remembred the Caſe of Nether-Wierſdale, between Ld. **Gerrard** and ſome few of the Tenants, and Lord **Nottingham's Caſe**, in the Dutchy, concerning the *Cuſtoms* of Daintree Manor *for grinding and baking at the Lord's Mill and Bakehouſe*, and ſaid, in theſe and a hundred others, *all were bound, though only a few Tenants Parties*; elſe where there are ſuch Numbers no Right could be done, if all muſt be Parties, for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute; for it is the Caſe of all; and in the Exchequer and Dutchy it would certainly be ſo, and no Difference when it is here, and he cited Sir William **Boothby's Caſe** in the Dutchy laſt Michaelmas Term, where a Bill concerning the Cuſtom of grinding at the Lord's Mill was amended, and made to be on Behalf of the Plaintiffs, and all the reſt of Tenants; and as to the Objection, that the Courts of Exchequer and Dutchy, are Courts of Revenue, add go by other Rules than ordinary Courts of Equity; he ſaid, that was of no Weight, and held that all muſt be bound here as well as there. Equ. Abr. 163. cites Mich. 1701. Brown v. Howard.

(B) Bound by Decree. What.

1. DEcreed, that Conuſee of a *Statute* entered into by the Father, for Performance of an Agreement with the Plaintiff to pay him ſo much per Ann. till &c. ſhould hold the Land *againſt* his Heir, *an Infant*, and his Guardian, till he be ſatisfied his Debt and Arrears. N. Ch. R. 45. 1649. Morton v. Kinman and Poplewell.

2. By the Laws of England a Decree (notwithſtanding any Contempts thereof) ſhall *not bind the Goods* or Moveables, but only charge the Perſon. Chan. Rep. 193. 12 Car. 2. Howard v. Suffolk.

3. A Decree in Chancery is of the *like Nature with a Judgment* at Common Law. Chan. Rep. 234. 14 Car. 2. Nanney v. Martin.

It is as effectual to charge the Perſon, as an Execution at Law. 2 Chan. Rep. 192. 32 Car. 2. Elvard v. Warren.

(C) In what Caſes.

1. THIS Court is cautious to make a Decree *without a Precedent*. Chan. Rep. 240. 15 Car. 2. Roberts v. Wynn.

2. No Decree *Pro Confeſſo* till after Appearance. 3 Ch. R. 22. Hill. 1667. Moyſer v. Peacock.

N. Ch R. 1. Oakham v. Hall. S. P.

3. Where there is a Remedy at Law for one Thing in a Bill which is complicated with other Matters which are proper in Equity, in ſuch Caſe Equity will determine the whole Matter; per Lord Chancellor. 2 Freem. Rep. 58. in pl. 64. Trin. 1680.

4. Where there is but *one Witneſs againſt Defendant's Anſwer*, the Plaintiff can have no Decree. Vern. R. 161. pl. 151. Paſch. 1683. Alam v. Jourdon.

(D) Stayed or avoided, or barr'd; By what; And How.

1. K. V. the *Plaintiff mortgaged a College Leaſe to F.* the Defendant, *who was let into Poſſeſſion of the Profits.* Afterwards *F. aſſign'd to N. V. the Son of K. V. the Plaintiff*; and *on a Bill by K. V. F. was decreed to account for the whole Time, though N. V. the Aſſignee was no Party.* Afterwards F. not being able to perform this Decree, brought a Bill againſt K. V. * [and N. V.] ſetting forth a Fraud and Practice between them, and that he was willing to account to the Time of the Aſſignment, and to comply with the Decree as far as he was able, and pray'd that N. V. might account from the Time of the Aſſignment. Then *N. V. exhibited another Bill againſt his Mother, claiming the original Leaſe by a Title paramount her's, and it appearing that he had ſuch a Title paramount, F. was diſcharged of the Decree againſt him.* Chan. Caſes. 2. 3. Trin. 12 Car. 2. Venables v. Foyle.

* Nelſ. Chan. Rep. 60. S. C. accordingly. —3 Chan. Rep. 178. S C. but S. P. does not appear. —2 Freem Rep. 151. pl. 197. S. C. accordingly.

2. Upon

2. Upon a Bill of Review the Queſtion was, whether a *Copyhold Eſtate, deviſed to be ſold by the Executor to pay Debts*, and afterwards ſold accordingly, ſhould be Aſſets at Law and in Equity, or at Law only; for if only at Law, then *a Decree which makes them Aſſets in Equity, without a Trial at Law, is erroneous*; and it was held, that the Decree could not be reverſed, becauſe it cannot now appear, whether upon the Proof it appear'd to be Matter of Law or Equity; and *after a Decree, it ſhall be intended, that the Court adjudged on the whole Proof*, according to the Purport thereof. Hard. 174. Mich. 12 Car. 2. Fanſhaw's Caſe.

3. Plaintiff *ſues as Sole, and after Marries*, and then a Decree is made, yet it is not *erronious*. Chan. Rep. 232. 14 Car. 2. Cramborne v. Delmahoy.

4. Decree *avoided by original Bill* upon Matter ſubſequent to the Decree. Chan. Caſes, 64. Hill. 16 & 17 Car. 2. Cocker v. Bevis. See 9 Mod. 6. Trin. 8 Geo. Mayor &c. of Coventry, and Lord Craven.

A former Decree cannot be ſet aſide by original Bill, unleſs in Caſe of *apparent Fraud*. Per Lord Ch. Talbot. See Caſes in Equ. in Lord Talbot's Time. 201. Trin. 1736. Galley v. Baker.

5. *General Words* not particularly apply'd ſhall not *ſhake a Decree*. Chan. Caſes, 218. Hill. 23 & 24 Car. 2. Roſcarrick v. Barton.

6. Bill *to ſet aſide a Decree and Sequeſtration* for Payment of Money, the Plaintiff having a *Title by Statute-Staple, and Judgment Prior* to the exhibiting the now Defendant's Bill, on which they obtained their Decree and the Decree was ſet aſide accordingly. Fin. 126. Mich. 26 Car. 2. Witham v. Bland.

7. Upon a *Demurrer to a Scire-Facias-Bill to have Execution of a Decree*, the Defendant *pleaded, that he was a Purchaſor without any Notice of the Decree, and that a Fine with Proclamations was levied, and five Years paſſed without Claim.* Ld. K. Finch inclin'd to think that it ſhould bar the Decree, and ſeem'd to continue of the ſame Opinion, but ſaid, that he would conſult with the Judges, and hear the Caſe argued. Freem. Rep. 311. pl. 381. in Chancery. Giffard's Caſe.

8. Where a *Decree is temporary*, or for ſpecial Ends, an original Bill lies to put a Period to it, and to ſhew the Purpoſes of the Decree ſatisfied, ſaid to have been reſolved. Chan. Caſes. 251. Hill. 26 & 27 Car. 2. in Caſe of Whorewood v. Whorewood. See tit Baron and Feme, (X. a) pl. 12. in the Notes S. C. cited 9 Mod. 6. in Caſe of the Mayor and Burgeſſes of Coventry v. Ld. Craven.

9. *Where no ordinary Proceſs upon the firſt Decree will ſerve for the Execution* thereof, there muſt be a new Bill to pray Execution of the firſt Decree by a ſecond Decree. 2 Chan. Rep. 127, 128. 29 Car. 2. Lawrence v. Berney.

10. Verbal *Agreement* though *ſubſequent* to the Decree, yet ſhall not *ſtay the Execution* of it but the Remedy muſt be by Original Bill. 2 Chan. Caſes 8. Mich. 31 Car. 2. Waklin v. Walthall. But otherwiſe of *Agreement in Writing*. Lev. 197. in Caſe of Middleton v. Shelly, cites it as decreed in Ld. Coventry's Time in Bonham Norton's Caſe.

11. *After a Decree of Diſmiſſion affirmed on Appeal to the Lords*, a Bill is brought for *diſcovery* of a Deed ſaid to be burnt, pending the Appeal which made out the Plaintiff's Title, ſo that after ſuch Diſcovery, the Plaintiff might apply to the Lords for Relief. Defendant demurred, but was ordered to anſwer, but the Plaintiff to proceed no further without leave of the Court. Per Jeffries C. Vern. 416. pl. 396. Mich. 1686, Barbone v. Searle.

12. Where there is a *Decree* it cannot be *altered* but by Bill of Review, but where there is *only a Diſmiſſion*, an Original may be brought upon

upon a *new Equity*; Arg. ſays it is an allowed Difference. Vern. 417. pl. 396. Mich. 1686. in Caſe of Barbone v. Searle.

13. A Rule, that whenever a Decree is *entered by Conſent*, the Merits after ſhall never after be enquired into, unleſs there be an Objection, that the Word Conſent be ſtruck out of the Order. MS. Tab. February 1702. Norcot v. Norcott.

14. An Original Bill, barely *in Nature of a Bill of Revivor*, and not broader or longer than a Bill of Revivor only, *does not open the firſt Decree*, to have it looked into; but if it be to enforce a Decree, or carry it further, then it opens the Cauſe. Paſch. 1706. Abr. Equ. Caſes, 83. Vare v. Wordall.

15. *Bill to redeem after a Decree of Foreclоſure ſigned and inrolled* 169-, *ſuggeſting Fraud and Surprize* in obtaining the Decree, *and a Parol Declaration before and after the Decree, that the Mortgagee was willing to take his Principal Intereſt and Coſts, and quit the Eſtate*; the Defendant pleads the Decreed of Foreclоſure, and by Anſwer denies the Fraud &c. *Several Witneſſes were read* in the *Cauſe to prove ſuch a Parol Declaration by the Mortgagee*, that he was willing to quit the Eſtate upon Payment of what was due to him, and that the Plaintiff and Defendant in the former Cauſe had the ſame Clerk in Court &c.

Per Harcourt C. the Plaintiff comes too late after ſuch a length of Time to be let in to redeem. I know no Inſtance where a Man has been let in to redeem by a new Bill after a Decree of a Foreclоſure ſigned and inrolled upon any Parol Agreement or Declaration, or by Reaſon of Over-Value of the Eſtate; ſuch a Thing would be of Dangerous Conſequence and ſhake Abundance of Titles; perhaps there may be an Inſtance of Relief upon a Bill to redeem after a Decree of Foreclоſure, but then the Bill was brought in a very ſhort Time after the Decree, and there muſt be ſome extraordinary Circumſtances in the Caſe, but I do not remember any ſuch Caſe of Relief. Bill diſmiſt with Coſts, and afterwards Decree affirm'd in Dom. Proc. MS. Rep. Paſch. 12 Ann. in Canc. Whiſhall v. Short.

16. The Defendant Conyers in 1712, brought a *Bill againſt the now Plaintiff Hicks and Mary* his Wife, who was *the Widow and Executrix of B. for an Account of the Eſtate of B. and obtained a Decree*, and *then Mary died*, and *before the Decree was inrolled* the now Plaintiff *Hicks petitioned for a Re-hearing*, and at the ſame Time *preferred an original Bill ſuggeſting new Matter come to his Knowledge ſince the Decree*, and obtained an Order to Re-hear the former Cauſe at the Hearing of this Cauſe &c.

The Plaintiff's Counſel admitted, that the Decree in the former Cauſe was juſt and right upon the Pleadings and Proofs in that Cauſe, but inſiſted, that upon the Pleadings in the preſent Cauſe, the Merits appeared otherwiſe, and therefore prayed a New Decree, in Favour of the now Plaintiff, and to ſet aſide the former Decree.

Per Cowper C. it is irregular to bring a New Bill to alter and vary a Decree already pronounced. It is true the Defendant in this Court may bring a Croſs Bill, before any Decree pronounced in the original Cauſe, and if the Original Cauſe is heard before the Croſs Cauſe, the Decree in the Original Cauſe may afterwards be varied by the Decree in Croſs Cauſe but in that Caſe, the Croſs Bill muſt be brought before any Decree made in the Original Cauſe. By the Courſe of the Court, if the Original Decree had been inrolled, the now Plaintiff upon Affidavit of new Matter come to his Knowledge, ſince the former Decree, *might have a Bill of Review*, but he cannot now be relieved againſt the former Decree by this new Bill and Re-hearing the former Cauſe; for the Decree is right upon the Pleadings and Proof in the Cauſe, and therefore cannot be varied upon a Re-hearing; and the now Plaintiff cannot

cannot be relieved upon his New Bill, becauſe it is *contrary to the Courſe of the Court to alter a Decree upon a New Original Bill exhibited after the Decree pronounced.* The Bill diſmiſſed and the former Decree affirmed. MS. Rep. Trin. 2 Geo. in Canc. Hicks v. Conyers.

17. Decree, *before Inrollment* thereof, *ought to be delivered to the adverſe Party or his Attorney*, who are in eight Days to return the ſame ſigned by the Council of that Side, or *to make their Objections* to the Draft. MS. Tab. March 6, 1720. Cheevers v. Geoghegan.

18. The *ſame Decree gives Liberty to try the Title at Law, and* yet *awards Injunctions to put Plaintiff into Poſſeſſion and quiet him in his Poſſeſſion*; reverſed as *repugnant*. MS. Tab. April 28, 1721. Ld. Lanesborough v. Elwood.

19. What might have been *ſupplied by Motion* is no Objection to a Decree. MS. Tab. Nov. 24, 1721. Banbury v. Bolton.

20. Aſſignee of a Mortgage (by circumventing of the Mortgagor) got Poſſeſſion by Ejectment the next Term after the Mortgage forfeited, and after brought a Bill to foreclоſe, and *by falſe Affidavits got the Cauſe to be heard Ex Parte, and a Decree and Report thereupon ſigned and inrolled*; afterwards the Mortgagor died, and his Heirs brought a Bill to redeem; and the Defendant the Aſſignee pleaded this Decree and Report, and both made abſolute, ſigned, and inrolled. Ld. C. Macclesfield ſaid, that all their Circumſtances of Fraud ought to be anſwered, and the Decree being ſigned and inrolled the Plaintiff has no other Remedy, and over-ruled the Plea that it ſhould not ſtand for an Anſwer. And it being objected, that according to this Rule a Decree might be *ſet aſide by an Original Bill*; His Lordſhip replied, that ſuch a *Groſs Fraud* as this, was an *Abuſe on the Court* and ſufficient to ſet any Decree aſide. 2 Wms's Rep. Trin. 1722. Lloyd v. Manſell.

Gilb. Equ. Rep. 185. S. C. That the Decree was ſign'd and enroll'd in 1701, and in 1702 the Plaintiff's Father died, and the Plaintiff continued an Infant till 1709, when he came of Age; in 1721, and not before, he brought an original Bill to ſet aſide this Decree, and be let into a Redemption, on Payment of Principal Intereſt and Coſts, ſuggeſting that the Defendant was much over paid, and the Lands were of greater Value, and that all the Proceedings in the Decree were Ex parte, and that the Service of the Subpæna to hear Judgment, was only on the Clerk in Court, on Affidavit that the Plaintiff was out of England, which Affidavit was falſe, and that there had been no Service at all of the Order for making the Decree abſolute, and other Irregularities. The Defendant anſwered to Part, and pleaded the Decree of Foreclоſure and Inrollment, and inſiſted it would be againſt Practice, to ſet aſide a Decree ſigned and enrolled by an original Bill. Lord Chancellor diſmiſſed the Bill, but without Coſts, and laid great Streſs on the Length of Time, the Plaintiff being of Age 12 Years before the Filing this Bill, and ſeemed to think it reaſonable, that Bills for Redemption againſt Mortgagees, ought not to be brought after 20 Years Poſſeſſion, but ſhould be barred by the Statute of Limitations of Jac. 1. as Entries are at Common Law; that in this Caſe, Infancy of the Plaintiff would not help him, the Right to Redeem not beginning in his Time, but in his Anceſtor's, and in all ſuch Caſes the Party was barred, and had not 10 Years after the Impediment was removed.

21. Ordered, that no *Application* ſhall be made *againſt the Minutes after a Week*; and no further Time to be allowed to *petition for a Rehearing* but *within a Week after that.* Sel. Caſes in Canc. in Ld. King's Time 21 Trin. 11 Geo. 1. Anon.

22. On a *New Bill to carry a Decree into Execution*, Court may vary and *alter what is thought proper*; but on a Rehearſing, no further than the Petition extends; but if the Petition be againſt the Decree in General, though particular Reaſons are given, the whole is open; but otherwiſe it is, if the Petition be only againſt one or two Particulars. Sel. Caſes in Canc. in Ld. King's Time, 13, 14 Paſch. 11 Geo. 1. Colcheſter v. Colcheſter.

23. The Rule of Court is, that *on Appeal the whole Cauſe is open*; but on a Rehearſing, only ſo much as is petitioned againſt; if all do not petition; it is open only to the Petitioners. Sel. Caſes in Canc. in Ld. King's Time 24. Trin. 11 Geo. 1. Hayward v. Colley.

24. On *Appeal* the Party may bring *New Matter*, but *aliter in Review*, unleſs there be a Clauſe to receive it. Sel. Caſes in Canc. in Ld. King's Time, 48. Trin. 11 Geo. 1. in Popping's Caſe.

25. Decree may be *altered* upon proper Application *the ſame Term*, it is pronounced without a Rehearſing. MS. Tab. May 3d, 1725. Vaughan v. Blake.

26. No *Original Bill* can be to *vacate a Decree ſigned and inrolled*. G. Equ. R. 185. Hill. 12 Geo. Floyd v. Manſell.

27. *Matters, proper to be excepted to upon the Maſters Report*, ſhall never be objected to a Decree after the Report confirmed. MS. Tab. April 28, 1726. Parker v. Stanley.

28. All Appeals from the Rolls are to be made to the Lord Chancellor, and *Decrees* made *at the Rolls muſt be* ſigned or *approved of by the Chancellor to make them Decrees of the Court of Chancery*. MS. Tab. March 13th, 1727. Morſe v. Dubois.

29. A Decree *gained by Fraud* may be *ſet aſide by Petition*, as well as a Judgment at Law by Motion; *a Fortiori may* ſuch Decree be ſet aſide *by Bill*. 3 Wms's Rep. 111. Paſch. 1731. Seldon v. Forteſcue Aland.

30. If a *Decree* be obtained and *inrolled*, ſo that the Cauſe cannot be re-heard, then *there is no Remedy but by Bill of Review, which muſt be on Error appearing on the Face of the Decree, or on Matters ſubſequent* thereto, as a Releaſe, or a Receipt diſcovered ſince. 3 Wms's Rep. 371. Trin. 1735. Taylor v. Sharp.

(E) Of the Inrolment of Decrees; and of Caveats to prevent the ſame.

A Decree was made, but the *Party died before Inrolment*, yet it was ordered to be inroll'd.

1. A Decree *pronounced in the Teſtator's Life-time, not to be paſſed under the Seal by the Executor*. Toth 127. cites Paſch. 1634. Ewer v. Frere. 2 Chan. Caſes, 227. Hill. 28 & 29 Car. 2. Anon.

Decrees take Effect from the Time the Judgment was given, and the *Death of the Parties* ought not to hinder the Inrolment in ſome convenient Time. Fin. Rep. 169. Mich. 26 Car. 2. Clapham v. Philips.

Cited ibid. 74, by Name of Sabine v. Allen.

2. A Decree was ordered to be *inrolled, if the Party died before Eaſter*. 3 Ch. R. 27. 22 Feb. 20 Car. 2. Labyne v. Alley.

3. T. an Adminiſtrator obtain'd Decree, and died *Inteſtate*. The *Inrolment was ſtay'd*; for the Title of T. as Adminiſtrator is gone. 2 Chan. Caſes 247. Hill. 30 and 31 Car. 2. Warren v. . . . . .

4. On a Motion for a Re-hearing a Cauſe decreed, ſign'd and inroll'd by the late Lord Chancellor, Ld. Keeper North ask'd Serjeant Maynard, if he knew any Law whereby he could juſtify the *Re-hearing a Cauſe ſign'd and inroll'd by his Predeceſſor?* for that was to vacate a Record. The Chancellor, or Himſelf, was Maſter of his own Inrolment, and might on his Memory know no Reaſon for Re-hearing of it, but he could not do it, unleſs there was ſome *Surprize* or other *Irregularity*

ority in the Inrolment of it; But he ſaid, he had a Privy Seal that enabled him to ſign and enroll the Decrees pronounc'd by his Predeceſſor. Vern. R. 131. pl. 117. Hill. 1682. Anon.

5. If a Caveat be *entered* to ſtay the ſigning and inrolling a Decree, it *ſtays the Signing* 28 *Days* not only after pronouncing the Decree, but from the Time of the Decree's being preſented to the Great Seal to be ſigned, in order to its Inrolment, and Notice thereof given by the Lord Chancellor's Secretary to the Clerk in Court of the other Side. Wms's Rep. 609. Hill. 1719. Allowed by Lord C. Parker, though at a former Day he ſeem'd to diſapprove it, till it was confirmed not only by the Maſter's Report, but alſo by a Certificate of the greateſt Number of Clerks in the Office. Burnet v. Theobal.

(F) Reverſal. Error.

1. A Decree was reverſed, though there was no New Matter; but the Caſe on which it was founded was *miſtaken*. Toth. 129. cites Trin. 5 Car. Durham (Bp) v. Martin.

2. Bill of Review to reverſe a Decree 22 Jac. The Plaintiff for Error ſays, the *Cauſe* was *referred to four Commiſſioners, and but three certified; and alſo*, that *the Leaſe, which the Plaintiff now inſiſts on, was not then in Iſſue, and the Plaintiff never conſented to the Certificate.* Upon reading the Proceſs it appeared by Depoſitions of two Witneſſes, that *there was an Agreement for ſettling the Differences*, and in regard the Decree was ſo long ſince, and *nothing done againſt the ſame in* all this Time, being *ſixteen Years*, this Court would not reverſe the Decree. Chan. Rep. 139, 140. 15 Car. 1. Goddard v. Goddard.

3. Pending a Reference to a Maſter to take an Account the Suit abated by Death of one of the Defendants afterwards. The Maſter proceeded in the Account, and made his Report, and the ſame was decreed and inroll'd near twenty Years ſince. On a Bill of Review, this was held no Error, or Cauſe of Reverſal. Chan. Caſes 122, 123. Hill. 20 and 21 Car. 2. Slingsby v. Hale.

4. It is no Error for the Court to decree for the Defendant to hold free of Equity of Redemption *on the Plaintiff's Bill*; for Circuity of Action is to be avoided, and there are many Precedents of Decrees in this Manner for the Defendant. Chan. Caſes 122. Hill. 20 and 21 Car. 2. Slingsby v. Hale.

5. A *Stranger*, that is bound by a Decree gotten by Fraud, may *falſify it*; per Lord Keeper. Ch. Caſes 152. Mich. 21 Car. 2. in Caſe of Style v. Martin and Boſville.

6. A Decree ought not to be made *to bind the Inheritance*, where there has been but *one Trial at Law*; per North. K. Vern. 293. Hill. 1684. in Caſe of Fitton v. the Earl of Macclesfield.

(G) Opened, or Amended &c.

1. A *Miſtake* in a Decree was amended. Toth. 129. cites Hill. 14 Car. E. of Devonſhire v. Leake.

2. Sir George Downing brought an *Appeal in the Houſe of Lords from a Decree* made *in* the Court of *Chancery, as by Conſent, ſuggeſting, that* though the Regiſter, in drawing up the Order, had drawn it as a Decree by Conſent, (and the Minutes were ſo too) yet *he never did conſent* to ſuch Decree nor his Counſel neither; or if they did, it was without his Authority, and made Affidavit of it; but the Appeal was diſmiſs'd. Eq. Abr. 165. pl. 4. cites Hill. 1699. Downing v. Cage.

3. Where *Facts appearing on the Decree as drawn up and inrolled*, they are *plainly erroneous*, the Decree was opened. Chan. Prec. 260, 261. pl. 211. Trin. 1706. Grice v. Goodwin.

4. Where Matters have been examined in Equity, and determined, the Court will be *cautious of unravelling former Decrees*, Agreements, or Releaſes. Wms's Rep. 723 &c. pl. 208. Trin. 1721. Cann v. Cann.

(H) Performance of a Decree. Inforced How.

1. ONE in the Fleet was ordered to be *laid in Irons*, becauſe he *refuſed to perform* a Decree. Toth. 129. South v. Gardiner.

2. *Fine was impoſed* for Breach of a Decree. Toth. 166. cites Trin. 6 Car. Longman v. Hopgood.

3. A *Defendant lay in the Fleet for Breach* of a Decree, the *Plaintiff* nevertheleſs *prefers a Bill to diſcover an Eſtate*; Defendant demurred becauſe a Double Execution; yet over-ruled. Toth. 137, 138. cites Hill. 1633. Audley v. Harris.

4. An Original Bill *to execute a Decree of Lands* againſt a Purchaſor, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto; per Lord Keeper. Chan. Caſes 231. Trin. 26 Car. 2. Organ v. Gardiner.

5. A *Sequeſtration* may be granted in the Exchequer, as it has been always practiſed in Chancery *where a Decree is for a Perſonal Duty*, otherwiſe the Juriſdiction of the Court of Equity would be to little Purpoſe, if it had not Authority ſufficient to ſee its Decrees executed; per three Barons; but the Lord Ch. Baron doubted, becauſe the Lord Ch. Baron Hale could never be prevailed upon to grant it, nor the Lord Montague, to whoſe Learning, he ſaid, he muſt greatly ſubſcribe; but by the Opinion of the other Three it was granted. 2 Freem. Rep. 99. pl. 109. Trin. 1687. in the Exchequer. Guavers v. Fountaine.

For more of Decree in General, See Chancery. And other Proper Titles.

Deeds.

See further title Fails vol. 13.

(A) The different Operations of the ſeveral Sorts of Conveyances

1. BY *Feoffment* or *Fine* all Uſes and *Poſſibilities* are convey'd by reaſon of the forcible Operation of it; but 'tis otherwiſe by *Bargain and Sale*. Le. 33. pl. 60. Mich. 15 Eliz. Anon.

Where the Uſe of a Fine or Feoffment is limited *to the right Heirs of the Feoffor or Conuſor*, it was held by Anderſon, Periam, Walmſley and Fenner J. and Popham, then Attorney General, and Coke, now Attorney General, that this is a Remainder and not a Reverſion; for that the Fine or Feoffment was a Determination of all the *old Uſes* in the Feoffor or Conuſor, and the Limitation upon the Fine or Feoffment, is to be ſaid all new. But upon Conference of all the Judges of England, all the others held, that it was a Reverſion, and the old Uſes not deſtroy'd. Mo 285, pl. 437. Paſch. 33. Fenwick v. Metforth.

Le. 182, pl. 256. Paſch. 31 Eliz. S. C. And by Gawdy, this Feoffment to his right Heir is merely void: to which Wray agreed, As if he had made a Feoffment to the Uſe of one for Life, without any further Limitation.——— And. 288. pl. 297. Milford v. Fenwick. S C. adjudged per tot. Cur. that the Leaſe was good; becauſe the Fee Simple remain'd in the Leſſor, and was as a Reverſion; For it cannot take Effect in the Heir of him who limits it, unleſs by Deſcent.———S. C. cited 2 Rep. 91. b.

They ranſack the whole Eſtate, and paſs or extinguiſh &c. all *Rights*, *Conditions*, *Powers &c.* belonging to the Land, as well as the Land itſelf. Per Hale. Vent. 228. King v. Melling.———But yet this does *not barr his Heir at Law, but he may enter* notwithſtanding. Per Trevor, Ch. J. 11 Mod. 151.

2. *Bargain and Sale* is not ſo ſtrong a Conveyance as a *Livery*; As if I have a Rent Charge in Right of my Wife out of the Manor of D. and afterwards I purchaſe the Manor, and afterwards, by Deed indented and inroll'd, I bargain and ſell the Manor; the Rent Charge ſhan't paſs. Arg. Le. 6. pl. 10. Mich. 25 and 26 Eliz. in the Exchequer in Caſe of Stoneley v. Bracebridge.

3. *At Common Law*, before the 27 *H.* 8. *of Uſes* where the Uſe was limited upon *Covenant to ſtand ſeiſed*, there could not but *one Perſon only*, and his Heirs be *truſted* with the Land, ſo that by the taking a Wife, acknowledging a Statute, dying without Heir, or making a Forfeiture, the Uſe was deſtroy'd or prejudiced; But upon *Eſtate executed*, a Man *might have truſted ſeveral* together, ſo that the Eſtate might ſurvive, and the Truſt continue in others after his Death, and the Land not be ſubject to his Incumbrances. Alſo if a Man will limit Uſe upon Covenant, he ought to have *effectual Conſideration*; but upon Eſtate executed, he may limit Uſe *without Conſideration*; upon Covenant he ought to *have a Deed*, but upon Eſtate executed *Not*. Upon Covenant he can't *reſerve a Power to make Leaſes*, *Jointures*, or to prefer younger Children, but upon Eſtate executed he may. Arg. Mo. 381. pl. 506. Mich. 36 and 37 Eliz. in Perrot's Caſe.

4. Baron and Feme are Jointenants of a Term. The Leſſor inſeoffs the Baron, who dies ſeiſed. The Wife ſurvives and claims the Term. But held that by the Acceptance of the Feoffment, the Baron had ſurrendered the *Term* and it is *extinguiſhed*. But if the Conveyance had been by *Bargain and Sale inrolled*, or by *Fine*, it had been otherwiſe. Cro. E. 912. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

5. A

This Caſe is in 1 Le. 33. pl 40 at Serjeant's Inn Anon. For by Conveyance by Feoffment, or Fine, all Uſes and Poſſibitities had been carried by reaſon of the forcible Operation of it.

5. A *Bargain and Sale* does not *paſs away*, or affect a *contingent Uſe* in the Bargainor. But a *Feoffment* or *Fine* would transfer it. Hale Ch. B. cites Hughe's Rep. in 27 & 28 Eliz Caſe 40. [but ſeems miſquoted] Hard. 416. Paſch. 17 Car. 2. in Scacc. in Caſe of Edwards v. Slater.

Lev. 237. S. C. in Canc.

6. *Power to charge Land* with 2000 l. is *deſtroyed* by Fine or Feoffment, but not by *Leaſe and Releaſe*; Per Bridgman K. Chan. Caſes 105. Paſch. 20 Car. 2. Jenkins v. Kemis.

7. By a *Leaſe and Releaſe* nothing paſſes but what lawfully may paſs without Hurt or Damage to another; for it cannot diveſt a Fee and thereby gain a Fee to convey; Arg. Pollex 91. 22 Car. 2. cites [Mich. 10 Jac.] 96. Seymour's Caſe.

8 *As*, if a Man has an *Eſtate in Fee upon Condition and conveys it over by Leaſe and Releaſe*, the Releſſee can have but an Eſtate upon Condition. Ibid. 92.

9. *So* if a Man has an Eſtate *to him and his Heirs, as long as J. S. has Heirs of his Body*, and he conveys his Eſtate by Leaſe and Releaſe, the Releſſee muſt be bound by this Limitation. Ibid. 92. 22 Car. 2. Arg. in Caſe of Carpenter v. Smith.

10. A *Feoffment* being a Common-Law-Conveyance, and executed by Livery, *makes a Tranſmutation of Eſtate.* But a Conveyance by the Statute of Uſes, As a *Covenant to ſtand ſeiſed* &c. makes only a Tranſmutation *of Poſſeſſion* and not of Eſtate; becauſe no Eſtate paſſes by thoſe Conveyances, but only an Uſe. L. P. R. 609. cites 2 Lev. 77. 1 Vent. 378. [Trin. 24 & 25 Car. 2. B. R. in Caſe of Pibus v. Mitford.]

Twiſden, J. ſaid, he ſaw no Difference between a *Feoffment to Uſes, and a Covenant to ſtand ſeiſed*;

11. There is a great Difference between a *Conveyance at Common-Law, and* a Conveyance to *Uſes*; at the Common-Law the Heir cannot take where the Anceſtor could not; But it is otherwiſe in Caſe of Uſes. Per Wylde J. Vent. 373. Trin. 26 Car. 2. B. R. in Caſe of Pibus v. Mitford.

for if a Feofment be made to the Uſe of one for Life, the Uſe, which is not diſpoſed of, ſhall return, as well as upon a Covenant to ſtand ſeiſed. Ibid. 376. ——Per Hale Ch. J. in all Caſes touching Uſes, there is a great Difference between a Feoffment to Uſes, a Covenant to ſtand ſeiſed, and a Conveyance at the Common Law. If a Man by Feoffment to Uſes conveys Land to the Uſe *of A. for Life, he may remit the Uſe to himſelf and the Heirs Male of his Body by the ſame Deed, and ſo alter that, which before was a Fee Simple*, and turn it into another Eſtate. *But if A. gives Land to B. for Life, Remainder to A. and the Heirs Male of his Body*, the Remainder is void, becauſe a Man cannot give to himſelf. For a Man *cannot convey to himſelf by a Conveyance at the Common Law.* Ibid 377, 378.

12. *Surrenders* (of Copyholds) muſt be *conſtrued as Deeds.* Per Holt Ch. J. 11 Mod. 58. Paſch. 4 Ann. B. R. in Caſe of Idle v. Coke.

(B) How to be taken where they may operate ſeveral Ways; or where they can't take Effect as the Parties intended.

Paſſor, by the Words *Dedi, Conceſſi, & Confirmavi*, conveyed *to the Leſſee and his Heirs*, with Letter of Attorney to make *Livery*, per Anderſon, Ch. J. he may take it as a Feoffment, or a Confirmation; and it was held a good Feoffment. Goldsb. 25. pl. 6. Trin. 28 Eliz. Lennard's Caſe.

1. A Deed comprehending *Dedi & Conceſſi* was pleaded as a *Feoffment*. Arg. Godb. 128. cites 21 and 22 H. 6.

2. *Bargain*

2. *Bargain and Sale* may be pleaded as *Releaſe* or *Confirmation*. See D. 116. b. 172. a. pl. 71, 72. Paſch. 2 & 3 P. & M. Ibgrave v. Lee. Ibid. See the Nota in Margin, pl. 72.

3. A. and B. were *Joint-Tenants* of Land charged with *Rent* of 20l. per Ann. to the King, who in Conſideration of Money &c. paid by B. by Patent *granted, remiſed, releaſed and renounced to B.* and his Heirs the ſaid Rent, Habend' & Percipiend' Reditum præd' to B. and his Heirs. B. deviſed this Rent to J. S. Per Dyer, the Patentee may uſe the Patent as he pleaſe, either as a *Grant or Releaſe*, and he, having deviſed the Rent, has declared his Election. D. 319. b. pl. 16. Mich. 14 and 15 Eliz. Anon. S. C. cited Arg. Godb. 127, 128. in pl. 147.

4. A. levied a Fine, and *declared the Uſe to A. and his Heirs, until he, his Heirs &c. ſhould make Default in Payment of 20l. a Year to B.* at every Michaelmas, *till 800l. be paid; and after ſuch Default, until B. and his Heirs ſhall have received ſo much as ſhall be Arrear*; and *after the ſaid Debt ſo paid*, then *to the Uſe of A. and his Heirs for ever.* Afterwards A. *bargains and ſells the Land to J. S.* and afterwards *Default is made of Payment*, and *B. enters*, and after the *Money is paid.* It was held by the Judges, that B. is *not eſtopp'd*, but that he ſhall have the Land again, notwithſtanding the Indenture of Bargain and Sale. For at the Time of the Bargain and Sale, he had an Eſtate in Fee, determinable upon a Default of Payment, which Eſtate only paſſed by the Indenture of Bargain and Sale, and not the *New Eſtate accru'd by the latter Limitation after the Debt paid*; for that was *not in Eſſe* at the Time of the Bargain and Sale. *But* if the Conveyance, inſtead of Bargain and Sale, had been *by Feoffment or Fine*, it had been otherwiſe; for that would have carried all Uſes and Poſſibilities, by reaſon of the forcible Operation of it. Le. 33. Mich. 27 and 28 El. at Serjeant's-Inn, pl. 40 Anon.

5. *Feoffment to Leſſee for Years in Poſſeſſion* is good, though it be by Deed, and he may take *Livery* after the Delivery of the Deed, and ſhall be deem'd to be in by Force of the Feoffment, although the Leſſee may take the Deed by way of Confirmation, and then the Livery is but Surpluſage and void. Ow. 7. the third Reſolution, Trin. 28 Eliz. C. B. in Caſe of Haverington, alias, Hamington v. Rider. Le. 92, 93. pl. 120. Mich. 29, & 30. Eliz. S. C. & S. P. admitted.—— S. P. and the Law expects it ſhall be a Godb 140.

till he has declared his Pleaſure, and when he has made *his Election* to take it by Livery, *Feoffment ab Initio*, and by the Delivery of the Deed in the mean Time Nihil Operatur pl. 170. Trin. 25 Eliz. C. B. Leonard v. Stephens. ——3 Le. 128. pl. 180. Leonard's Caſe. Trin. 28 Eliz. C. B. the S. C. & S. P. held accordingly, per tot. Cur.——Ow. 1. S. C adjudg'd a good Feoffment——Gouldsb. 25. pl. 6. S. C. the Court held the Feoffment good clearly.

6. The Lord *releaſes and grants his Seigniory to the Husband*, who is *ſeiſed of the Tenancy in Right of his Wife* to him *and his Heirs.* The Husband dies, and his Heir diſtrains for the Rent upon the Lands. It was held, that it ſhall enure as a Grant, which is moſt beneficial to the Grantee, and it is agreeing with the Intent of the Deed, that the Huſband and his Heirs ſhould have it. Cro. E. 163. pl. 3. Mich. 31 and 32 Eliz. C. B. Anon.

7. *A.* by Indenture *in Conſideration of Love* which he bare *to his Son*, and for natural Affection unto him, *bargained and ſold, gave, granted and confirmed* certain Land unto him and his Heirs. The Deed was *inrolled*; the Queſtion was, Whether this Land ſhould paſs? And it was held, it ſhould not, unleſs *Money* had been paid, or Eſtate were executed; for the *Uſe ſhall not paſs.* But becauſe the *Son was then in Poſſeſſion*, it was held to enure by way of *Confirmation.* Cro. J. 127. pl. 17. Trin. 4 Jac. B. R. Osborn and Bradſhaw v. Churchman.

8. A *Leaſe* made *by Virtue of a Power reſerv'd on a Fine*, in Conſtruction of Law *precedes* the firſt Eſtate for Life, and all the Remainders; for S. C. cited Mod. 108, 109. Arg. after

after the Leaſe made, it is as if the Uſe had been limitted originally to the Leſſee for the ſaid Term, and then the other Limitations in Conſtruction of Law follow it; and this is the Reaſon that the uſual Clauſe in ſuch Indentures is, that the Conuſees and their Heirs ſhall ſtand ſeiſed to the Uſe of ſuch Leſſees &c. ſo that in the firſt Caſe, the Leſſee derives his Eſtate out of the Eſtate which paſſes by the Fine of the Leſſor, which he has for Life. 8 Rep. 71. Hill. 6 Jac. C. B. in Caſe of Whitlock.

9. In Judgment of Law, Ut Res magis Valeat, *Executory Deviſe* ſhall *precede*, and the Diſpoſition of the Leaſe, till the Contingent happens, ſhall be ſubſequent, and ſo all ſhall well ſtand together. 8 Rep. 95. b. Trin. 7 Jac. Matthew Manning's Caſe.

10. If one *makes two ſeveral Deeds*, *one* purporting an Eſtate in *Fee*, the other an Eſtate *Tail*, and they are made *to one and the ſame Perſon*, and he brings both the Deeds in his Hands, and makes *Delivery of both Deeds with the Land*; By this both Deeds ſhall take Effect, and by them Eſtate Tail, and alſo Fee Simple, ſhall paſs; Per Doderidge J. who cited a Caſe in which it was ſo held. 2 Roll. R. 23. Paſch. 15 Jac. B. R. in Caſe of Thurman v. Cooper.

Gilb. Equ. Rep. 143, 144 S. C. in totidem Verbis.

11. The Husband being poſſeſſed of a *Term for* 999 *Years*, for good and valuable Conſiderations in the Indentures contained, *by Leaſe and Releaſe*, *grants*, *bargains*, *ſells and demiſes* to Truſtees and their Heirs, to the Uſe of himſelf and his Wife for their Lives, and the Survivor of them; Remainder *to the Heirs of the Wife*, and *covenants that he was ſeiſed in Fee.* The Wife dying without Iſſue, made a Writing, in Nature of a Will, and deviſed it to J. S. and his Heirs. It was inſiſted, that nothing paſſed by this Settlement, for that being a Term in Groſs, no Uſe paſſed to the Truſtees by the 27 *H.* 8. that by the Leaſe for a Year, which was only a Bargain and Sale, no Uſe paſſed, and there was no Attornment to veſt it as a Reverſion, and the Releaſe being to enure upon it by way of Enlargement of the Eſtate, if nothing paſſed by the Leaſe, or if that transferred no Poſſeſſion, then there was no Eſtate for the Releaſe to operate upon, and that the Limitation to the Heirs was void, and ſo a Releaſe by her Heir at Law to J. S and his Heirs could have no Effect, and ſo the Term muſt go to the Husband. Per Lord Cowper, though the Settlement could not operate as a Leaſe and Releaſe, yet the Husband being in Poſſeſſion, and the Word *Grant* being *in the Releaſe*, it took Effect as a *Grant or Aſſignment of his whole Intereſt at Common Law*; and though it could not go to the Heirs of the Wife, yet he ſhould not be admitted after to derogate from it, and therefore ſhould veſt in thoſe in whom by Law it might, and ſhould go to the Adminiſtrator of the Wife; for as the Husband intended to deveſt himſelf of the whole Fee, had it been a Fee, there was no Reaſon that it ſhould not paſs when it appeared to be a leſs Intereſt. Ch. Prec. 480. pl. 301. Hill. 1717. Marſhall v. Frank.

(C) Operation of Conveyances. Whether by Inrolment, or Livery, or Fine.

But if Livery had preceded the Inrollment, then that had prevented it paſſing

1. A *Tenant in Tail*, *Remander in Fee to his Siſters his Heirs at Common Law.* A. made a Deed thus, *I the ſaid A. have given*, *granted*, *and confirmed for a certain Piece of Money* &c. without the Words Bargained and Sold; and the Habendum was to the Feoffee *with Warranty* againſt A. and his Heirs, and a Letter of Attorney was to

to make *Livery and Seiſin*; and the Deed was, To all Chriſtian People &c. The *Deed was inrolled* after the making it. The Deed was indented. Four Months after the Delivery of the Deed the Attorney made Livery of Seiſin. A. died without Iſſue, the Siſters entered and the Feoffee ouſted them of the Land and they brought Treſpaſs, and held for the Plaintiff; for here is no Diſcontinuance; for the Conveyance is by Bargain and Sale, and not by Feoffment, becauſe the Livery comes too late after the Inrollment, and then the Warranty ſhall not hurt them, and the Deed being indented and the Parties Seals to it is ſufficient. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

by Bargain, and Sale, and it had paſs'd by the Livery. Arg. 3 Le. 125. and And. 113. Bracebridge's Caſe.

2. And per Cur. the Words *give for Money*, *Grant* for Money, *confirm* for Money, *agree* for Money, *Covenant* for Money; if the *Deed be duly inrolled*, the Land paſs both by the Statute of Uſes and by the Statute Inrollments, as well as upon the Words Bargain and Sale, and per 3 J. the Party ought to take by Bargain and Sale, and cannot take by Way of Livery. But when *all is in one Deed*, and takes Effect equally together, in ſuch Caſe the Grantee has *Election*. But in this Caſe the Bargain and Sale (the Deed being inrolled) doth prevent the Livery, and takes his full Effect before. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

3. Land was bargained and ſold, *Bargainee levies a Fine* of the Lands, and afterwards with Six Months the Deed is inrolled; It ſhall paſs by the Fine, and the Conuſee ſhall have the Land. For the Inrollment ſhall *relate* to the Time of the Bargain and Sale. 4 Le. 4 pl. 18. Popham's Caſe.

If the Fine be firſt, it ſhall paſs by the Fine. If the Inrolment, be firſt it

paſſes by the Inrolment, or if *Livery and Seiſin* be *firſt*, it paſſes by that. Arg. 2. And. 161. pl. 88.—Ibid. 203, pl. 19. Arg. S. P. ——— Cro. E. 917. S. P. and cites the Caſe of Lybb v. Hinde. —— S. P. by Croke, J. Cro. C. 218, in pl 2. S C. there cited.—S. P. by Montague, Ch J. and ſaid, that if it were otherwiſe, all Aſſurances would be ſhaken.——Mo. 337. pl. 456. Trin. 22 Eliz. The Earl of Northumberland's Caſe. S. P. adjudged.———And. 285. pl. 292. Hill. 34 Eliz. Libb. v. Hynd. S. P. held accordingly.———4 Rep 70. b. Hinde's Caſe. S C. adjudged.———Ow. 70. Arg. S. P.

4. If a Bargain and Sale be of a *Manor*, and *before Inrollment*, *Livery* and Seiſin is made *of* the *Demeſnes*, and then the Deed is inrolled, the *Services* do not paſs. 2 And. 203. pl. 19. Arg. cites D. Paſch. 25 Eliz. Bracebridge's Caſe.

There is no ſuch Year in Dyer, nor any ſuch Name of a Caſe, but

it ſeems to be the Caſe of Stonely v. Bracebridge, which is in 1 Le. 5. pl. 10. Mich. 25 & 26 Eliz. B. R. and Ibid. 6. Arg. S. P.

5. J. S. ſeiſed in Fee, levies a *Fine* to the *Uſe of himſelf and his Heirs*, *until* he, his Heirs, Executors &c. ſhall make *Default in Payment* of 20 l. per Annum, till 500 l. be paid, and *after* Default *to the Uſe of A. his Heirs &c. till the 500 l. received of the Rents &c.* and *then* to the Uſe *of himſelf and* his Heirs for ever; afterwards J. S. by Deed indented and inrolled, bargains and ſells the Land to a Stranger; Default is made of Payment; *A. enters*, and afterwards *the 500 l. is paid*. J. S. ſhall have his Land again, notwithſtanding his *Bargain and Sale before the Entry*, for at the Time of the Bargain and Sale he had an Eſtate in Fee, determinable upon a Defanlt in Payment, which accrued to him by the Fine and Deed of Uſes between him and A. which Eſtate only paſſed by the ſaid Indenture of Bargain and Sale, and not the new Eſtate, which is accrued to him by the latter Limitation, after the Debt paid; for that *new Eſtate* was *not in Eſſe at the Time of* Bargain and Sale. But if the Conveyance by Bargain and Sale had been by *Feoffment or Fine*, it had been otherwiſe; for by ſuch Conveyance, all Uſes and Poſſibilities had been carried by Reaſon of the forcible Operation of it. Le. 33. pl 40. Mich. 27 & 28 Eliz. at Serjeant's Inn. Anon.

6. *Feoffment*

6. *Feoffment inrolled without Livery* is not of any Force to make the Land to paſs, but the Inrollment may *eſtop* the Feoffor to ſay Not his Deed. Agreed per Omnes. Poph. 8. Mich. 34 & 35 Eliz. B. R. in Caſe of Gibbons v. Maltyard and Martin.

Per Walmſley, J. he is in by the Feoffment, and not by the Bargain.

7. A. Bargained and ſold Lands to B. and his Heirs; and the Deed *not inrolled*, A. *delivers Seiſin* of the Land, Secundum Formam Chartæ indentat' prædict.' This is a good Feoffment. 2 And. 68. pl. 51. Denton's Caſe.

——Per Popham, Ch. J. Poph. 49. S. P.——S. P. Arg. and agreed per Cur. Yelv. 124. Hill. 5 Jac. B. R.

8. A. *infeoffed* B. of all his Lands in S. and afterwards bargains and *ſells* to B. all his Lands in S. and covenants to make further Aſſurance of all ſuch Lands as he had bargained and ſold to him, whereas by the Feoffment A. had not any Lands in S. at the Time of the Bargain and Sale, and in Debt upon Bond for Performance of Covenants, the not making further Aſſurance was aſſigned for Breach. But for the Reaſon above, the Court held it not well aſſigned. But if one enfeoffs another of his Lands, and afterwards bargains and ſells them *by Name*, and covenants to make further Aſſurance, he is bound to make Aſſurance accordingly. Cro. E. 833. pl. 3. Trin. 43. Eliz. B. R. Lane v. Hodges.

Brownl. 141, 142. S. C. and ſeems only a Tranſlation of Yelv

9. Bargain and Sale was made by W. R. *Tenant in Tail of a Houſe in London* to J. S. and delivered the Deed but not on the Land, in Order to make a Tenant to the Præcipe to ſuffer a Common Recovery; *three Days afterwards W. R. made a Feoffment to J. S. of the Meſſuage, which was executed by Livery and Seiſin*; adjudged, that the Houſe did paſs by the Bargain and Sale, though not inrolled (for Houſes in London are out of the Statute of Inrolment) and not by the Feoffment; becauſe it was made to the ſame Perſon, who had the Inheritance of the Houſe at that Time, by Virtue of the Bargain and Sale, and a Poſſeſſion executed ſhall always hinder a Poſſeſſion Executory. Yelv. 123. Hill. 5 Jac. B. R. Darby v. Bois.

Per Williams J. the *Fine being ſubſequent* to the Bargain and Sale, is only a Corroboration and Confirmati-

10. *Tenant in Tail* makes a Bargain and Sale and the Deed is *inrolled*; by this all the Eſtate, which he lawfully had in him, ſhall be deveſted out of him, but no more, and until Inrolment nothing doth paſs, after the Inrollment a *Fine* is levied, which is no more than a Feoffment of Record; This Fine is but a Releaſe of his Right with Warranty. Per Croke J. Bulſt. 162. Trin. 9 Jac. in Caſe Heywood v. Smith, alias Seymour's Caſe.

of the Bargain an Sale. Ibid. 193.——And no Alteration at all is made as to Remainders. Per Williams, J 2 Bulſt. 34. ſays, it was ſo adjudg'd in the Lady Arrabella's Caſe.——But it had been otherwiſe if the Fine had been firſt levyed before the Inrolment, for there he ſhould take by the Fine. Per Williams, J ibid. cites it as adjudg'd 4 Rep. 70, 71. in Hind's Caſe, and cites alſo the Caſe of Wilmot v. Knowls.——But if the *Bargain and Sale* is made firſt *to B. and before the Inrolment* the Bargainor *levies a Fine to C.* and afterwards the Deed of Bargain and Sale is inroll'd. This ſhall now avoid the Fine. Ibid. Per Williams, J.

(D) Conveyances by Leaſe and Releaſe. And Pleadings thereof.

1. ENTRY &c. the *Tenant pleaded Leaſe for Years, and Releaſe in Fee to his Poſſeſſion*, and the Opinion was, that he *ſhall plead certainly what Day the Leſſor leas'd*; for it may be that it was made to commence four Years to come, and then Releaſe made meſne is not good, Quod Nota. Br. Pleadings, pl. 154. cites 32 H. 6. 8.

2. *At* the *Common Law* when an Eſtate did not paſs by Feoffment, the Leſſor or Vendor made a Leaſe for Years, and the *Leſſee actually entred*, and then the *Leſſor granted the Reverſion to another, and* the *Leſſee attorned*, and this was good. *Afterwards* when an Inheritance was to be granted, then alſo was a Leaſe for Years uſually made, and the *Leſſee entred* as before, *and then the Leſſor releaſed to him*, and this was good. But after the *Statute of Uſes*, it became an Opinion, That if a Leaſe for Years was made upon a Valuable Conſideration, a Releaſe might operate upon that, *without an actual Entry of the Leſſee*, becauſe the Statute did execute the Leaſe, and raiſed an Uſe preſently to the Leſſee. Sir Francis Moor, Serjeant at Law, was the firſt who practiſed this Way. But becauſe there were ſome Opinions that where Conveyances may enure two Ways, the Common Law ſhall be preferr'd, unleſs it appear that the Party intended it ſhould paſs by the Statute, thereupon the uſual Courſe was to put the *Words Bargain and Sale* into the Leaſe for a Year, to bring it within the Statute, and to allege that the Leaſe was made to the Intent and Purpoſe that by the Statute of Uſes the Leſſee might be capable of a Releaſe; but notwithſtanding this, Mr. Noy was of the Opinion, that this Conveyance by Leaſe and Releaſe could never be maintained, without the actual Entry of the Leſſee. 2 Mod. 252. Trin. 29 Car. 2. C. B. in Caſe of Barker v. Keat.

3. North Ch. J. ſaid, He had known it rul'd ſeveral times that a Leaſe and Releaſe *in the ſame Deed*, was a good Conveyance; for Priority ſhould be ſuppoſed. Freem. Rep. 251. pl. 266. Paſch. 1678. in Caſe of Barker v. Keete.

(E) Deeds of Conveyance. By Demiſe and Re-demiſe.

1. LESSEE re-demiſes his *whole Term* to Leſſor, *reſerving Rent*; *Leſſor dies*; Leſſee brings Debt againſt the Guardian of the Heir of the Leſſee, who receiv'd the Profits as *Executor de ſon Tort* in the Debet and Detinet. It was argued, that here is no Term in being for any one to be Executor de ſon Tort of; for this Re-demiſe *was a complete Surrender* in Law, and therefore this differs from an Aſſignment made by Leſſee for Years of his whole Term to a Stranger; for Debt will lie on the Contract there, becauſe an Intereſt paſſes to him in Reverſion, and as to this Purpoſe a Term is in Eſſe by the Contract of the Parties, and ſo it would be here againſt the firſt Leſſor, who was Leſſee upon the Re-demiſe; But now becauſe of the Surrender, the Heir is intitled to enter, and the Guardian Defendant enters in his Right as Guardian, which ſhe, being his Mother, may lawfully do; ſo that Debt lying only on the Contract, the Term being gone, the Plaintiff can't charge any as Executor de ſon Tort in the *Debet and Detinet*. Had the Re-

demiſe been upon *Condition*, the Surrenderor by Entry for *Non-Performance* might have *reviv'd the Term*, and Judgment accordingly; and told the Plaintiff, he might reſort to Equity if he thought fit. 2 Mod. 174. Hill. 28 and 29 Car 2. C. B. Loyd v. Langford.

2. Demiſe and Re-demiſe *are but one Conveyance* in the Law, and ſuch Conveyance is better than a Grant of a Rent-Charge, becauſe all ſubſequent Grants ſtand on an equal Bottom with the firſt, and therefore if the laſt Grantee make the firſt *Diſtreſs*, he will be firſt ſatisfy'd; therefore this Conveyance was found out for the Benefit of the Perſon who is to have the Rent-Charge. Arg. N. Ch. R. 169. Mich. 1690. in Caſe of Bladen v. E. Pembroke.

(F) Conveyance Good. Though it cannot take Effect as the Parties intended.

1. A. Poſſeſſed of a Term, grants it *to B. and his Heirs*, it paſſes the Whole; ſo to *B. for Life* it ſhall paſs the whole Intereſt, and go to his Executor. Parl. Caſes 206. in Caſe of Jermin v. Orchard cites Pl. C. 424. and 3 Cro. 534.

2. Baron poſſeſſed of a long *Term for Years*, *convey'd* it *as a Fee* to Truſtees, and their Heirs for the Wife and her Heirs, for a Valuable Conſideration. She by Will deviſed the Lands to J. S. to whom her Heir at Law releaſed. The Baron claimed it as a Chattle as Adminiſtrator to the Wife. But Lord Cowper decreed it to J. S. Ch. Prec. 480. pl. 301. Hill. 1717. Marſhall v. Frank.

(G) Bargain and Sale. Of what Eſtate &c. Good, and the Effect thereof.

1. A. By Indenture inrolled *bargains and ſells* Land to B. *with a Way over other Land*; the Grant of the *Way* is not good; for nothing but the Uſes paſſes by the Deed, and there cannot be a Uſe of a Thing which is not *in Eſſe*, as of a Way, Common &c. which are *newly* created, no Uſe can ariſe by Bargain and Sale. Cro. J. 189, 190. pl. 13. Mich. 5 Jac. B. R. Bewdly v. Brooks.

Cro. J. 475. pl. 1. Hingen v. Payn. S. C. & S. P. admitted.—

2. The Leſſor for Years did bargain and ſell *the Reverſion* by Deed inrolled to two, and held good. Godb. 272. pl. 381. Paſch. 16 Jac. B. R. Ingin v. Pain.

Bridgm. 128. S. C. & S. P. admitted.

If a Man bargains and ſells Lands, preſently the *Bargainee has actual Poſ-*

3. Upon a Bargain and Sale *for Years of Lands*, *whereof the Bargainor himſelf is in Poſſeſſion*, and the Bargainee never entered; if afterwards the Bargainor makes a Grant of the Reverſion (reciting this Leaſe) it is a good Conveyance of the Reverſion, and the Eſtate was veſted and executed in Leſſee for Years, by the Statute, though not to have Treſ-

paſs

paſs without Entry and actual Poſſeſſion. Reſolved by the Two Ch. Juſtices and Ch. Baron Gro. J. 604. pl. 32. Mich. 18 Jac. in the Court of Wards. Lutwich v. Mitton.

ſeſſion, he may ſurrender, aſſign, attorn and releaſe, but he cannot bring Treſpaſs. Per Bridgman, Ch. J. Cart. 66. Paſch. 18 Car. 2. C. B. in Caſe of Geary v. Beacroft.

But if the Words are Bargain and Sale *for Conſideration of Money*, he is in Poſſeſſion upon Execution of the Deed, to bring Treſpaſs, to take a Releaſe &c. by the Statute of Uſes. Woods Inſt. 262.

4. An *Eſtate* does *not* paſs by a Deed of Bargain and Sale, but *only an Uſe*. L. P. R. 207.

(H) Bargain and Sale of Land.

Good. In Reſpect of the Manner and to whom.

1. A Bargain and Sale cannot be *to one, to the Uſe of another*; for a Uſe cannot be upon a Uſe; but a Bargain and Sale may be of Land by Deed, rendering *Rent*, and the Reverſion will be good. Poph. 81. per Popham Ch. J. cites 36 H. 8.

2. Bargain and Sale before, or after the Statute 27 H. 8. by Deed, for 200*l.* to B. in Fee *to the Uſe of the Bargainor for Life &c. or in Fee*, or to the Uſe *of a Stranger*, this Uſe ſo limited is utterly void, for the Bargain for Money implies in it a Uſe, and the Limitation of the other Uſe is meerly contrary. And. 37. pl. 96. Mich. 4 & 5 Ph. & M. Tyrrel's Caſe.

Bendl 61. pl. 108. Anon. S. P. and ſeems to be S. C and held accordingly.—— D. 155. a pl. 20. S. C. in the Court of Wards, and S. P. held accordingly.

3. If *after* 1 *R.* 3. *Ceſty que Uſe*, by Words of Bargain and Sale only, had ſold the Land to a Stranger, No Poſſeſſion had paſſed by this to the Vendee but the Uſe only. Mo. 34. pl. 113. Trin. 4 Eliz. C. B. Anon.

4. A. by Deed indented and inrolled *in Conſideration of* 100*l. paid by B. bargains and ſells the Lands to B. C. and D. Parties to the Indentures*; in this Caſe the Lands paſſes to them all; for although the valuable Conſideration be expreſſed to be paid by one, yet it muſt be intended, that it was paid for them all, to the End, that the Land may paſs to them all, according to the Meaning of all the Parties, and a Conſideration given by one of the Parties is ſufficient to convey the Land to them all. 2 Inſt. 672.

5. It muſt be *by Writing*, and not by Print or Stamp. Secondly, it muſt be Written *in Parchment or Paper*, and not upon Wood, Stone, Lead, or other Material. 2 Inſt. 672.

6. If the Deed begins *Hæc Indentura*, or, This Indenture, yet, if the *Deed is not indented*, it is no Indenture; *but if the Deed be indented* tho' the Deed does begin This Deed made, *without mentioning the Word (Indenture)* yet it is a Writing within this Statute. 2 Inſt. 672.

7. A *Bargain and Sale for a valuable Conſideration* of Houſes, or Lands *in London* &c. *by Word only* is ſufficient to paſs the ſame; for that Houſes and Lands in any City, &c. are exempted out of the Act 27 H. 8. and *at the Common Law ſuch a Bargain and Sale by Word only raiſed an Uſe*. And the Statute of 27 H. 8. cap. 10. does transfer the Uſe into Poſſeſſion. 2 Inſt. 672.

8. If a Bargain and Sale be *void in Part* it is void in all. Brownl. 37.

9. In

9. If in the *Habendum* of a Bargain and Sale of Land a *Truſt is declared*, this does not make the Bargain and Sale void, but the Conveyance being to the Truſtees by Bargain and Sale, it was wiſely done to declare the Confidence and Truſt. 10 Rep. 34. a. Mich. 10 Jac. B. R. Per Cur. in Sutton's Hoſpital's Caſe.

10. If one makes a Bargain and Sale *to A. and afterwards* makes a Bargain and Sale *to B. of the ſame Land*, and the Deed to B. is firſt inrolled, but the *Deed to A. is not inrolled within Six Months*, the Bargain and Sale to B. is good. But if the Deed to A. had been inrolled within the Six Months, the Deed to B. had been void. Per Hobart Ch. J. Hob. 165. pl. 194. Paſch. 14 Jac. Arg.

11. A *Bargain and Sale* made *by one* who is *not in Poſſeſſion, nor receives the Rents*, though it be by Deed inrolled in Conſideration of Money is not good, if there be *no Livery* thereupon. (Mich. 23. Car. 2.) But if there be Livery it paſſeth; for the making of the Livery puts the Bargainee into Poſſeſſion. So likewiſe if the *Bargainor enters and takes Poſſeſſion, and then ſeals* and delivers the Deed *upon the Land.* But if the Bargainor be *in Poſſeſſion*, or receives the Rents, then the Eſtate will well paſs by Deed inrolled, without Livery. L. P. R. 207.

(I) What amounts to, or ſhall be ſaid a Bargain and Sale.

1. IF *he in the Reverſion upon a Leaſe for Years, grants his Reverſion to his Leſſee* for Years, *by* Words of *Dedi, Conceſſi, Feoffavi, and a Letter of Attorney* is made *to make Livery* and Seiſin, the *Donee cannot take by the Livery*, for that the Leſſee *has the Reverſion preſently.* Per Wray and Catline. 3 Le. 17. pl. 39. Mich. 14 Eliz. B. R. Anon.

2. If Lands are convey'd by the Word *Dedi*, without any Words of Bargain and Sale, and there is a Conſideration of Money, and the Deed is Debito Modo inroll'd, the Uſe will paſs as well as if the Words Bargain and Seal had been in the Deed, becauſe of the Money paid. 4 Le. 110. pl. 224. 19. Eliz. B. R. Gray v. Edwards.

3. V. having a *Rent Charge in Fee by Indenture*, which was *inrolled* within ſix Months, gives and *grants it to H. in Fee*, and there was no Attornment. (Nota, in Truth the Caſe was, that he *for a certain Sum of Money*, gives, grants, and ſells the Rent &c. But it was pleaded only, that he by Indenture Dedit & Conceſſit) and it was ruled without any Argument, that *the Rent without Attornment paſſes not, being only by way of Grant, and not of Bargain and Sale, although the Deed was inrolled.* Cro. E. 166. pl. 2. Hill. 32 Eliz. B. R. Taylor v. Vale.

4. A. the Bargainor reciting by Indenture, that *whereas J. S. was bound for him in a Recognizance and Bonds*, he now, *for divers good Conſiderations, bargained and ſold* the Lands *to him and his Heirs*; the *Deed was inrolled* within ſix Months, but it was *found that no Money was paid* within the ſix Months. Adjudged, this was not a good Bargain and Sale, becauſe in every Bargain and Sale there ought to be *Quid pro quo*; but the ſame might be good by the Way of Covenant, if there had been apt Words, viz. a Covenant to ſtand ſeiſed to Uſes; for if I bargain and ſell Lands to my Son, no Uſe ariſeth thereby; but it is a good Conſideration to raiſe Uſe by Way of Covenant. Cro. E. 394. pl. 19. Paſch. 37 Eliz. C. B. Ward v. Lambert.

5. A

5. A *Demiſe and Grant* was adjudged to amount to a *Bargain and Sale*, within the Statute of Uſes. For to make a Freehold or Inheritance paſs by Deed indented and inrolled, there need not the preciſe Words of Bargain and Sale, but Words tantamount are ſufficient. 8 Rep. 94. Hill. 7 Jac. Fox's Caſe.

2 Brownl. 291. Smalman v. Powis. S C. and argued by all, and Judgment accordingly.——If the Words of a Leaſe are Demiſe, Grant &c. the Leſſee is not in Poſſeſſion to bring Treſpaſs, or *take a Releaſe to enlarge* an Eſtate &c. till actual Entry; But if the Words are Bargain and Sell for *Conſideration of Money*, he is in Poſſeſſion, upon Execution of the Deed, to bring Treſpaſs, to take a Releaſe &c by the Statute of Uſes. Wood's Inſt. 262.——So the Words *Alien and Grant*, in a Deed indented and inroll'd, amounts to a Bargain and Sale, if it be for Money, and the Land ſhall paſs without any Livery and Seiſin; Per Cur. 8 Rep. 94. a. in Fox's Caſe.

6. A Bargain and Sale *is a real Contract upon valuable Conſideration* for paſſing of Manors, Land, Tenements or Hereditaments, by Deed indented or inrolled within ſix Months after the Date of it, without Livery of Seiſin, or Attornment of Tenants. 2 Inſt. 672.

7. Though it be good to Uſe, thoſe *Words mentioned in the Act of 27 H. 8. yet they are not of Neceſſity* to be uſed; for *whatſoever Words, upon valuable Conſideration, would have raiſed an Uſe* of any Lands, Tenements or Hereditaments *at the Common Law*, the ſame *do amount to a Bargain and Sale within this Statute*, 2 Inſt. 672.

8. *As* if a Man by Deed, inrolled according to this Act *covenants for valuable Conſideration to ſtand ſeiſed* of Lands to the Uſe of another &c. this is in Nature of a Bargain and Sale within this Act. 2 Inſt. 672.

9. A. ſeiſed of certain Lands in Fee, *demiſed* the ſame *to C. for Life, Remainder for Life, reſerving a Rent* at the Feaſt of St. Michael, and of the Annunciation; A. by Indenture, *in Conſideration of 50 l. does demiſe*, grant, ſet, and to farm lett *the ſame* Lands *to B. for 99 Years*, reſerving a Rent at the ſame Feaſts preſently, and C. the Leſſee for Life, did not attorn; and it was adjudged, that the ſaid Demiſe and Grant, upon the Conſideration of 50 l. amounted to a Bargain and Sale of the ſaid Term. 2 Inſt. 672.

10. *So* if a Man, for Valuable Conſideration by Deed indented and inrolled, *aliens or grants* the Land *to a Man and his Heirs* &c. this is a Bargain within this Statute & ſic de ſimilibus. 2 Inſt. 672.

11. But inaſmuch as the Intention of the Parties is the Principal Foundation of the Creation of Uſes, *if by any Clauſe in the Deed it appears, that the Intention of the Parties was to paſs it in Poſſeſſion by the Common Law*, there *no Uſe ſhall be raiſed*; and therefore if *any Letter of Attorney* be in the Deed, *or a Covenant to make Livery*, or the like, there nothing ſhall paſs by way of Uſe, but, according to the Intention of the Parties, a Poſſeſſion by the Common Law. 2 Inſt. 672.

(K) Bargain and Sale.
Inrolment by Statute. And by Whom.

1. IN Caſe of a Deed made *by Baron and Feme* to be inrolled, the Feme ought not to be received to make Acknowledgment, and ſuch Deed ſhall not be received in Chancery, by reaſon of the Coverture of the Feme; though otherwiſe *in London by Cuſtom*. And Error was brought of ſuch Acknowledgment taken in C. B. becauſe the Court had no Power to take the Examination without a Writ, but no Judgment

It ſhall be inrol'd *by the Baron only*. Br. Ibid. pl. 14. cites 29 H. 8. ——The acknowledgment

ſhall be before the Recorder, and

ment was given. See Br. Faits inroll. pl. 3. cites 24 E. 3. 64. and Ibid. pl. 10. cites 5 E. 4. 7.

an Alderman, and the Feme ſhall be examined, and ſhall bind a Fine at Common Law by the Cuſtom, and not as a Deed only; and it is good without Livery of Seiſin. Br. Ibid. pl. 15. cites 29 H. 8.

2. One came to inroll a Deed, and Littleton examined him if he was willing, or Not; who ſaid, Yes. Then he examined his *Age*. He ſaid, he was 26 Years old. Littleton bid him be adviſed; for that if it be inroll'd, he could never after ſay that it was not his Deed, nor that he was within in Age, nor that it was by Dureſs. Br. Faits inrol. pl. 11. cites 7 E. 4. 5.

3. *Bond by Baron and Feme*, during Coverture, ſhall not be inroll'd, becauſe it is not the Deed of the Feme. Br. Faits inrol. pl. 11. cites 7 E. 4. 5.

4. 27 *H.* 8. *cap.* 16. *S.* 1. *No Lands or Hereditaments ſhall paſs whereby any State of Inheritance or Freehold ſhall be made, or any Uſe thereof by reaſon only of any Bargain and Sale, except the Bargain and Sale be* made by Writing indented and inrolled in one of the King's Courts of Record at Weſtminſter, or within the County where the Lands lie, or before the Cuſtos Rotulorum and two Juſtices of Peace and the Clerk of the Peace of the County, or two of them, whereof the Clerk of the Peace to be one; *and the ſame Inrollment to be made* within ſix Months after the Date *of the Writings, the Cuſtos Rotulorum, or Juſtices of Peace and Clerk taking for the Inrollment, where the Land exceeds not the Yearly Value of* 40*s.* 2*s. viz.* 12*d. to the Juſtices, and* 12*d. to the Clerk; and for the Inrollment of ſuch Writing, wherein the Land comprized exceeds* 40*s. in Yearly Value* 5*s. and the Clerk of the Peace ſhall inroll the Deeds, and the Rolls thereof, at the End of every Year, ſhall deliver unto the Cuſtos Rotulorum, to remain in his Cuſtody amongſt other Records of the Counties.*

5. *S.* 2. *This Act ſhall not extend to Lands within any City, Borough, or Town Corporate, wherein the Mayors, Recorders, or other Officers, have Authority to inrol Deeds.*

6. Note by the Juſtices where *two Jointenants* were, and the *one alien'd all his Lands* and Tenements in D. *after the Statute of Inrolments of Anno* 27 *H.* 8. *cap.* 16. and *before the Inrolment, the other Jointenant died*, ſo that his Moiety ſurvived to the Vendor, and after the *Vendor within the Half Year inroll'd the Deed*, yet *nothing paſs'd but the Moiety*; for the Inrolment had Relation to the Making and Delivery of the Deed; ſo that it ſhall give nothing but that which was ſold by it at the Time of the Delivery of the Deed, Quod Nota. Br. Faits inrol. pl. 9. cites 6 E. 6.

7. A. ſeiſed of Land in Fee by *Indenture dated* 4 *October* for 200*l.* bargains and ſells in Fee. It was held, that this Deed being *inroll'd* 21 *March next* following, which was the laſt Day of the ſix Months, accounting *Lunar Months*, and accounting the ſaid Day of the Date of the Indenture for none of them. And all the laſt intire whole Day of 4 Oct. above ſhall be accounted in Law the Day of the Date of the Indenture, and any Part of 31 March which was the laſt Day of the Month, ſhall be ſaid *Infra ſex Menſes*. But this was a narrow Pinch in the Caſe. D. 218. b. pl. 6. Mich. 4 and 5 Eliz. Thomas v. Popham.

8. *The Statute of Inrolments* doth *not hinder the riſing of any Uſes, but only upon Bargains and Sales*, which ſhall not execute by Bargains and Sales but by Indenture inroll'd; but all other Uſes are at the Common Law, which ariſe on Conſideration of Marriage &c. Arg. Cro. E. 345. pl. 16. Mich. 36 and 37 Eliz. in Caſe of Callard v. Callard.

9. Albeit the Indenture may be either on Parchment or Paper, yet the Inrolment *muſt be on Parchment only*; and ſo it is expreſſed in the Clauſe of

of Inrolment by the Clerk of the Peace, viz. that he ſhall ſufficiently inrol and ingroſs in Parchment the ſame, and ſo much is implied when the Inrolment is in any of the King's Courts of Record at Weſtminſter; and ſo it was adjudged as Mr. Plowden cited it before the Lords in Parliament Anno 23 Eliz. in the great Caſe between **Herbert and Vernon**, which I heard and obſerved. 2 Inſt. 673.

10. If an *Infant bargains and ſells Lands* which are in the Realty *by Deed indented and inrolled*, he may avoid it when he will; for the Deed was of no Effect to raiſe an Uſe; and this *Statute is to be intended of lawful and effectual Bargains and Sales*, and ſuch as would have raiſed Uſes at the Common Law, and does only reſtrain the Execution of them that be of no Effect, except the Deed be inroll'd. And this ſtands with the Reaſon of the Common Law, that none but effectual Deeds ought to be inrolled; and therefore a Deed of Feoffment ought not to be inrolled before Livery. But in Caſe of a Fine, the Infant muſt reverſe it during his Minority; for the Conuſance is taken by Force of the King's Writ before a Judge, and is voidable by the Common Law. 2 Inſt. 673.

11. *A. poſſeſſed of a Leaſe for Years, bargains and ſells it*; the Uſe is executed, and paſſes *without Inrolment*; for it is not within the Statute 27 H. 8. of Inrolments; but otherwiſe it is where *A. is ſeiſed of Land in Fee, and bargains and ſells a Leaſe for Years out of it*; for this ought to be Inroll'd. Per G. Croke, to which all the Court ſeem'd to agree. 2 Roll. R. 205. Mich. 18 Jac. B. R. Shortgrave v. Rone.

12. It may be inroll'd *the ſame Day* on which it is executed. Per Doderidge J. Lat. 14. Mich. 2 Car. in an Anon. Caſe. cites Dal. 4 Eliz.

13. By the Statute of 27 *H.* 8. 10. *of Uſes*, the Eſtate paſſes by the Contract, and the Uſe executed by the Statute; Then comes the *Act of Inrolment, cap.* 16, *of the ſame Year, and enacts, that no Eſtate ſhall paſs without Inrolment of the Deed indented, and this within ſix Months.* The Words are, (unleſs it be by Deed indented and inroll'd) not (until) but (unleſs) and the Contract there is with the Party that has the Eſtate, and the Deed is appointed to be inroll'd within certain Time, but is otherwiſe in Caſe of *Commiſſioners of Bankrupts*, who have only a Power and no Eſtate, and there to paſs the Eſtate, there muſt be not only a Deed indented, but the ſame muſt be inroll'd alſo, and in that Caſe there is no *Relation*; For in this Caſe no Time is mentioned within which it is to be done, ſo that it might extend to 7 or 20 Years, which would be dangerous. Adjudged accordingly. 2 Jo. 197. Paſch. 34 Car. 2. B. R. Perry v. Bowers.

Vent. 360. Perry v. Bowes. S. C. adjudged accordingly. ——Skinn. 30. pl. 6. S. C. argued, but no Judgment, nor any thing ſaid by the Court.—— 2 Show. 156. pl. 142 Berris v. Bowyer. S. C. adjudg'd per tot. Cur. that Inrolment is Neceſſary before any Thing can paſs by ſuch Deed of Aſſignment, or Bargain and Sale from the Commiſſioners.——S. P. and when it is inroll'd it veſts not by the Statute of Inrolments, but by the Statute of Uſes preſently. Hob. 136, in pl. 185. by the two Chief Juſtices, and Ch. Baron. Paſch. 15 Jac. in Dimmock's Caſe, ſent out of the Court of Wards.——Cro. J. 409. pl. 5. S. C. and S. P. held accordingly.

14. Deed may be inroll'd *on Oath of the Execution.* 1 Salk. 389. pl. 1. Mich. 8 W. 3. B. R. Taylor v. Jones. Even *after the Death of Bargainor.*

Godb. 270. pl. 376. Hill. 13 Jac. in Canc. Winchcomb v. Dunch.

15. Where two are Parties, the *Acknowledgment of one* binds the other. 1 Salk. 389, in Caſe of Taylor v. Jones.

16. If a Man lives in *New England*, and would paſs Lands here in England, they join a meer nominal Party with him in the Deed, who acknowledges it, and it binds. 1 Salk. 389, in Caſe of Taylor v. Jones, and ſays, it is the Practice.

(L) Bargain

(L) Bargain and Sale.
In what Caſes the Deed muſt be inrolled.

1. A. Seiſed of Lands in Fee makes a Leaſe of Lands for Years, and after by Deed indented bargains and ſells the *ſame Lands to the Leſſee and his Heirs, without any Word of Give* or *Grant* expreſſed in the Deed. Per Omnes J. Nothing paſſes by the Deed, unleſs it be *inrolled*, for without Inrolment the Frantenement does not paſs, and this is *no Confirmation*. Mo. 34. pl. 113. Trin. 4 Eliz. C. B. Anon.

2. *Rent* paid to the Bargainor at the Rent-Day incurred after the Bargain and Sale is good, and the Bargainee has no Remedy, becauſe it is a *Thing executed*. Ow. 150. Paſch. 5 Jac. in the Court of Wards, in Caſe of Sir Hen. Dimmock.

3. *After the Statute of 27 H. 8. cap. 10. of Transferring Uſes into Poſſeſſion* if a Man by his Deed had bargained and ſold for Valuable Conſideration, any Lands &c. of any *Eſtate of Inheritance, Freehold or for Years*, the ſame *had been executed* by the ſaid Act of 27 H. 8 cap. 10. Now this *Act of Inrolments reſtrains only Eſtates of Inheritance and Freehold*; and therefore Bargains and Sales * for Years, for what Number ſoever, are not reſtrained by this Act, though it be not by Deed indented nor inrolled. 2 Inſt. 671.

* 2 Rep. 36. a. Paſch. 37 Eliz. in the Court Wards. S. P Per Cur. accordingly. —— If a Man is poſſeſſed of a *Leaſe for Years*, and bargains and ſells it, the Uſe is executed preſently, and paſſes without Inrolment, for it is not within the Statute 27 H. 8. [cap. 10.] of Inrolments, but otherwiſe it is if *A. ſeiſed in Fee, bargains and ſells a Leaſe for Years out of it*, this ought to be inrolled. Arg. and all the Court ſeemed to agree to it. 2 Roll. R. 204. Mich. 18 Jac. B. R. Shortgrave v. Rone.

4. A. in *Conſideration of Blood covenants to* ſtand ſeiſed *to the Uſe of B. his Son* and the Heirs of his Body, and in Default of ſuch Iſſue, then to the Uſe of *J. S. in Conſideration of* 100 *l.* B. died without Iſſue, the Deed was not inrolled; Quære if the Uſes can ariſe *partly by Covenant* to ſtand ſeiſed, *and partly by Bargain and Sale*, or whether it muſt ariſe *wholly one Way*, or wholly the other, and not by Fractions. Bridgman Ch. J. ſaid in this Caſe there was a *Mixt Conſideration*, and there needed no *Inrolment*. See Cart. 144. Mich. 18 Car. 2. C. B. Garniſh v. Wentworth.

5. Though the Inrolment of a Bargain and Sale ſhall relate to the Delivery of the ſame Deed to avoid *Meſne Incumbrances*, yet every Bargain and Sale, before Inrolment, is void, and can't be made good by any Relation, becauſe the Bargainee has *no Eſtate before Inrolment*, and if ſo, he *cannot grant* any Eſtate. Carth. 178. Hill. 2 and 3 W. and M. in B. R. Bennet v. Gandy.

(M) Bargain and Sale.
Inrolment. At what Time; and Where.

1. THE Inrolment may be in any of the King's Courts of Record at Weſtminſter; That is, in B. R. the *Chancery*, the *C. B.* and the *Exchequer*. And though the Words be (at Weſtminſter) for that at the

the Time of the making of this Act theſe Courts were there; yet if theſe be *adjourned into another Place*, the Inrolment may be in any of theſe Courts; for the Inrolment is confined to the Courts, whereſoever they be holden. 2 Inſt. 673, 674.

2. Or elſe *in the ſame County* &c. *before the Cuſtos Rotulorum, and two Juſtices of Peace, and the Clerk of the Peace* &c. 2 Inſt. 674.

3. The *ſix Months* ſhall be *accounted* after the Computation of 28 *Days to the Month.* After the Date, and after the Day of the Date upon this Act is all one; ſo as the *Date itſelf is taken excluſive.* And yet in the Report of Juſtice Dalliſon it is ſaid that it was holden Anno 4 Eliz. that if it be inrolled the ſame Day it bears Date, it is ſufficient; but the ſafer Way is to inrol it after the Day of Date. And yet where it has a Date, and is delivered after, it ſhall *take Effect to paſs from the Bargainor from the Delivery*; for then it became his Deed, and not from the Date; but the Deed muſt be inrolled within ſix Months after the Date. 2 Inſt. 674.

A Deed may be inroll'd *the very Day of the Date*, but that is by reaſon of the Intent of the Law, and not by the Letter. Per Hobert, Ch. J. Hob. 140. pl. 190. Hill. 14 Jac. Norris v. Gawtry (Hundred of.)——See Le. 184. pl. 257. Arg. S. P. In Replevin the Avowant's Title was by Bargain and Sale *inroll'd the ſame Day*, which per Cur. on Hob. 140, is well enough, and Judgment for the Avowant. 2 Keb. 561. pl. 61. Mich. 21 Car. 2. B. R. Ligo v. Chiffin.

4. If the Deed indented has *no Date*, then the Day of the Delivery is the Day of the Date of that Deed, and may be inrolled within ſix Months after the Delivery. And when the Deed is inrolled within the ſix Months, then it paſſes from the Delivery of the Deed. And albeit after the Delivery and Acknowledgement, either the *Bargainor or the Bargainee dies before Inrolment*, yet the Land paſſes by this Act; for the Words thereof be, No Manors, Lands, Tenements, or Hereditaments, ſhall paſs of any Eſtate of Inheritance of Freehold, except the Deed be inrolled. So as by the Common Law and the Statute of 27 H. 8. of Uſes, it ſhall have paſſed. And by the Words of this Statute when the Deed is inrolled it paſſes ab initio. 2 Inſt. 674.

If Bargainor dies, Inrolment after is good. Godb. 270, pl. 376. Hill. 13 Jac. in Canc Winchcomb v. Dunch. ——And. 229, in pl. 245. Paſch. 32 Eliz. S. P. as to the Death of either Bargainor or Bargainee before Inrolment, that it is good if it be inroll'd within the ſix Months.

(N) Bargain and Sale. How the Eſtate is, and what the Bargainee may do before Inrolment.

1. IF the Bargainee of Land after the Bargain and Sale, and *before the Inrolment bargains and ſells the ſame by Deed indented and inrolled* to another; and after the *firſt Deed is inrolled within the Six Months*, the Bargain and Sale by the Bargainee is good. 2 Inſt. 675.

Before Inrolment *Bargainee bargains and ſells over*, and after the firſt Deed is inroll'd, the ſecond Bargain and Sale is void. Arg. Roll R. 425. cites it to have been ſo adjudg'd. 3 Jac. in Bellingham's Caſe.

Arg. Ow. 149. cites 10 Eliz. Mocket's Caſe; and 3 Jac. Bellingham v. Alſop.——Cro J. 52. Per three J. againſt two, ſuch ſecond Bargain and Sale may be good. Bellingham v. Alſop.——Noy. 106 S. C. that it is not good.——S. C. cited Hob. 136. pl. 185. and S. P. agreed by the two Ch. Juſtices and Ch. Baron, that the Bargainee cannot bargain and ſell to another before his own Deed is inrolled.——Bargainee cannot grant over before Inrolment. Carth. Hill. 2 & 3 W. & M. B. R. Bennet v. Gandy.

2. If there be a Bargainee of a Reverſion and the Tenant makes *Waſt*, the Bargainee ſhall not have Waſt unleſs the Deed be inrolled before the Waſt committed. Arg. Ow. 149. 3 Jac.

3. Until Inrolment the Land *remains in Bargainor*, for the Bargain and Sale on the Statute 27 H. 8. 16. is but *Inchoatum* & non Perfectum; for the Indenture of Bargain and Sale gives nothing to the Bargainee *till the Deed is inrolled* according to the Statute. Arg 3 Bulſt. 216. Mich. 14 Jac.

4. The Bargainor, and not the Bargainee, ſhall have *Treſpaſs*, or Aſſiſe before Inrolment. Arg. 3 Bulſt. 216. Mich. 14 Jac.

5. Bargainee may *ſuffer a Recovery* before Inrolment, and this is warranted by the Common Practice; Vent. 361. Hill 33 & 34 Car. 2. B. R. in Caſe of Perry v. Bowes.

(O) Bargain and Sale. Inrolment. Relation.

1. A Man gave in Tail, the *Remainder to the King*; the Remainder ſhall not paſs without Inrolment, and by the Inrolment it *ſhall paſs a Principio*, As Remainder to the Right Heirs of W. N. who is alive, and after dies, and ſo ſee Relation. Br. Relation, pl. 20. cites 1 H. 7. 31.

2. Where a Man *ſells his Land by Deed indented to one, and after he* ſells it by another Indenture *to another*, and the *laſt Deed is firſt inrolled and then the firſt Deed is inrolled within the half Year*, there the firſt Vendee ſhall have the Land; for it has Relation to make it the Deed of the Vendor, and to paſs the Land from the Delivery of the Deed; for the Statute is that Frank-tenement, nor Uſe thereof ſhall not paſs, nor change from one to another by Bargain and Sale only, unleſs it be by Deed indented and inrolled within the half Year; therefore if it by Deed indented and inrolled within the half Year it ſhall paſs, as the Uſe might paſs at the Common Law by the Sale of Land, which was immediately upon the Sale. Br. Faits enroll. pl. 9. cites 6 E. 6 Per ſeveral Juſtices.

3. 5 *Eliz. cap.* 26 *S.* 1. *All Inrolments of ſuch Writings indented, as are mentioned in the Statute of* 27 *H. cap.* 16. *of Lands &c. in the* Counties of Lancaſter, of Cheſter, and the Biſhoprick of Durham, *being inrolled within Six Months after the Date thereof, (viz. thoſe in Lancaſhire, in the Chancery at Lancaſter, or before the Juſtices of Aſſiſe there; thoſe in Cheſhire, in the Exchequer at Cheſter, or before the Juſtices of Aſſiſe there; and thoſe in the Biſhoprick, in the Chancery at Durham, or before the Juſtices of Aſſiſe there) ſhall be as good in Law, as if they were inrolled in any of the Courts at Weſtminſter.*

4. *S.* 2. *This Act ſhall* not extend *to Lands in any City, or Town Corporate, wherein the Mayor or other Officer has Authority to inrol Deeds.*

5. A Bargain and Sale to K. Edward the 6th in Exchange, and *acknowledged before a Maſter in Chancery*, and alſo before the Chancellor of the Augmentations, and delivered in the Court and there put in a *Cheſt but not enrolled till ſeveral Years after*. It was held that ſuch Inrolment would not veſt any Intereſt in the Queen. Hill. 19 Eliz. D. 355. a. pl. 37.

But See in Margin ibid. where it is ſaid, that the Judges denied they gave any ſuch Opinion as is reported by Dyer; and that Paſch. 30 Eliz in Scacc. this Caſe of Dyer was denied to be Law; and Manwood denied his Opinion to be as reported there; For that after the Acknowledgment of the Deed, the Delivery of it to be inrolled makes it a Record. ——— But ibid. 35 Eliz it was agreed by all the Juſtices in England, that ſuch Inrolment was good, and Judgment given accordingly, in the Caſe of Dean and Chapter of Windſor v. Middlemore ——— And ſays, that the ſame was debated and agreed in the Parliament Houſe; and that it was reſolved by all the Juſtices, that the Acknowledgment of the Deed before the Maſter in Chancery, and the Delivery of it in the Augmentation Court, does not make it a ſufficient Record before Inrolment to veſt the Intereſt in the King, but when it is now inrolled with other Date, it veſts the Intereſt in the King with Relation. For all Men are eſtopped to ſay, it is not inrolled according to the Date, and cites to this Purpoſe Pl. C. 491. in the Caſe of Lutford v. Gretten.

6. Inrol-

6. Inrolment *after Livery* ſhall not have Relation to the Date of the Deed, becauſe now it takes Effect by the Livery which was before the Inrolment. Arg. Goldsb. 18. Paſch. 28 Eliz. ſays it has been ſo adjudged.

7. If a Man makes a Leaſe for Life rendering Rent, and then the Leſſor bargains and ſells the Reverſion, and before the Inrolment the *Rent is behind*, and the Bargainee demands the Rent which was not paid and then the Deed is inrolled, yet he cannot *enter for the Forfeiture*. Ow. 69. Trin. 42 Eliz. Arg. ſaid to have been ſo adjudged.

If Rent become due after the Bargain and Sale, and after Notice of the Bargain and Sale to the Leſſee, and the Leſſee *before Inrolment pays the Rent to the Bargainor*, and then the Deed is inrolled, it is a good Payment, and the Bargainor ſhall not account for it to the Bargainee. Godb. 156. pl. 209. Mich. 6 Jac. B. R. Barker v. Finch.

8. *S.* was ſeiſed of certain Lands in Fee, and acknowledged *a Recognizance to T.* whoſe Executrix brought a Scire Facias upon the Recognizance *bearing Date the 9th of November, Anno* 41 *Eliz.* againſt S. and alleged him to be ſeiſed of the ſaid Lands in Dominico ſuo ut de Feodo the Day of the Scire Facias brought, which was traverſed by the other Party. And the Truth of the Caſe being by long pleading diſcloſed to the Conrt, was this; *S. on the 7th of November before the Recognizance acknowledged, by Deed indented for Money had bargained and ſold the ſaid Land to another*, and the *Deed was inrolled* 20 *Novem. following*. The Queſtion was, whether S was, upon the whole Matter, ſeiſed in Fee the 9th Day of November, the Deed not being inrolled til the 20th of the ſaid Month. And it was adjudged Una Voce, that S. was not ſeiſed in Fee of the Land the 9th of November, for that when the Deed was inrolled, the Bargainee was in Judgment of Law ſeiſed of that Land from the Delivery of the Deed. And it was reſolved, that neither the Death of the Bargainor, nor of the Bargainee before Inrolment, ſhall hinder the paſſing of the Eſtate. 2 Inſt. 674. cites Trin. 42 Eliz. C. B. Mallory v. Jennings.

9 *A. Bargainor, and B. Bargainee*, before Inrolment they both *grant a Rent Charge by Deed to C.* and after the Indenture is inrolled; ſome have ſaid, that this Charge is avoided, for, ſay they, it was the Grant of A. and by the Inrolment it hath Relation to the Delivery, which (ſay they) ſhall avoid the Grant notwithſtanding the Confirmation of the other, which had nothing in the Land at that Time. But the Grant is good, and after the Inrolment by the Operation of the Statute, it ſhall be the Grant of B. and the Confirmation of A. But if the Deed had not been inrolled, it had been the Grant of A. and the Confirmation of B. And ſo Quacunque Via data the Grant is good. Co. Litt. 147 b.

10. If a Man for a valuable Conſideration by Deed indented bargains and ſells Lands to another and his Heirs, and before the Deed be inrolled he *levies a Fine, or makes a Feoffment to Bargainee and his Heirs* of the ſame Lands, and after, and within the Six Months the Deed be inrolled, the Bargainee ſhall be in by the Fine or Feoffment, and not by the Bargain and Sale, both by Reaſon of this Word (*only* &c.) and that the Eſtate by the Common Law veſted ſhall be preferred. 2 Inſt. 671, 672.

11. A *Releaſe of a Stranger to the Bargainee before Inrolment* is good. So as it holds not by Relation between the Parties by Fiction of Law, but in Point of Eſtate, as well to them, as to Strangers alſo. 2 Inſt. 675.

If a Diſſeiſor bargains and ſells Land, and *Diſſeiſee releaſes to Bargainee before* Inrolment it is void. Arg. Roll R. 425, ſays, it was ſo adjudg'd Mich. 10 Eliz. Mocket's Caſe

But a Releaſe *to the Diſſeiſor* before Inrolment had been good, and then the Inrolment ſhould paſs the Eſtate to the Bargainee, and he ſhould take Advantage of the Releaſe. Roll Rep. 425. Mich. 14 Jac in pl. 16.

12. A

12. A *Recovery ſuffered againſt the Bargainee before Inrolment, (the Deed* indented *being after, within the Six Months, inrolled)* is good, for that the Bargainee was Tenant of the Freehold in Judgment of Law at the Time of the Recovery. And non refert when the Deed indented is acknowledged, ſo it be inrolled within the Six Months. And all this was afterwards affirmed for good Law by the Court of C. B. Trin. 3 Jac. Regis upon a ſpecial Verdict given upon an Ejectione firmæ between Lellingham v. Alſop. 2 Inſt. 675.

Ow. 69. Arg. S. C. cited as the Caſe of Sir Richard Brockett, and Morgan's Caſe.

13. Bargain and Sale, the *1ſt of May* and *Bargainee covenants to grant over all his Land, which he had the 1ſt of May*, and after the *Deed is inrolled* he is not bound to grant this Land, which he has by the Bargain and Sale. Roll. R. 425. Mich. 14 Jac. B. R. cites Sir John Cutt's Caſe.

Roll R. 424. Gawen v. Stacy. S. C adjornatur.

14 A. bargained and ſold Land to B. by Deed indented bearing Date 11th June 1 Jac. afterwards 12th June the ſame Year *Common was granted* to B. for all Manner of Cattle commonable upon the Land; 15th June the Deed of Bargain and Sale was inrolled, and it was adjudged a good Grant of the Common; and the Inrolment ſhall have Relation as to that, though for *Collateral Things* it ſhall not have Relation. Godb. 270. pl. 377. Mich. 15 Jac. B. R. Ludlow v. Stacy.

Hetl 82. S. C. & S. P. accordingly.

15. A *Leaſe* for Years made by Bargainee before Inrollment is void, and Inrolment after ſhall not make it good. Cro. C. 110. pl. 2. Paſch. 4 Car. C. B. in Caſe of Iſham v. Morrice.

(P) Bargain and Sale. Pleadings &c.

3 Le. 175. pl. 227. Holland v. Bonis. S. C. in totidem Verbis; only that the Word (* received) is there miſprinted (reverſed.)—— Le. 183. pl. 257. Holland v. Franklin. Hill 31 Eliz. in B. R. the S. C argued.———Sav. 41. Holland v. Downe. S. C. the Point was if againſt the Time of Inrolment of a Deed in Chancery Averment cannot be taken, that the Deed was firſt delivered at a Time after the Inrolment, and adjudged againſt the Defendant; and it ſeemed to the Court, that a Stranger ſhall not be eſtopped by the Inrolment, but the Parties ſhall be bound by it; For though the Inrolment is reputed to be of Record, yet it is not a Record created by any Judicial Act; for it is not like to a Recognizance; and in all Recognizances Nul tiel Record is a Plea. The Sealing and Delivery is the Force of ſuch Deeds, and not the Inrolment, but in Caſes of Recognizances, there they take their Force and Effect by the Inrolment and the Cognizance only, and not by the Delivery; and therefore he may well enough be received to deny the Time of the Delivery, which is only a Matter of Fact; but the Conuſance before a Judge is Matter of Record, and thereby the Debt is created. But Obligations, Indentures, and Deeds of Feoffment, take their Force by the Delivery, and conſequently is a perfect Act before the Conuſance is taken and before any Inrolment, and ſo the Bar to the Avowry was adjudged good, and Judgment was given for the Plaintiff.—— Ow. 138. Howard's Caſe, S. C. ſays that in Truth it was delivered, acknowledged, and inrolled afterwards, and that it was held that the Bargainee [but ſeems to be miſprinted for (Leſſee)] was without Remedy at the Common Law; For he cannot plead that it was acknowledged or delivered after the Date of the Day acknoſtledging it, and that if ſuch a Plea ſhould be admitted contrary to the Record, it would ſhake moſt of the Aſſurances in England.

1. IN *Replevin* the Defendant *ſhew'd, that P. was ſeiſed, and granted* the Land by the Words of Dedi & Conceſſi to A. and his Heirs, Pro certa Pecuniæ Summa, *by Indenture dated and inroll'd in* Chancery, 4 *Nov.* 29 *H.* 8. The Plaintiff *pleaded, that P. by Indenture*, 12 *Oct.* 30 *H.* 8. *demiſed it to H. for* 99 *Years, and that afterwards P. by Indenture dated as above, viz.* 4 Nov. 29. *and primo deliberat'* 1 *Nov.* 31 *H.* 8. *Dedit & Conceſſit*, all the ſaid Lands, leaſed to H. to the ſaid A. ut ſupra, *and traverſed, that the ſaid P. the ſaid* 29 *Nov.* 29 *H.* 8. *Dedit & Conceſſit*, the ſaid Land *to the ſaid A.* Upon Demurrer the Court held clearly, that the Averment of primo Deliberatum againſt a Deed inroll'd ought not to be* receiv'd, for by the ſame Reaſon it might be averred, that Nunquam Deliberatum, and ſo upon the Matter Non eſt Factum. 2 Le. 121. pl. 168. Mich. 29 Eliz. C. B. Holland v. Boin.

2. If a Man bargains and ſells his Land in Fee, and by thoſe Words only, and *makes Livery*, yet the Bargainee may plead, that the Indenture was *not inroll'd*. For a Bargain includes a Grant. Per Curiam. Noy 66. Oſmand and his Wife.

3. If a Man *pleads a Bargain and Sale, in which no Conſideration of Money is expreſſed*, there it *muſt be averred, that it was for Money*, and the Words (for divers Conſiderations,) ſhall not be intended for Money without Averment, but if the *Deed expreſſes for a Competent Sum of Money*, though the Certainty of the Sum be not expreſſed, it is good enough; For againſt this expreſs Mention in the Deed, no Averment, nor Evidence ſhall be admitted; Reſolved per tot. Cur. clearly, and Judgment accordingly. Mo. 569. pl. 777. Trin. 41 Eliz. Fiſher v. Smith.

4. Albeit no *valuable Conſideration* be expreſſed in the Indenture, yet if any were given, the ſame *may be averred*, and the Land does ſuffici-paſs. 2 Inſt. 672.

5. If a *Deed* be *ſhewed in Court, or in the Cuſtody of the Court*, and *by Miſchance the Seal is broken off*, the Court ſhall inrol the Deed in Court for the Avail of the Party. 2 Inſt. 676.

6. In Declaration ſetting forth an Indenture of Bargain and Sale inrolled, it is not enough to ſay that it was inrolled *Juxta Formam Statuti*, but it muſt likewiſe *ſhew in what Court*, that the Court may know whether it be duely inrolled, and that the Party may know where to ſearch for it. Cro. J. 291. pl. 9. Mich. 9 Mich. 9 Jac. B. R. Warley v. Purley. 7 Mod. 77, 78. S. C and the Conviction was affirmed.

7. An *Inrolment* was *pleaded to be made before T. a Juſtice of Peace of the Weſt Riding in Yorkſhire*, and W. Clerk of the Peace there; it was held clearly, that though the *Words of the Statute are* (before the Juſtices of Peace *of the County*) yet it will ſerve before a Juſtice of Peace of the Weſt-Riding, if the Lands lie there. Hob. 128. pl. 163. Hill. 13 Jac. Perkin v. Perkin.

8. *A. leaſed for Years, rendering Rent* half yearly, and afterwards *bargained and ſold the Reverſion by Deed bearing Date before the Rent-Day*, but the *Rent-Day incurred before the Deed was inrolled*; In Debt for this Rent the Bargainee *declared* upon this Deed, and averred, *that it was inrolled within the Six Months, according to the Statute*; Exception was taken to the Declaration, becauſe the Plaintiff did *not ſhew whether the Deed was inrolled before or after the Rent-Day*; but the Court agreed that it is well enough it being pleaded to be according to the Statute; and if it was not inrolled before the Rent was due, that ought to be ſhewn by the Defendant. Lat. 157. Trin. 2 Car. Hall v. Dewe.

9. In *Debt for Rent* the Plaintiff *declared on a Leaſe for Years made by Stranger, who by a certain Indenture Debito modo irrolulat'* in Chancery, *ſold the Reverſion to the Plaintiff*; Upon Nil Debet pleaded, the Plaintiff had a Verdict; but the Judment war arreſted, becauſe he did *not ſet forth that the Inrolment was within Six Months, nor Secundum Formam Statuti*; and though it was ſaid (Debito modo irrotulat') that would not help, becauſe it might be ſo at Common-Law; and Verdict could not make the Declaration good for Want of a Convenient Certainty for the Foundation; and therefore on great Deliberation adjudged againſt the Plaintiff. All. 19. Trin. 23 Car. B. R. King v. Somerland. Sty. 34. S. C. accordingly, and Judgment afterwards againſt the Plaintiff.—— Rent-Charge by Bargain and Sale was pleaded, but did not ſay, that it was Secundum Formam Statuti, nor that there was any Attornment. The Court held this naught, and that the ſaying *Virtute cujus he was ſeiſed*, will not help it. Cart 221. Paſch, 23 Car. 2. C. B. Anon.—— The Reporter ſays, Quære if after a Verdict; For the Caſe there was upon Demurrer. Ibid.

10. A Bargain and Sale *pleaded* of Rent, but *without ſetting forth any Conſideration*, is ill, but upon Iſſue of Non conceſſit, the Want of ſetting Vent. 108. Monnington v. Williams S. C. ad-

judged accordingly. ——Raym. 200. Guilliams v. Mannington, S. C. mentions the Deed as duely inrolled, but it being pleaded by Way of Bargain and Sale, and that by Virtue thereof and of the Statute for transferring of Uſes into Poſſeſſion he was ſeiſed, and yet alleges no Conſideration, not ſo much as Pro quadam Pecuniæ ſumma, it is not good.

ſetting it fort is cured by Verdict; for it ſhall be intended to be proved on the Trial; and Judgment accordingly. Lev. 308, 309. Hill. 22 & 23 Car. 2. B. R. Mannington v. Guillims.

11. Where a Man in pleading *ſets forth his Title by a Conveyance in which are the Words give, grant, releaſe, confirm, bargain, ſell* &c. he muſt expreſs to which of them he will uſe it; Per Twiſden. Vent. 109. Hill. 22 & 23 Car. 2. B. R. in a Note at the End of the Caſe.

12. 10 *Annæ cap.* 18. *S.* 3. *Where in any Declaration, Avowry, Bar, or other Pleading whatſoever, an Indenture of Bargain and Sale enrolled ſhall be pleaded, with a* Profert hic in Curia, *the Perſon ſo pleading it, may produce a* Copy of the Inrolment *of the Bargain and Sale; which being* examined *with the Inrolment* and ſigned with the proper Officer, *and proved on Oath to be a true Copy, ſhall be of the ſame Effect, as if the eriginal Indenture of Bargain and Sale were produced.*

Provided *that this Act ſhall* not give any Benefit in Pleading *or deriving* a Title to any Rent, *which hath* not *been paid, or* levied within Twenty Years next before *the Time of ſuch Pleading or deriving a Title.*

For more of Deeds in General, See **Faits, Inrolment,** And other Proper Titles.

Deer.

(A) How far protected.

1. IF Deer are *killed in an Incloſure* which is *No Park*, the Owner ſhall recover Damages. Kelw. 203. 21 H. 8.

2. If a Deer goes *out of a Park*, though it be in the King's Caſe, yet 'tis lawful for the Owner of the Soil to take it, if it be in the Place where the Deer hath Chaſe and Re-chaſe. Per Cur. Poph. 141. in the Earl of Northumberland's Caſe.

And if a Deer go out of the King's Foreſt into a Man's Land, though the Man ought, or uſed to Pale againſt the Foreſt, yet neither the Foreſter, or any elſe can take them out, for now the King has no Property in them, becauſe they are wild Beaſts. Per Brian. Kelw. 6. Mich. 13 H. 7 —— Owner of Land may Hunt ſuch *Foreſt Deer*, and if the Deer fly to the Foreſt, and the Hounds purſue them, he ought to call in his Dogs, and ſo he may juſtify. Per Doderidge J. Poph. 162. Paſch. 2 Car. B. R.

Deer-Stealing.

(A) Proceedings againſt Deer-Stealers, and Exceptions to Convictions.

1. THE *Method of Proſecution on* 3 *and* 4 *W. and M.* 10. per Holt Ch. J. is thus, viz. The Perſon convicted, if *preſent*, may be detained in Cuſtody two Days, in which Time the Juſtice ought, by Warrants &c. at his Diſcretion to make what Inquiry he can, ſo as to inform and ſatisfy himſelf whether the Penalty may be levied by Diſtreſs; And if he finds there is *nothing to diſtrein*, then he muſt make a Record thereof by way of *Adjudication*, viz. *That it appearing to him that the Party hath not any Goods by which* the Penalty may be levied by Diſtreſs, *therefore in Purſuance of that Statute he doth award him to Priſon* (at the End of two Days, but not before.) If the Perſon is *abſent* when convicted, then the Juſtice muſt make a Warrant to diſtrein; and if there is *Nothing on which a Diſtreſs* may be made, then after two Days he muſt make a Record thereof ut ſupra, and then iſſue out his Warrant of Commitment. Carth. 509. Hill. 11 W. 3. B. R. The King v. Chandler. 12 Mod. 314. 316. Mich. 11 W. 3. S. C. The King v. Chaloner.

2. Information on the Statute of Deer-Stealing. Exception was taken to a *Witneſs*, becauſe he *was Party and Proſecutor*. The Exception was over-ruled. Comb. 35. Mich. 2 Jac. 2 B. R. The King v. Drake. 2 Show. 489. S C. and ſame Exception taken, and to this the Court ſtuck a little, and Ld. Herbert declar'd it unreaſonable that it ſhould be ſo, but here was a particular Law which made the Offence, and creates a Particular Form of Proceeding; And per Wythens, J. the two Juſtices of Peace are ſole Judges of the Credibility of the Witneſſes; and ſo all the Court delivered their Opinions Seriatim & Separatim, that it was well enough; Et ſic non Allocatur.

3. On a Conviction of Deer-Stealing, Exception was taken, 1ſt, That two Juſtices, upon a ſingle Oath, have *convicted* a Man *for breaking and entring a Park, and courſing a Deer*, and impoſing 20 l. Penalty for it; whereas there is no Statute againſt breaking the Park; and the Offence by 13 Car. 2. cap. 10. is Courſing &c. and the Penalty they have impoſed is pro Offenſa præd. generally; But the Exception was diſallow'd, and it was anſwer'd, that the Offence was Hunting the Deer. 2 Show. 490. Mich. 2 Jac. 2. B. R. The King v. Drake.

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only to give a Satisfaction for the Deer ſpoiled; But this Exception was diſallow'd; for by the Words of the Statute, every ſeveral Perſon forfeits 20l. a-piece. 2 Show. 490. King v. Drake.

2 Show. 455. pl. 419. Mich. 1 Jac. 2 S. C. Exception was alſo taken, becauſe the Indictment concluded Contra Formam Statuti, and therefore naught, becauſe there was no Statute againſt breaking the Park, but only againſt Chaſing, Hunting and Killing &c. but the Court, without any Anſwer to the Exceptions, refuſed to quaſh it, and bid them to plead or demur.

6. The Defendant was indicted at a Quarter-Seſſions, for breaking a Park and taking away a Deed *De Bonis & Catallis* &c. 1ſt Exception. Becauſe one cannot have ſuch a Property of a Deer in a Park, as De Bonis & Catallis. 2d, It is *Extitit Præſentatum*, for *exiſtit*. 3d, That *the Price is Quadragint'*. But it was anſwered by the Court. 1ſt, The Offence is, Killing the Deer &c. which is well laid, and De bonis & catallis, is Surpluſage. 2dly, Extitit, or Exiſtit, is good both Ways. 3dly, It is good without any Price. Cites Co. Ent. 362. And the Indictment was confirmed. Comb. 69. Mich. 3 Jac. 2. B. R. The King v. Foot.

7. Three were convicted of Deer-Stealing on the late Act, one on his Confeſſion, and two on Evidence, and the Judgment ſaith, that all *Three* were *Convict de Separalibus offenſis by Confeſſion and Teſtimony*, and held good Reddendo ſingula ſingulis, but for another Exception *(Venatus in Parculum)* the Conviction was quaſh'd. Cumb. 233. Hill. 5 W. & M in B. R. The King v. Moſely.

8. The Defendant was *committed* (upon a Conviction for Deer-Stealing) *for a Year, and till ſuch Time as he ſhould be ſet in the Pillory*; whereas the *Act ſays, for a Year only*, and therefore he was diſcharged. Comb. 305. Mich. 6 W. and M. in B. R. Clark's Caſe.

5 Mod. 321. S. C. It was inſiſted that an Information is no Proſecution and ſo if the Party was not proſecuted within Twelve Months after the Offence committed; But it was was anſwered and ſo ruled, that the Record ſets forth, that the Defendant debito modo ſecundum Formam Statuti convictus fuit, which is well enough —— Carth. 406. S. C. and this Difference was taken, to which the Court agreed, viz. Where Time mentioned in any Statute is expreſſed by the Year, half Year, or Quarter of a Year, it is always computed in Law by Solary Months, (viz.) Twelve Calendar Months for a Year; but where Months are mentioned in a Statute, and not Years, thoſe are always computed by the Moon, (viz.) Four Weeks to the Month; theſorefore this Statute appointing the Proſecution to be within twelve Months after the Fact; and twelve Lunary Months being expired before any Proſecution, for that Reaſon the Conviction was quaſhed.

9. Upon a Conviction for Dear ſtealing; Northey took Exception, that whereas by the Statute the Offender *ought to be proſecuted within Twelve Months*, which muſt be underſtood *Lunar Months*, Here the *Offence was* 14 *Auguſti* 7 *W.* 3. the *Conviction* 13 *Auguſti* 8 W. 3. Indeed it is ſaid, Ipſo P. debito modo proſecut' infra 12 Menſes poſt Offenſ'. The Court ſeemed to allow of the Exception. Holt ſaid, here is a ſpecial Juriſdiction newly ſet up, and not known in Law before, and therefore the Act muſt be ſtrictly purſued, and muſt appear to be ſo, they need not ſet forth every Step of their Proceedings, but ſo much that it may appear to be debito modo in Reſpect of Time &c. for perhaps they might conſtrue Twelve Months to be all one with a Year. Comb. 439. Trin. 9 W. B. R. The King v. Peckham.

10. On a Warrant directed to all Conſtables, it is the ſame as if directed to each particular Conſtable, and *every one is bound to execute it in his particular Juriſdiction*; but if one Conſtable returns, that he has *no Diſtreſs in the County* at large, it is ill. 12 Mod 314. Mich. 11 W. 3. King v. Chaloner.

2 Ld. Raym. Rep. 768. S. C. but ſame Points do not appear.

11. F. was convicted in a ſummary Way on the Statute of Deer-Stealing; to which it was objected, 1ſt, That it did *not appear* on the Record *that the Defendant had* any *Notice to* come and *make his Defence*, Et Citatio eſt de Jure Naturali, that none be convicted without an Oppor-

Opportunity of making Defence; Quod Cur' conceſſit. But this being by Perſons by Law intruſted with the Adminiſtration of Juſtice, we will intend they have proceeded regularly and legally, if the contrary appear not. 2dly, Not ſhewed to be the Offence deſcribed by the Statute; for it is *not ſaid that Deer were uſually kept there for Ten Years before.* Per Cur. If that be *notoriouſly known*, it need not be averred. 3dly, It is ſaid, we killed the Deer *without the Conſent of the Owner on ſuch a Day*; ſo they tie up the Want of Conſent to the Day, and that is ill, for the Conſent might have been given the Day before to kill the Deer the next Day, and then it would be a lawful killing, though in ſtrictneſs without the Owner's Conſent on that Day. But per Cur. a Conſent to Day to kill a Deer any Day for a Month is a Conſent for every Day till it be executed or revoked, which cannot be till Notice. Laſtly, It was *moved to ſtay the affirming the Conviction, becauſe there was an Information for Perjury againſt the Witneſs* on whoſe Oath it was, till that were tried. But nevertheleſs it was confirmed. 12 Mod. 453. Paſch. 13 W. 3. The King v. Ford.

12. Exceptions to a Conviction of Dear-ſtealing, where the *Fact was laid to be done in Foreſta uſitata for keeping Deer, and that the Defendant killed a Deer without Conſent of the Keeper*; and inſiſted that *Uſitat.* might be meant of a long Time before, and there might be the Conſent of the Ranger; ſed non allocatur, for the Leave of the Ranger is the Leave of the Keeper, and (*uſed*) ſpeaks the preſent Time, as well as Time paſt. 1 Salk. 377. pl. 22. Mich. 1 Ann. B. R. The Queen v. Smith. 7 Mod. 77, 78. S. C. and the Conviction was affirmed.

13. In a Conviction of Deer-Stealing, it was agreed. 1ſt, That the Fact in the Conviction need not be laid *Contra Pacem*; for mere Form, or Form or Formality is not required in theſe nor any other ſummary Proceedings, Et per Northey Attorney General, *This is not the King's Proſecution*, (he can have no Fine) but the Proſecution of the Party, and this is the Memorandum of what the Juſtice had done in that Matter. 1 Salk. 378. pl. 23. Mich. 1 Ann. B. R. The King v. Chandler.

14. Secondly, *That inter ſuch a Day, and ſuch a Day he killed three Deer* is good; for if a Day certain were alleged, the Informer is not tied up to that; now in theſe Caſes he is confined to give *Evidence of a killing within theſe Days*, ſo that it is more certain and better for the Defendant. 1 Salk. 378. in S. C.

15. Thirdly, That an *unlawful killing* is ſufficient, and it *need not ſet forth a Hunting, nor how the Deer was killed.* 1 Salk. 378. in S. C.

16. Fourthly, That *ideo conſideratum eſt quod convictus eſt*, without *Et quod forisfaciet*, is ſufficient; for the Statute gives that in conſequence, and the judicial Part ends at the Conviction; the reſt is only Conſequence and Execution. 1 Salk. 378. in S. C.

17. Fifthly, That if the *Owner of the Park dies before Execution*, and the Conviction is affirmed here; his *Executors ſhall have a Levari Facias* (|| ſed videtur, it muſt be *upon Affidavit*, and then the Matter ſuggeſted on the Roll) ſo may the Churchwardens without Suggeſtion or Scire Facias, and ſo may the King. 1 Salk. 378. in S. C. || This in the Parentheſis ſeems to be a Note of the Reporter.

18. A Conviction againſt the Defendant for killing Deer was removed into this Court by Certiorari, and was quaſhed, becauſe it was ſaid only, that he killed Deer in Quodam Loco, where they had been uſually kept, and did not ſay incloſed. 2 Ld. Raym. Rep. 791. Trin. 1 Ann. B. R. The Queen v. Moore.

19. It was moved to quaſh a *Conviction* of Deer-Stealing on 3 & 4 W. & M. taken *by a Juſtice who entered into a Glover's-Houſe, and finding a Deer-Skin*, asked him how he came by it? *the Glover ſaid, he bought it of J. S. who not giving a good Account of himſelf was convicted.* A Conviction which ſaid, that Jennings had Skins in

is Cuſtody, without ſaying, that the Skins were found in his Houſe, is not ſufficient, but was quaſh'd; For his Conviction muſt be taken ſtrictly. MS. Rep. Trin. 7 Ann. Jennings's Caſe.

And the Court held, that the Juſtice might enter and convict the Perſon that ſold it; for the Statute might be eaſily evaded, if the Deer-Stealer could diſcharge himſelf by a Sale. 1 Salk. 383. pl. 33. Trin. 7 Ann. B. C. The Queen v. Jennings.

20. Upon the Statute of 3 & 4 W. & M. the Queſtion was, Whether Juſtices of Peace might *convict the Offender in his Abſence, upon his Default* to appear *after having been duly ſummoned*; and after ſeveral Arguments in ſeveral Terms, the Court held that they might, and the Conviction adjudged good. 10 Mod. 248. Trin. 13 Ann. and 341. Mich. 3 Geo. and ibid. 378. Hill. 3 Geo. B. R. The Queen v. Simpſon.

21. An *Information* granted *againſt Two Juſtices for convicting a Perſon of Deer-Stealing, becauſe he had in his Cuſtody Four Buck-Skins dreſſed into Leather, and made a Third Perſon give Bond for Payment of the Forfeiture*; for Buck-Skins dreſſed into Leather are not within the Statuee any more than a Man's having a Pair of Buff Breeches. They muſt be freſh raw Skins. Paſch. 2 Geo. B. R. The King v. Sadler.

22. *Conviction* upon Deer-Stealing *quaſhed*, becauſe it did not *appear when the Deer was killed*, and the Proſecution muſt be within a Year. MS. Caſes P. 2 Geo. B. R. The King v. Dell.

23. The Defendant was convicted upon the 3 and 4 W. and M. cap. 10. for killing Deer in the Biſhop of Wincheſter's Park; Exception was taken to the Conviction, 1ſt, Becauſe it *ſet forth that J. S. took an Oath to ſay the Truth* concerning the Premiſſes & *ſic Jurat' exiſten' dicit deponit & Jurat*, without ſaying, *Supra Sacrament' ſuum prædictum*, which it was ſaid was neceſſary to make what he ſwore, to appear to be Sworn in purſuance of the Oath, which he took to declare the Truth upon the Premiſes, for *it might be, that what he did Depoſe was in purſuance of an Oath extrajudicially adminiſtred, and ſo the Uncertainty would prevent his being Convicted of Perjury if his Oath was falſe, but diſallowed* per tot. Cur. and it was held, that the Words in the Conviction did ſufficiently ſhew, that what he depoſed was in Purſuance of the Oath aforementioned, and as certain as the Entry of all Verdicts. 2dly, Becauſe it *ſaid, that the Defendant poſt Summonitionem ei debito modo fact' appeared, but did not ſet forth the Day of the Summons, nor that it was to anſwer to that Information*, both which it was ſaid were neceſſary; the firſt that the Court might Judge, whether the Defendant had a reaſonable Time to prepare for his Defence; the ſecond, that the Defendant might know what to anſwer unto; but the Court over-ruled the Exception, and held, that Debito Modo Summonit' was ſufficient, and that it was the Common Form, and that in this Caſe, there was no Need to mention any Summons, becauſe the Defendant appeared, and that it had been often ſo adjudged, and that his Appearance and Defence made the other Part of the Exception wholly Groundleſs. 3dly, Becauſe it *ſaid, that Cauſa Information' præd. & Information' præd. & Evidentia per præd. J. S (who was the Witneſs) audit' & plene Intellect'*, whereby it appeared, that the Cauſe of the Information &c. was heard and underſtood by the Witneſs, *but did not appear that it was heard &c. by the Defendant*; but the Court diſallowed this Exception, and held, that per præd. J. S. referred to Evident' and not to Audit' &c. and that Audit' & Intellect' extended to every one that was preſent and concerned, and that the ſubſequent Words, viz. that the Defendant was ſpoke to by the Juſtice, if he had any Thing to ſay why he ſhould not be convicted of the Premiſſes, ſhewed that he was ſufficiently acquainted with the Matter. N. B. Eyre ſaid, that it would have been better,

better, if inſtead of per præd. J. S. it had been per præd. the Defendant audit' &c. MS. Rep. Trin. 4 Geo. B. R. The King v. Coldham.

24. The Defendants were ſeverally convicted of Deer-Stealing, upon the 3 & 4 W. 3. cap. 10. Two Exceptions were taken to both the Convictions; 1ſt Becauſe *the Perſon, upon whoſe Teſtimonies the Defendants were convicted, appeared to be of the ſame Pariſh where the Facts were committed, and ſo might be intitled to Part of the Penalty*, and conſequently not indifferent and credible Witneſſes. The ſecond, Becauſe the *Judgment was only, that the Defendants ſhould pay* 30*l. whereas it ought to have been for* 30*l. or Impriſonment &c.* but both were over-ruled per tot. Cur. the firſt, becauſe the Juſtice of Peace hath averred them to be credible Witneſſes, and it doth not appear that they were of the Poor of the Pariſh. The ſecond, becauſe the Judgment for 30 l. is to be firſt given, and that this Exception hath been before over-ruled. MS. Rep. Mich. 5 Geo. B. R. The King v. Wilford and Savage.

25. Record of Conviction for Deer-Stealing, was enter'd without any Judgment, as *Ideo forisfaciat*, and therefore quaſh'd. Gibb. 124. pl. 9. Hill. 3 Geo. 2. B. R. The King v. Hawkes.

(B) Execution. How.

1. ON a Conviction for Deer-Stealing, the *Execution* ſhall be by *Fi. Fa.* Carth. 231. Paſch. 4 W. and M. in B. R. The King v. Rogers.

And if the Sheriff return Nulla Bona, then a *Capias* againſt the Body. See 13 Car. 2. cap. 10. Ibid.

2. It was agreed per totam Curiam, that Deer-Stealer *was not to be impriſoned*, but upon *Failure of* Payment and *Diſtreſs*. 12 Mod. 315. in Caſe of King v. Chaloner.

3. If all the Sum were levied to a ſmall Matter, yet the Party for Default thereof ſhall undergo the Corporal Puniſhment too, viz. the Pillory, and a Year's Impriſonment; per tot. Cur. 12 Mod. 330. Mich. 11 W. 3. in Caſe of the King v. Speed.

4. F. and the other Defendants were convicted of Deer-Stealing by Juſtices of Peace, according to the late Act of Parliament; and the *Convictions*, being *removed into B. R. by Certiorari, were there confirmed.* And *after the Confirmation, and before Execution awarded*, the Perſon, who was *as well the Informer as the Owner of the Deer, died*; and his Wife being his Adminiſtratrix, ſuggeſted his Death upon the Roll, and that ſhe was *Adminiſtratrix*, and upon that *ſued a Levari Facias* upon the ſaid Convictions, confirmed as aforeſaid, to levy the Penalties; which were levied accordingly by the Sheriff, and diſtributed as the Statute directs. It was moved, that this Execution ſhould be ſet aſide as irregularly obtained, 1ſt, Becauſe a Levari Facias does not lie. 2dly, Becauſe the Execution ought not to have been ſued by the Adminiſtratrix *without a Scire Facias* &c. But as to the firſt Objection, the whole Court held, that a Levari Facias well lay. But they held, that this Execution was irregular; becauſe in no Caſe where the Parties to the Judgment are changed ought Execution to be ſued by any other without a Scire Facias. Whereupon Reſtitution was granted of the Money levied. 2 Lord Raym. Rep. 768. Paſch. 1 Ann. B. R. The Queen v. Ford, & al'.

5. The

2 Ld. Raym Rep. 989. S. C. and no Mandamus lies.

5. The Defendant was convicted of Deer-Stealing, and a Warrant was awarded to the *Conſtable* to levy &c. He accordingly *diſtrained*, and then came a *Certiorari* to remove the Conviction; and *after the Record removed, the Conſtable ſold the Goods, but would not part with the Money, or return the Warrant.* And the Court held, 1ſt, That the *Conſtable might* well *proceed in the Execution after the Certiorari, becauſe it was begun before*, and the Certiorari no more ſtays it than a Writ of Error of a Judgment in C. B. ſtays the executing of a Fieri Facias already begun to be executed. And in that Caſe, if the Sheriff returns want of Buyers, C. B. may award a Venditioni exponas, notwithſtanding the Writ of Error pending. 2dly, That this *Court* had no Power over the Warrant, being granted before the Certiorari iſſued, and therefore they *refuſed to make a Rule upon the Conſtable to return it*; comparing it to the Caſe of a Writ of Execution delivered &c. before a Writ of Error. *But* they ſaid, *the Juſtices might fine him, if he would not return his Warrant, or deliver over the Money to the Proſecutor.* 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. The Queen v. Nath.

6. One was convicted for Deer-Stealing, and a Warrant was directed to the Defendant to levy the Forfeiture by Diſtreſs, by Virtue whereof he *diſtrained Cattle, and ſold them, but before he paid the Money* to the Proſecutor, *he was informed it was dangerous for him to ſell the Cattle*; whereupon he *reſtored the Money and the Cattle*, and now the Proſecutor moved for a Mandamas, to compel him to pay the Money to him; but it was denied, though inſiſted for him, that he could not charge the Defendant in an Action, without giving the Warrant in Evidence, which he could not do, becauſe it was in the Cuſtody of the Defendant. It was held, that a Copy of the Warrant was good Evidence. 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

2 Ld. Raym Rep 1189. S. C. and Holt, Ch. J. held, that it was not neceſſary to ſet forth the Conviction in the Indictment at large, but only ſhortly, viz. that ſuch an One was before ſuch and ſuch Juſtices convicted Secundum Formam Statuti, & Superinde, a Warrant was iſſued &c.

7. If the Conſtable *levies* the Penalty, but does *not return the Warrant*, he is *indictable*. 11 Mod. 53. pl. 30. Paſch. 4 Ann. B. R. The Queen v. Wiatt.

2 Ld. Raym. Rep. 1195, 1196 S. C. & S P. Per Cur.

8. If a Man is under *three Convictions*, and his *Goods are ſufficient to anſwer two of them*, the Money ſhall be paid, and he ſhall *ſtand in the Pillory for the third*; per Holt Ch. J. 11 Mod. 54. Paſch. 4 Ann. B. R. in Caſe of the Queen v. Wiatt.

2 Ld. Raym. Rep. 1196. S. C & S. P. Per Cur.

9. But *on one Conviction*, if he *wants but 2 s. in the Whole*, the Juſtices cannot take it, but he muſt be impriſoned, and *ſtand in the Pillory for it* afterwards; per Holt Ch. J. in the S. C.

(C) Aiders and Abetters. Who are.

1. UPON a Conviction of Deer-Stealing by Juſtices of Peace on the late Statute, the Queſtion was, Whether *one not preſent*, but procuring, adviſing, and abetting, by *lending his Gun, Dog &c. before the Fact*, ſhould be ſaid to be aiding and abetting therein? Holt Ch. J. inclined, 1ſt, That he was not within the Words, not being actually preſent at the Fact, becauſe the Statute is to be conſtrued ſtrictly, for that it takes away the Privilege of a better Trial viz. per Pares. 2dly, Becauſe

Becauſe it adds a farther Penalty to what was an Offence before; He ſaid, there might be an Aiding and Abetting before the Fact, viz. *by Advice* &c or in the Fact, by being preſent; or *after the Fact, by abetting the Party*, ſays, See Dy. 187. Co. Ent. 56. The other Judges held, that Aiders in the Fact would be Principals, and then Aiders and Abettors would mean nothing, Quod Holt Negavit, ſaying, All that are preſent may be ſaid to be Principals as to an Action of Treſpaſs, but not as to the Penalty of this Statute; And this Diverſity is apparent in other Caſes; for one aiding and aſſiſting upon the Statute of Stabbing, ſhall have his Clergy; whereas a Principal ſhall not; ſo in the Caſe where two went to break a Houſe, one broke it and enter'd, the other ſtood upon the Ladder and received the Goods; he that ſtood upon the Ladder ſhall have his Clergy, and the other ſhall not, he being a Principal. 2 Salk. 542. pl. 1. Mich. 1 Ann. B. R. The Queen v. Naſh.

2. Rolfe and others were convicted of Deer-Stealing upon 3 and 4 W. and M. cap 10. and that Whiſtler was *illicite & injuſte auxilians & aſſiſtens* prætato Rolfe &c. *in illicita & injuſta venatione & occaſione Damæ præd.* viz. *perſuadendo & incitando præfat. Rolfe to kill the ſame Deer, and lending Dogs to hunt and kill, and Horſes to carry away the ſaid Deer, contra Formam Statuti*; and whether this was an Aiding and Aſſiſting within the Statute, was the Queſtion. Powell, Powys and Gould, Juſtices, held that it was; but Holt Ch. J. contra held, That the Conviction ought to be quaſh'd, for that where a Statute makes that Felony, which was not ſo at Common Law, Aiders and Abettors, according to the Notion of the Common Law, are within the Statute, though not expreſſed; but where an Offence at Common Law is only made more penal, Aiders and Abettors are not to be underſtood of ſuch as aid before and after the Fact, but ſuch as are preſent only; Theſe were only Acceſſaries at Common Law, and are not within the Act; and cites 1 Cro. 478. Dal. 11. 22. Poſtea in the ſame Caſe, Holt Ch. J. ſaid, he held the ſame Diverſity with this farther, that this is to be underſtood when an Offence at Common Law is made more penal by a particular Deſcription of the Fact, and not under a general Denomination of the Crime; as if this Statute had enacted theſe Penalties on them, as Treſpaſſers, as 'tis done by the Statute de Malefactoribus in Parcis. 2 Salk. 542. pl. 2. Hill. 1 Ann. B. R. The Queen v. Whiſtler.

7 Mod. 129. to 138. S. C. with the Arguments of the Judges, and adjudged the Conviction good, but Holt, Ch. J. e contra. —— 11 Mod. 25. pl. 3. S. C. argued by the Court, and adjudg'd by three Judges contra Holt Ch. J. that the Defendant was Guilty, within the Statute. —— 2 Ld. Raym. Rep. 842. S. C. with the Arguments of the Judges, and the Conviction was confirmed by the Opinion of three Juſtices, againſt the Opinion of Holt, Ch. J.

For more of Deer-Stealing in General, See the ſeveral Statutes relating thereto.

Default. Appearance.

(A) Appearance.
What ſhall be ſaid an Appearance.

Fol. 580.

1. IF the Tenant or Defendant be in Court, yet if he ſays that he will not appear, this is not any Appearance. * 8 H. 6. 7. b. 8. ‖ 7 H. 6. 38 b. 8 H. 6. 8. adjudged.

* Br. Conuſance, pl. 26. cites S. C. — Fitzh. Default, pl. 2. cites S. C. —— Br. Default, pl. 56. cites S. C.

‖ *Formedon* by J. S againſt H. C. who were at Iſſue, and H. C. was *Priſoner* in B. R. and the Demandant

mandant pray'd *at the Day of the Jury*, that he might be brought in, that he might not take the Advantage of the Impriſonment, becauſe he did not appear, and it was granted him, and he *was brought in by the Marſhal in Ward, and was demanded, and would not appear, and was brought to the Bar, and Babb. demanded of him if he would appear*, who *ſaid No*; Babb. ſaid, Then you ſhall not have Advantage to avoid your Default, and *Petit Cape was awarded*, and the *Demandant pray'd, that all be enter'd, and ſo it was, and pray'd upon his Preſence, that the Inqueſt be taken*, which was denied; for *his Preſence is no Appearance*, and by his Non-appearance, he ſhall be intended another Perſon; and after he was ſent back to Priſon. Br. Default, pl. 33. cites 7 H. 6. 38.——Br. Saver Default, pl. 21. cites S. C. and 8 H. 6. 16 and that the Court ſent him back, and recorded his Preſence, but not his Appearance; But if he had been *Priſoner to the ſame Court*, his Appearance had been recorded; For if the Preſence of the Priſoner is always of Record in that Court to which he is Priſoner, contra if in another Court; but ſays, it ſeems reaſonable, that if he takes Advantage of the Impriſonment, the other ſhall ſhew, that he was preſent at the Bar, and might have appear'd, and would not. And Ibid cites the Opinion of Martin, in Aſſiſe 8 H. 6. 8. at the End, that by this Special Entry made for the Priſoner, that he was preſent, and might have appear'd, and would not, that he ſhall not excuſe his Default after by Impriſonment.——Fitzh. Default, pl. 1. cites S. C.

Br. Default, pl. 36. cites S. C.--Fitzh. Default pl. 2. cites S. C. The Preſence of an *Officer of the Court*, and of *Sheriff upon his Account*, and of *a Priſoner to this Court, is always of Record*, and *upon Bill brought againſt any of them, he ought without Force to anſwer, or he ſhall be condemn'd*, but a Man at large, may choſe to appear, or to make a Default; but *in this Caſe the Defendant had Election; for he was not a Priſoner to this Court, but to another Court*, Quod Nota, a very good Difference. And ſo it ſeems here, that the Defendant may avoid the Default at the Petit Cape, by his Impriſonment. Br. Default, pl. 33. cites 7 H. 6. 38. and 8 H. 6. 16.——Br. Saver Default, pl. 21. cites S. C.

2. As in an Aſſiſe, the Tenant makes Default, and one appears for him as his Bailiff, and the Tenant comes and diſavows him as his Bailiff, this is not any Appearance; for he does not come to appear, but to diſavow the Bailiff. 8 H. 6. 7. b. adjudged.

3. If a Man brings an Action againſt an * Officer of a Court, he ought of Neceſſity to anſwer, otherwiſe he ſhall be condemned; for he is always in Court. 8 H. 6. 16.

4. So of a Sheriff upon his Account. 8 H. 6. 16.

5. So if an Action be brought againſt a Man that is a Priſoner in the ſame Court, he cannot but appear, or ſhall be condemned. 8 H. 6. 16.

* Sid. 134, 135. pl. 8. Paſch. 15 Car. 2. B. R. The King v. Paget. S. P. and that he ſhall not appear by Attorney, nor ſhall any Proceſs iſſue againſt him, but that upon reading the Information [as the Caſe there was] againſt him, the Court will give Judgment againſt him; And Twiſden, J. cited the Book of 7 H. 6. 38. b. where ſuch Proceedings ſeem to be againſt an Attorney of C. B.—— Keb. 487. pl. 27. S. C.

6. But it is otherwiſe of him that is a Priſoner in another Court. 8 H. 6. 16.

7. If a Man comes in by Cepi Corpus to two Writs, and to three other Writs he hath Day by Diſtreſs, he ought to anſwer to thoſe to which he comes in by Cepi. 12 H. 6. 2.

8. So he ought alſo to anſwer to thoſe in which he hath Day by Diſtreſs, for he is in Ward by the Return of Cepi Corpus. 12 H. 6. 2.

9. But if upon the Capias the Sheriff had returned Non eſt inventus, and he had come in gratis, he might have anſwered to the Writ out of which the Capias iſſued, and not have anſwered to the reſt. 16 H. 6. 2.

Hob. 179. pl. 209. S. C.

10. In an Action of Debt againſt Baron and Feme for the Recuſancy of the Feme, the Baron cannot appear by Superſedeas only; for either both ought to appear, or both be out-lawed. Hobert's Reports 24. *Loveden's* Caſe, reſolved per Curiam.

Sty. 226. Elſy v. Mawdit. S. C. adjudged, that the Plaintiff Nil capiat, per Billam, becauſe his Declaration,

11. If an Action be brought againſt an Attorney de B. R. and his Wife, and he declares againſt the Baron, being an Attorney of the Court, in proper Perſon, and againſt the Feme in Cuſtodia Mareſchalli, upon Bail filed for the Feme only, this is not good; becauſe Bail cannot be filed only for the Feme, without Bail for the Husband, and the Baron cannot have his Privilege in this Caſe when the Action is brought againſt him and his Wife. Trin. 1650. between *Morth-*

Morthwaite and Elſy, adjudged, this being moved in Arreſt of Judgment. Mich. 23 Car. B. adjudged accordingly for an Attorney in Bank, between Smith and Smith. is not good againſt her in Cuſtodia.

12. In Mortdanceſtor in Middleſex the *Tenant was eſſoigned and after made Default* by which Bacon awarded a Reſummons againſt the Tenant where the Demandant intended to have the Aſſiſe by Default, which the Tenant made after the Eſſoign; But nota, that *Eſſoign is not any Apsearance*, and ſo Nota Bene. Br. Mordanceſtor, pl. 18. cites 8 Aſſ. 13.

13. In *Aſſiſe* the *Lord of D. demanded Conuſance*, and the *Tenant ſaid, that it is out of his Franchiſe*, and ſo *to Iſſue*; and when the *Aſſiſe came ready to paſs upon this Iſſue*, the *Tenant was demanded and appeared by Bailiff*, and no Appearance by Award; for it is againſt a Stranger to the Aſſiſe; for he may appear and plead againſt the Plaintiff in the Aſſiſe by Bailiff, but not againſt a Stranger as here, and ſo a *good Appearance againſt the Plaintiff*, and *Default againſt the Lord*, Quod Nota. Br. Default. pl. 102. cites 28. Aſſ. 13.

14. In *Præcipe* quod reddat, the *Tenant as to Parcel pleaded Nontenure* and ſo to Iſſue &c. *and to the reſt vouched*, and *Proceſs ſued till the Sequatur, which was not returned*; and *as to the Parcel the Tenant caſt Eſſoign*. Thirn ſaid, the Eſſoign does not lie; for he ought to appear upon the Iſſue; for the Diſtreſs is returned againſt the Jury, and *he cannot appear and be eſſoign'd all at one and the ſame Day upon one entire Original, which is not by ſeveral Præcipes*, by which he made Default. Br. Default, pl. 100. cites 11 H. 4 8.

15. A Man cannot *appear as Tenant and make Default as Tenant all at one and the ſame Day*; *but* he may *appear as Tenant and make Default as Vouchee all at one and the ſame Day*, as it is ſaid elſewhere; for he may eſſoign as Vouchee. Br. Default, pl. 83. cites 11 H. 4. 82.

16. When *Eſſoign is caſt for the Tenant by one Roll, and Appearance entered in another Roll at the ſame Day*, the Appearance ſhall defeat the Eſſoign, Quod Nota. Br. Default, pl. 43 cites 4 H. 6. 6.

17. *A Man may appear and be by Protection all at one and the ſame Day in diverſe Reſpects*, Quod Nota bene. Br. Default, pl. 40. cites 21 H. 6. Br. Protection. 52. cites 21 H. 6. 41. S. C.

18. In *Action Perſonal* if the Defendant *does not appear at the Return of the Original* the Entry of the Filizer is, Et quod *querens obtulit ſe 4to Die againſt the Defendant, Et ipſe non venit ideo capiatur* &c. and ſo at the Alias Cape, and other Proceſs, and yet by the beſt Opinion *this is no Appearance of the Plaintiff to conclude him to deny but that this is his Suit*. Br. Default, pl. 50. cites 27 H. 6. 23.

19. When the *Defendant in Action Perſonal makes Default at the Original by which it is entered, Quod querens obtulit ſe 4to Die* againſt the Defendant, *and has Capias, and ſo at the ſecond Appearance, this is not properly an Appearance of the Plaintiff to the Suit*, and then *without Appearance it cannot be ſaid his Suit*. Br. Eſtoppel, pl. 105. cites 37 H. 6. 22, 23.

20. The Abbot of C. brought *Aſſiſe againſt J. S.* and *had Niſi Prius againſt him the ſame Day in Action Perſonal*, and the *Defendant appeared in Perſon to the Aſſiſe and caſt Protection' Quia moratur to the Niſi Prius*, and did not appear to it and yet good; for in *diverſe Actions a Man may be nonſuited and may appear all at one and the ſame Day*. Br. Default pl. 66. cites 5 E. 4. 3.

21. Where upon any Proceſs the Defendant does appear, although the *Day of Appearance* be *not lawful*, yet he ſhall be put to anſwer. 2 Le. 4. in Savacre's Caſe. cites 9 E. 4. 18. where there are many Caſes to the ſame Purpoſe.

22. The

22. The Abbot of St. A. entered into *Account in the Exchequer by Bailiff*, and *pending the Account L. brought Bill of Debt of* 20*l. againſt him upon Obligation*, and prayed that he ſhould anſwer. Catesby ſaid, he has not yet appeared, Urſewick Ch. B. ſaid, he has *appeared by Bailiff, which is his own Appearance*, and during his Account he ought to anſwer. Quod Nota. Br. Bille, pl. 12. cites 15 E. 4. 28.

23. In *Debt* the *Appearance of the Defendant was recorded for all the Term*, except pro Juratoribus; Brooke ſays, it ſeems that this ſhall not ſerve in another Action purchaſed by another. Br. Default, pl. 103. cites 21 E. 4. 37.

He *ought to plead Prout Patet de Recordo*; For though he appears, yet if his Appearance be not enter'd of Record, he forfeits his Obligation, and he ought to conclude ſo, otherwiſe the Plaintiff cannot have an Anſwer thereto, to ſay, Nul tiel Record; and of that Opinion was all the Court. Cro. E. 466. pl. 16. Hill. 38 Eliz. B R. Corbet v. Cook. ——Le. 90. pl. 114. Mich. 29 & 30 Eliz C. B. Brett v. Shepherd, per Anderſon, Ch. J. if A. is bound to appear in B. R. ſuch a Day, and A. goes *at the Day* to the ſame Court, *but no Proceſs is returned*, he may pray one of the Chief Clerks of the Court to take a Note of his Appearance; and the Prothonotary ſaid, that they have ſuch a certain Form of Entry of ſuch Appearance in ſuch Caſes; And the ſame Law is, where *at the Day of Appearance no Court is holden*, or the Juſtices do not come &c. he ought to have an Appearance recorded, and if the other Party pleads, Nul tiel Record, the Defendant muſt have the Record ready at his Peril; For C. B. in which this Action was brought, cannot write to the Juſtices of B. R. to certify a Record hither ——But per Dyer, in Debt or *Treſpaſs againſt Baron and Feme*, and *at the Capias the Baron appear'd gratis*, he ſhall have Idem Dies, and the Proceſs ſhall Iſſue againſt the Feme; But where the *Baron appears at the Day of the Exigent* return'd, and the Feme is return'd waiv'd, the Baron ſhall go Fine Die, and Capias Utlagatum ſhall iſſue againſt the Wife; Quod Leonard conceſſit. Dal. 38. pl. 7. Anno 4 Eliz.

24. *A. is bound in a Recognizance to appear in C. B. at ſuch a Day*, and *A. is there that Day*; it was moved, that though his Appearance be not recorded, yet he ſhall have *Averment*, and it ſhall be tried per Pais, but this was denied by Bryknell, and Coningsby J. but it was ſaid, that if A. will aver, that he himſelf was impriſoned, he ſhall have a Writ directed to the Gaoler to know the Truth thereof, Keilw. 180. pl. 1. Trin. 8 H. 8. B. R. Anon.

Le. 138, 139. pl. 189. S. C. The Prothonotaries ſaid, that the Court could not prevent the Huſband's doing it, but the Court, who thought it a dangerous Practice, at laſt adviſed thereof, and order'd the Superſedeas to be ſtay'd, without recording the Husband's Appearance. And Antrobus, one of the Attorneys of the Court, ſaid, that it was the Caſe of the Lady Malory and her Husband, in which the Husband brought Superſedeas, and it was not allow'd, but Proceſs continued until Outlawry.

25. *Debt againſt Husband and Wife Executrix* of her former Husband, the *Husband appeared upon the Exigent, and would have put in a Superſedeas for himſelf alone*, without Appearance for the Wife, which at firſt the Juſtices thought he might, but upon a Precedent ſhewed, 18 Eliz. in one **Sommer's Caſe**, who would have put in ſuch Superſedeas for himſelf alone, but was not ſuffered ſo to do, but was compelled to put in Appearance, Attorney and Superſedeas for his Wife alſo; whereupon all the Juſtices held now accordingly; otherwiſe an Exigent Denovo ſhall iſſue out againſt him. Cro. E. 118. pl. 4. Mich. 30 & 31 Eliz. B. R. Bilford v. Fox.

26. W. A. *Priſoner in the Fleet, was brought to C. B. Bar by Habeas Corpus, to* the Intent to *have him appear to an Original in Debt* brought againſt him; and being demanded by Goldesburgh Clark, whether he were the ſame Party againſt whom the Original was brought, confeſſed it, but *denied to appear to the Action*; the whole Court ſaid, this was no Appearance, whereby he was remanded to the Fleet; And the Plaintiff proceeded to the Outlawry againſt him. Goldsb. 118. Hill. 43 Eliz. Aſcough's Caſe.

27. *Condition* for Appearance is not ſaved by *removing the Recognizance by Certiorari*. Yelv. 207. Trin. 9 Jac B. R. Roſs v. Pie.

28. In an Action of Debt upon a *Bond*, being entred into *to the Sheriff, for the Appearance of another here in Court, at a Day certain, at which Day*

Day the Party did not appear, but two Days after he did appear; whereupon it being moved for the Party to have this Appearance now allowed of, and ſo to have a Diſcharge of his Bond, the Court held clearly, that this Appearance, though after the Day, is to be *allowed for a good Appearance*, and to be a ſufficient Diſcharge of the Bond, for that the whole Term is but as one Day in Law; and ſo was allowed of by the Court, and the Appearance was recorded, and the Bond diſcharged. 2 Bulſt. 255. Mich. 12 Jac. Daly v. Fryar.

29. Appearance in *the King's Bench*, is, the Defendant's *filing* either *of Common* Bail *or ſpecial Bail*, *if* the *Action be by Bill*; *but if* it be *by Original*, then the Appearance muſt be *with the Philazer* of the County where the Arreſt was. *But* if the Appearance be *in the Common Pleas*, then it muſt be enter'd with the Philazer there; *But if* it be *by Bill* (which in ſome few Caſes it is) it muſt then be *enter'd with the Prothonotary*. L. P. R. 83.

30. There can be *no* Appearance in B. R. *but* either *by ſpecial or Common Bail*; for it is the putting in of Bail, that attaches the Cauſe in Court. 7 May, 1650. B. S. L. P. R. 84.

31. *Giving Bail to appear* ſhall be taken as an Appearance, ſo that in ſuch Caſe, Judgment being enter'd by *Nihil Dicit*, inſtead of *Defaltam Fecit*, is Erroneous. Per Twiſden, J. Sid. 32. Hill. 12 & 13 Car. 2. B. R. Burgeſs v. Pierce.

Filing Common Bail, is an Appearance upon Record. L. P. R. 85.

32. It is a general Rule that were a Defendant appears *voluntarily* it ſhall be of no Force, unleſs the Plaintiff ſues out his Latitat, or Bill of Middleſex, and within a Fortnight. Cumb. 244. Paſch. 6 W. & M. in B. R. Anon.

33. The *Filing* a Writ *of Habeas Corpus* is not an Appearance, but a *Procedendo* may go notwithſtanding; but if Bail, either Common or Special, be put in, then no Procedendo to go. Per Holt Ch. J. 12 Mod. 215. Mich. 10 W. 4. B. R. Anon.

34. An Appearance *to an Indictment differs from Appearance in a Civil Action*, where if there is once an Appearance, it is an Appearance *to the End of the End of the Suit*; *but* an Appearance *to an Indictment*, *is of Courſe but of that Term*, and then if it be not proſecuted, then the Defendant is out of Court the next Term, and may be outlawed, and the Outlawry is a Conviction while it ſtands unreverſed. 12 Mod. 448. Paſch. 13 W. 3. B R. The King v. Foſter.

35. If before a Writ be taken out, an *Attorney promiſes to appear* to it, and after it is taken out and ſhewed to him he ought to appear, but it is no actual Appearance, but if ſuch Undertaking be after Writ taken out it is an Appearanee. Per Holt Ch. J. 6. Mod. 42. Mich. 2 Ann. B. R. Anon.

36. The *Defendant*, being a *Juſtice of Peace*, *was found Guilty upon an Information for maliciouſly convicting* and impriſoning *the Proſecutor* for ſelling Ale without a Licence, *without ever ſummoning* him, *or admitting him to make any Defence*; and it was *moved that till* the Court ſhould give *Judgment* upon him, *his perſonal Appearance might be diſpenſed with*, *on a Clerk in Court undertaking to appear for him*, and this was inſiſted upon as a Motion of Courſe, which was never denied in any Caſe, where the Puniſhment will probably be only pecuniary, and not corporal. But this was oppoſed, unleſs the Defendant would make an Affidavit of Sickneſs, or other reaſonable Excuſe; the Court were clearly of the ſame Opinion, and ſaid it was by no Means a Motion of Courſe, but merely of Favour and Diſcretionary; that the Court has a Right to demand his Appearance, and whatever the Puniſhment may happen to be, his Publick and Perſonal Attendance in Court is Part of it; it was moved again at another Day, *but denied* very ſtrongly by the whole Court Afterwards the Defendant appeared in Perſon, and was fined 300l. Paſch. 11 Geo. 2 B. R. The King v. Harwood.

(A. 2) Where, upon Coming into Court for another Purpoſe, one ſhall be obliged to Anſwer in the Cauſe in Court.

1. HE *who came by Capias Utlagatum*, was compell'd *to anſwer to an other's Exigent*, which was *at another Suit*, at the Prayer of the Plaintiff in the other Suit. Br. Reſponder. pl. 61. cites 38 E. 3. 25.

2. One was *Prayee in Aid as* a Man who was *within Age*, and *was made to come to be view'd*, and was *adjudged of full Age*, and was not awarded to anſwer, but Proceſs was made againſt him to anſwer, becauſe he did not come to anſwer, but to be view'd; and contra in the Time of R. 2. and that he who is within Age, and Prayee in Aid, and awarded of full Age, ſhall anſwer preſently. Br. Reſponder. pl. 8. cites 2 H. 4. 6.

S P. Per Vamp. Br. Proceſs, pl. 88. cites 14 H. 6. 19, 20. ——S. P. Br. Reſponder, pl. 27. cites 14 H. 6.

3. *Contra of Vouchee*, for he *has no Day in Court to anſwer*, and Concord' of the Vouchee 14 H. 6. For the Vouchee ought to be view'd in Court, and *all the Anſwer lies in the Mouth of the Tenant*, againſt whom &c. as appears 31 E. 3. and P. 21 E. 3. in Cui in Vita. Ibid.

For he comes for other Purpoſe. —— *So Infant who comes in Præcipe Quod Reddat to be viewed*, ſhall not be compelled to anſwer to the Action or Voucher. Br. Reſponder, pl. 58. cites 45 E. 3.

Fol. 581.

(B) *What* ſhall be ſaid *an Appearance*. *In Cuſtodia* Mareſchalli.

Cro. E. 605. pl. 1. S. C. held accordingly. — Roll Rep. 217. pl. 18. Trin. 13 Jac. S. P.

1. THERE ſhall never be a Declaration againſt a Man in Cuſtodia Mareſchalli, but where there is a Committitur made of the Party, or Bail put in for him. Paſ. 40 El. B. R. in *Holland's* Caſe, by Popham.

Cro. E. 605. pl. 1. S C.

2. Upon an Appeal, if the Sheriff returns Cepi Corpus, the Plaintiff cannot declare againſt the Defendant in Cuſtodia Mareſchalli, without declaring againſt him upon the Original, upon which the Cepi Corpus is returned; for there is no Reaſon to commit the Defendant to Priſon, when he is ready to anſwer the Writ upon which he was taken. Paſch. 40 El. B. R. *Holland's* Caſe adjudged.

3. A *Declaration was delivered to one in Cuſtodia Mareſchalli, who immediately remov'd himſelf to the Fleet.* All the Juſtices held, that the Party may proceed againſt him upon the Declaration; and after Judgment ſeem'd that he may remove him into B. R. again by Habeas Corpus. Sid. 100. pl. 3. Hill. 14 and 15 Car. 2. B. R. a Nota.

(B. 2) Notice

(B. 2) Notice of Appearance. How. Good.

1. A Queſtion aroſe *upon the late Act* of Parliament, touching Notice to be given upon the Copy of Proceſs, *Whether the Day to be expreſſed* in the Notice *muſt be the Eſſoin-Day, or the Appearance-Day?* In this Caſe Notice was given for the Appearance-Day, which the Court held to be good. This Motion was after Judgment; but the Merits not having been tried, a Rule was made to ſhew Cauſe why the Judgment ſhould not be ſet aſide upon Payment of Coſts, but no Cauſe was ever ſhewn. Notes in C. B. 202. Paſch. 6 G. 2. Alſop v. Bagott.

2. A Queſtion did ariſe, Whether the *Day to be inſerted* in the Engliſh Notice *to appear* upon Proceſs purſuant to the late Act of Parliament, *ſhould be the Eſſoin-Day* of the Return, *or the Quarto die poſt*. Court held, that it muſt be the Eſſoin-Day, which in this Court is the Return-Day, and not the Quarto die poſt, which is only a Day of Grace. Notes in C. B. 204. Trin. 6. and 7 Geo. 2. Alſop v. Nichols; cites Dyer 269. pl. 21. Co. Litt. 135. Finch 427. Carth. 172. Sid. 229. Salk. 626. pl. 8. Harvey and Broad, pl. 9. Davis and Salter.

3. Upon hearing Counſel on both Sides, and after taking Time to conſider, the Court were of Opinion, that a *Notice to appear on Monday January* 21, *as the Return-Day of Octab' Hill.* was bad; it ought to have been to appear on the 20th, which, although it be *Sunday, is the true Day* of the Return. Notes in C. B. 206. Hill. 7 G. 2. Green v. Watkins.

(C) *Who* are *demandable.*

1. IF an Attorney of the Common-Pleas ſues an Action there, he ſhall not be demanded, becauſe he is ſuppoſed always preſent aiding the Court. 20 H. 6. 44. b. Fitzh. Jour. pl. 33. cites S. C. & S. P. Per Brown and Newton, though Newton before held e contra.

2. An *Information* was exhibited *againſt the Cuſtos Brevium of B. R.* for Abuſes and Miſdemeanors committed in his Office. He at firſt refuſed to appear in Perſon, but offered to appear by Attorney; but the Court were of Opinion, that he *cannot appear by Attorney*, in as much as he was an Officer of the Court, and preſumed to be always preſent. Sid. 134. Paſch. 15 Car. 2. B. R. The King v. Paget.

(D) *At what Time* the Parties are *demandable.*

1. IN an Action of Debt, after a Demurrer upon the Plea in Bar, the Plaintiff is demandable. 20 H. 6. 44. b. Fitzh. Jour. pl 33 cites S. C.——

After Demurrer joined, if the Court gives a Day over, the Plaintiff or Demandant is demandable at that Day, and therefore may be Nonſuit. Co. Litt. 139. b. (o) and in Marg. cites 9 H. 5. 5. and 8 R. 2. Nonſuit 34.

2. If

2. If the Biſhop certifies a Man to be a Baſtard or Mulier, he is not demandable, but Judgment ſhall be given. 20 H. 6. 44. b.

3. Where the *Second Deliverance is not ſerved*, the Defendant ſhall not compel the Plaintiff to count againſt him, though he has Day by the Roll. Br. Jours, pl. 25. cites 21 E. 3. 43.

Br. Journes, pl. 17. cites S. C.—Br. Brief, pl. 291 cites S. C.

4. *In Formedon* the *Tenant may appear at the firſt Day*, and may abate this Writ, and *a New Writ may be brought bearing Date meſne between the firſt Day and the fourth Day*, and for this it ſhall not abate. Br. Jours, pl. 33. cites 24 E. 3. 24.

5. The *Tenant is not bound to appear at the firſt Day unleſs in Writ of Right after the Miſe joined.* Br. Journes, pl. 17 cites 24 E. 3 24.

6. In *Debt againſt Executors*, they were *at Iſſue*, and the *Court roſe and were going to their Houſes after the Inqueſt charged and ſent together*, and after *they were warned that the Inqueſt was ready to give their Verdict, by which they came back and would not demand the Plaintiff*, becauſe the Court was riſen; but took their Verdict in Eaſe of the Jury, ſo that they might take Meat and Drink and go to Bed, who *found for the Defendant, and the Juſtices charged them* to remain together at their Eaſe, and *to come back the next Day*, when the Court is ſitting, and give their Verdict again, Quod Nota, and *then the Plaintiff ſhall be demanded, and may be nonſuited.* Br. Verdict pl. 9. cites 2 H. 4. 21. 22.

Br. Jours, pl 62 cites S. C.

7. In *Formedon* the *Demandant is demandable the firſt Day, and* if he does not come, and no Eſſoign be caſt for him, the *Default ſhall be recorded the firſt Day*, and Judgment ſhall be given upon this the fourth Day after. Br. Default, pl. 23. cites 12 H. 4. per Hank.

8. *But* the *Tenant has no Occaſion to appear before the fourth Day*, and the Entry is Obtulit ſe quarto Die &c. Ibid.

9. In *Account* the Plaintiff ſhall *not* be demanded to be nonſuited *at the firſt Day*, nor till the fourth Day. Per Hank clearly. Br. Jours, pl. 63. cites 14 H. 4. 19.

10. *Contra in Writ of Right*, as appears elſewhere. Ibid.

Default in Writ of Right at the firſt Day, is peremptory. Br. Jours, pl. 86. cites Fitzh. Droit 27.

Br. Jours pl. 40. cites S. C.

11. In *Aſſiſe*, if Day is given to the Parties by *Adjornment to Weſtminſter* 15 *Paſchæ*, the Parties ſhall not be demanded till *the 4th Day.* Br. Demand, pl. 12. cites 1 H. 6. 4.

12. *But* where Day is given *Die Lunæ, or Die Martis* &c. they ſhall be demanded *the very Day*, quod Nota. Ibid.

Where the *Imparlance* is *General, both Parties* ought always to attend the Court, and *are demandable at the Pleaſure of the Court*; *But* it is otherwiſe where the Imparlance is *to a certain Day*; For in ſuch Caſe the Parties are *not demandable till the Day*. Jenk. 81. pl. 58. ad finem.

13. Where a Man *imparles to no Day certain*, there *his Appearance is of Record at every Day all the Term*, ſo that he cannot be nonſuited in this Term; and ſo ſee that there is no Diverſity where he imparles the ſame Day, whether he imparles to No Day certain, and whether he imparles to any Day certain, be it in this Term, or in another Term; for *where any Day certain is given, he is demandable, contra where no Day certain is given.* Br. Departure in Deſpite, pl. 1. 3 H. 6. 14.

14. In *Writ of Right* the Party is demandable at the firſt Day, and Eſſoign lies at the firſt Day, therefore the Sheriff cannot ſerve the Writ after it; but the Fourth Day is for Appearance, and this by the Curteſy of the Law; Per Priſot; but the Entry is Quod querens obtulit ſe 4to Die againſt the Defendant, Et ipſe non Venit. Br. Jours, pl. 7. cites 33 H. 6. 42.

15. *And* per Lakon, he who is bound to appear, his *Appearance ſhall not be recorded nor accepted till the Fourth Day* &c. Ibid.

16. *Audita Querela upon a Releaſe made after Judgment in Treſpaſs*, and *Ve. Fa. iſſued againſt him who releaſed*, and the *Sheriff did not return the*

the Writ, and the *Defendant prayed that the Plaintiff be demanded*, Et non allocatur; becauſe the Writ is not returned ſerved notwithſtanding he has Day in Court. Br. Jours, pl. 51. cites 6 E. 4. 9.

17. *At the Grand Cape, or Petit Cape returned*, the Tenant is demandable, Per tot. Cur. and becauſe he was not demanded Tenant he brought Writ of Error thereof upon the Recovery by Default. Br. Demand, pl. pl. 11. cites 21 H. 7. 31.

18. At Common Law upon every Continuance, or Day given over before Judgment, the Plaintiff might have been nonſuited, and therefore *before the Stat.* 2 *H.* 4 [*cap.* 7.] *after Verdict given, if the Court gave a Day to be adviſed, the Plaintiff was demandable* at that Day, and therefore might have been nonſuit which is now remedied by the Statute. Co. Litt. 139. b. See tit. Nonſuit, (D) and (E) per totum.

19. The *Difference* as to the Demand is thus, (viz.) that the *Defendant or Tenant* is not demandable, but *upon the Quarto Die Poſt*, but the *Plaintiff* may be demanded *Primo Die Placiti*, and for Non-Appearance may be Nonſuited. Per Holt Ch. J. Carth. 173. Hill. 2 & 3 W. & M. in B. R. in Caſe of Clobery v. The Biſhop of Exon.

20. Where *Apperance of Bail* is not put in according to the *Paper Act* in Eight Days we muſt examine the Matter in Court and make a Record and give Judgment; It is a Queſtion, whether *Bail* muſt be *filed* within Eight Days after the Writ returned, or after it is returnable; Per Holt Cumb. 326. Trin. 7 W. 3. B. R. Smith v. Butler and Ux.

21. An *Order* was made in Chancery *that the Defendant ſhould appear Gratis at the Hearing*; this implies that he ſhould not pray Day over. Per Lord C. King. 2 Wms's Rep. 368. Trin. 1726. Jervoiſe v. O'Carrol.

(D. 2) Plaintiff Demandable. In what Caſes.

1. A Man was *out-law'd by Name of J. S. Husbandman, and came by Capias Utlagatum, and ſaid, that at the Day of the Writ purchas'd he was Hoſtler*, and *not Husbandman*, by which Scire Facias iſſued againſt the Plaintiff, who came and maintain'd the Writ, and they were at Iſſue, and per Cur. the Plaintiff is not demandable; for his Suit is determin'd by the Out-lawry, and he cannot be nonſuited, nor can he declare upon the Original; Contra in Scire Facias upon Charter of Pardon after Out-lawry; for there the Original is reviv'd, and he may declare, and the other ſhall anſwer, and there the Plaintiff may recover, or be barr'd, as the Iſſue is found. Br. Demand, pl. 55. cites 21 H. 6. 50. S. C. Br. Scire Facias, pl. 193 accordingly, and if the Iſſue be found for the Plaintiff, nothing ſhall be done but to award the Defendant to the Fleet; and if found againſt him, then the Award ſhall be, that the Plaintiff take nothing by his Writ.

2. In *Debt*, they were *at Iſſue upon Specialty non eſt Factum*, and *Jury charged*, and upon this the *Defendant confeſſed the Deed*, and ſhewed Matter in Conſcience of Damages; by which the Inqueſt was charged upon the Damages and Coſts, and came back; and therefore at this Day the Plaintiff ſhall not be demanded; for he ſhall not be nonſuited; for becauſe he has confeſs'd the Iſſue, therefore the Jury *is now only an Inqueſt of Office*, at which there ſhall not be any Party demanded. Br. Jours, pl. 55. cites 16 E. 4. 1. Br. Enqueſt, pl. 44 cites S. C.

(E) To what Appearance.
[At what Time the Parties may appear and plead, in Reſpect of the Action.]

See tit. Continuance (B) pl. 2. S. C. and the Notes there.

1. IN Replevin, **if the** Proceſs continues till a Pluries **iſſues out of Chancery, and the** Sheriff thereupon returns **in Bank,** that the Defendant claims Property, **though by this Writ no Day is expreſsly given to the Parties, but to the Sheriff only, to excuſe his Contempt for not ſerving the Proceſs before, yet** upon the Return of this Writ, the Parties may appear and plead, **ſcilicet, the Plaintiff may declare, and the Defendant plead thereto; and this will not be erroneous,** for there is no other Writ to be ſued after this Writ, **and therefore if the Parties cannot plead thereto, they would be at great Miſchief. Trin. 38 El. B. R. between** *Gawen and Ludlow*, **adjudged. Quære. D. 8 El. 246. 67.**

2. So **if this Caſe,** if the Pluries be returned Tres Michaelis, and nothing is done **in Term, nor** till Eaſter after, **yet at this Term** the Parties may appear and plead **if they will. Trin. 38 El. B. R. between** *Gawen and Ludlow*, **adjudged.**

(E 2) Appearance. Aided by it; What. Defects in Meſne Proceſs &c.

1. *WAST in Suſſex*, the *Proceſs was continued in Eſſex*, and becauſe it was well continued by the Record, and now the Defendant is ready in Court, the Proceſs was awarded good. Br. Diſcontinuance de Proceſs, pl. 15. cites 38 E. 3. 20.

2. In a *baſe Court* the Summons was *ita quod ſit coram Sectatoribus* and in the Roll this Word *(coram)* was wanting, and the *Tenant appeared and pleaded*, and loſt, and for this Cauſe brought of Falſe Judgment, Et non allocotur; for when he appears by the Summons he ſhall not take Advantage to ſay he was not well ſummoned. Br. Summons, pl. 22. cites 46. E. 3. 30.

3. *So* if he be *eſſoigned*; for all this affirms the Summons. Ibid.

4. *Executors ſued Execution of Damages recovered by their Teſtator*, the *Defendant alleged Acquittance of the Teſtator*, and *Writ iſſued againſt the Executors to anſwer to it* returnable Oct. Hill. and the *Sheriff returned that he warned them, and they did not come*, by which the Defendant went quit. Br. Peremptory, pl. 64 cites 47 E. 3. 24.

4. If a Man *comes by one Writ, where he ought to come by another*, yet he ſhall anſwer. Br. Reſponder, pl. 12. cites 12 H. 4. Per Hank.

Br. Proceſs pl 47 cites S. C.

6. *Quare Impedit againſt a Patron and Incumbent, who appeared at the Diſtreſs*, and *ſaid, that the Pone is not ſerved againſt the Incumbent, and prayed new Pone*, Et non Allocatur, but were awarded to anſwer becauſe they appear'd; and ſo it ſeems that a *Miſcontinuance of Proceſs* is not material where the Parties appear, ſo that Judgment is upon their Plea, or at Appearance, and not upon their Default. But otherwiſe it ſeems of *Diſ-*

Diſcontinuance of Proceſs. Br. Diſcontinuance de Proceſs, pl. 14. cites 9 H. 5. 3. and ſays that ſo it ſeems Br. Ibid. pl. 1. which cites 3 H. 6. 3.

7. Default *after Imparlance in Action Real or Perſonal on the Part of the Defendant, Tenant, or Vouchee*, is peremptory, and in the one Caſe the Plaintiff ſhall recover his *Debt and Damages*, and in the other, the Demandant ſhall recover *Seiſin of the Land*, without Petit Cape being awarded, quod nota. Br. Peremptory, pl. 27. cites 38 H. 6. 33 & 39. H. 16. 17.

8. *Scire Facias* out of a *Fine* was *returned Tarde*, and the *Plaintiff brought other Scire Facias returnable 15 Mich. which was not a Common Day*, but too late; and per Moile and Chocke, when the Party appears this is no matter. Br. Jours, pl. 36. cites 9 E. 4. 18.

And where it is uſed to have 15 Days between the Teſte and the Return, yet, if he has only 11 Days, if he appears it is good, and he ſhall be compelled to anſwer; and ſo it was by Award; Quod Nota. Ibid.

Where *ill Proceſs* is awarded, and the Tenant appears, he ſhall be compell'd to anſwer, per Needham. Br. Proceſs, pl. 81. cits 9 E 4. 18.

And per Danby and others, *upon ill Day awarded*, and he appears, he ſhall anſwer. Ibid.

9. Note, per Moile, if the *Proceſs* be *miſcontinued*, yet if the Party appears he ſhall anſwer. Br. Reſponder, pl. 47. cites 9 E. 4. 18.

10. And in *Aſſiſe* if the *Tenant be not attached Fifteen Days* before the Day of Aſſiſe he ſhall not anſwer. Ibid.

11. *And in other Actions*, if there are not Fifteen Days between the Teſte of the Writ and the Day of the Return, the Defendant ſhall not be compelled to anſwer. Per Chocke. Br. Reſponder, pl. 47. cites 9 E. 4. 18.

12. *But* in thoſe Caſes it ſeems, that *he ought to plead this Exception.* Ibid.

13. And per Needham, if *Diſtreſs iſſues by Pone, or Capias, where it ſhould be Pluries Capias*, and the Party appears, he ſhall be compelled to anſwer. Br. Reſponder, pl. 47. cites 9 E. 4. 18. Br. Jours, pl. 36 S. P. cites S. C.

14. *But if he has Day, which he ought not to have by the Law*, he ſhall not be compelled to anſwer; Note the Diverſity. Ibid.

15. Miſcontinuance of Proceſs (as where *one Proceſs is awarded for another, or miſ-returned)* may well be aided by Appearance of the Parties; *But Diſcontinuance in Appeal of Murder* is not. Cro. J. 283. pl. 4. Trin. 9. Jac. B. R. in Caſe of Bradley v. Banks.

16. The Error aſſigned in a Judgment in Aſſumpſit was, that the Defendant was ſued by the Name of Sir Francis Forteſcue, *Knight of the Bath* only, when he *was both Knight of the Bath and Baronet*; but becauſe he appeared to that Name and pleaded, the Judgment was affirmed. Cro. J. 482. pl. 15. Paſch. 16 Jac. B. R. Sir Francis Forteſcue v. Markham. Jenk. 335. pl. 73. S. C.

17. Where *Judgment is given by Default upon a Proceſs*, and there was no Appearance, the Proceſs ought to be according to Law. *But* where it given *Verdict or Default after the Party has appeared and pleaded*, there a Miſcontinuance will not hurt at the Common Law; for the Defendant ſlipped his Advantage when he appeared and pleaded. Jenk. 57. pl. 5.

18. At this Day, if *Judgment* be given *by Default*, *a Diſcontinuance*, or *Miſcontinuance before appearance* is not aided, but ſuch Judgment is reverſible. A miſcontinuance is, where the Continuance is made by undue Proceſs; a Diſcontinuance is, where no Continuance is made at all. Jenk. 57. pl. 5.

19. *Wrong* Proceſs, as a Summons inſtead of a Scire Facias, or a Capias inſtead of a Venire Facias, is *cured by Appearance* for upon Defendant's Appearance, the Proceſs is at an End. Jenk. 57. pl. 5.

In Falſe Impriſonment the Defendant juſtified by Capias on a Suit commenced againſt the Plaintiff in an Inferior Court. Plaintiff demurred, becauſe it was not ſhewn that a Summons was iſſued firſt, and Inferior Courts can award no Capias, but on a Summons firſt return'd. Per Hale Ch. J. A Fault in the Proceſs is aided by Appearance &c. yet falſe

False Imprisonment lies here on it, and the Officer cannot justify here as upon Process out of the Courts of Westminster. Vent. 120. Trin. 24 Car. 2. B. R. Read v. Wilmot.

Appearance aids *Error in Process* where a Capias issues without an Attachment in an Inferior Court. 2 Ld. Raym. Rep. 1544. Mich. 2 Geo. 2. Blenkinson v. Iles.

Cro. J. 311. pl. 10. Mich. 10 Jac. B. R. Lovelace v. Jeniper. S.C.

20. *Debt* was brought *for* 40 *l.* At the Pluries Capias, an *Entry* was made *upon the Roll* of the Process *Quod Quer' obtulit se in Placito debiti* 40 *s.* At the Exigent, the Defendant appears and confesses the Action; the Plaintiff has Judgment upon it, The said Appearance takes away all Discontinuance and bad Process before it; and the said Words 40 *s.* in the obtulit se, is superfluous. Judgment affirmed in Error. Jenk. 341. pl. 99.

Denied Hill. 11. Geo. 2. in Case of the King v. Haddock.

21. It was affirmed by Keeling J. that the Law is, and hath been adjudged, that *ill Addition, or no Addition*, is cured by the Appearance of the Party. Sid. 247. pl. 11. Pasch. 17 Car. 2. B. R. in Case of the King v. Warren.

22. Though one do *appear in Court upon* the *Return of the Writ issued* forth against him, yet he doth *not admit the Writ to be good* by such his Appearance; for he cannot have Oyer of the Writ until the Party hath declared against him (Hill. 22 Car. 1. B. R.) for he is arrested upon a Warrant made by the Sheriff upon the Receipt of the Writ, and doth not see the Writ. And the Law will not presume any Person to admit a Thing, which he knows not what it is, and may be prejudicial to him to admit it. L. P. R. 83.

23. If one *appear by a Name, which is not in Truth his Right Name*, and thereupon the Plaintiff declares against him by that Name, he shall be estopped, after to say that he is not right Name (20 Oct. 1650. B. S.) for he shall not be suffered to take Advantage of his own Wrong to prejudice another thereby. L. P. R. 85.

24. Where the *first Process in an Inferior Court* is a *Capias*, (which ought not to be) it is salved by an Appearance. Lutw. 954. Because the Defendant hath by his Appearance admitted the Process by which he is brought into Court to be legal. L. P. R. 85.

Cro. J. 108. pl. 4. Hill. 3 Jac. B R. Pratt v. Dixon.

25. Error *in Exeter Court.* The Error assigned was, that there was *no Summons*; and for that cited 2 Cro. 108. which was said to be the same Case with this. But, per Curiam, it was held to be well enough; for by Appearance all Defaults before are salved, though it be in an Inferior Court; and so Wylde said, it had of late been constantly ruled, contrary to 2 Cro. 108. Freem. Rep. 468. pl. 642. Trin. 1678. Wheeler v. ———

Ld. Raym. Rep. 20. S C. & S. P accordingly.

26. Exception was taken to a *Return*, because it was said, *Corpus præfat' &c. parat' habeo &c. ubicunque*, the which is uncertain, and not according to the Form of the Return; for though the *Writ* be, *that he should have the Body in the King's Bench Ubicunque*, because it is uncertain, where the Court shall be at the Day of the Return, yet when the Day is come, he ought to *return the Body into Court*, which then is in a Place certain, and not to say he had the Body Ubicunque, the which the Court said was a *Blunder*, but it is aided by the Appearance. Skin. 444. Trin. 6 W. & M. in B. R. Wilson v. Law.

Ld. Raym. Rep. 21. S. C. & S. P. by Eyre J. but when the Party comes and demurs on the Process, Judges gave no Opinion.

27. If the *Writ and Return* had been ill, the Appearance had aided it, if the *Party appears and pleads*; but if he *appears and takes Exception* for a Defect in the Writ and Return, such Defect is not aided by Appearance; but if he *pleads over* he waves the Advantage of such Exception, and he was ruled to proceed to Trial. Per Eyres J. Skin. 554. Mich. 6 W. & M. in B. R. Wilson v. Law.

this Appearance will not aid any Defects in the Process; But as to this, the other

28. A *Writ of Error* was *executed the ſame Day with the Return of the Pone*, and ſo might be before any Pone iſſued out. And Judgment was reverſed for this Error, for no Appearance can help that. 12 Mod 524 Trin. 13 W. 3. B. R. Bidolph v. Veal.

29. *Sci. Fa. upon a Fine wanted* the due Number of *Days*, *becauſe the Teſte and Return*, and that Writ did partake of the Nature of a Real Action, yet if Party appeared and pleaded to it, it made it good. Per Holt Ch. J. 12 Mod. 452. Paſch. 13 W. 3. B. R. in Caſe of Wilmot v. Tiler.

30. *So* if *Writ of Covenant to levy a Fine wants* Fifteen Days between the Teſte and Return, yet if Party appear, and Fine be levied it is good. This indeed has been after queſtioned by ſome Judges, but was adjudged to be a ſtated Doctrine, and needs no new Settlement; for if the Defendant appears and anſwers without taking Advantage of this Fault of the Writ, as if it were in Aſſiſe, and he not attached Fifteen Days before, the Fault of the Writ is thereby cured. Per Holt Ch. J. 12 Mod. 452. In Caſe of Wilmot v. Tiler.

31. *Irregularity of the Delivery of a Declaration* is made good by Appearance. Per Cur. Ld. Raym. Rep. 706. Mich. 13 W. 3. Walgrave v. Taylor.

32. Appearance, and the Party being heard, ſupplies *Want of Summons* in Summary Proceedings. 2 Salk. 428. Mich. 8 W. 3. B. R. The King v. the Mayor &c. of Wilton. 1 Salk. 383. pl. 34. Mich. 9 Ann. B. R. in Caſe of the Queen v. Barret. S. P.——5 Mod. 257. S. C.

33. Defendant moved to ſtay the Proceedings, the Proceſs not having been *ſerved* upon him, but *upon another Perſon*, it was inſiſted by Plaintiff that an Appearance being now entered, the Defendant was in Court, and the Miſtake was cured. But per Cur. The *Appearance* is *entered by the Plaintiff*, according to the Statute, and *by no Means cures the Miſtake*. Barnes's Notes in C. B. 291. Trin. 8 & 9 Geo. 2. Weſtall v. Finch.

(F) Appearance. At what *Time*.

In what Caſes a Man [or Corporation, pl. 8.] *may appear* where the *Proceſs* is *not ſerved*. [Or where it is not returned, or returned Nihil, pl. 7. 9. 12. 13.] Fol. 582.

Where an *Inheritance* is *to be loſt*, *or other Thing*.

1. WHERE a Man is to loſe an Inheritance if he does not appear, he ſhall appear without a Return of the Sheriff gratis by the Day in the Roll. 10 H. 7. 11. b. Br. Jours. pl. 93. cites S. C.

2. As in a Sequatur ſub Periculo againſt a Vouchee, he may appear at the Day of the Return, though no Writ be returned, for that otherwiſe he ſhould loſe in Value. * 22 Ed. 3. 4. adjudged. 7 b. adjudged. 29 Ed. 3. 40. b. 2 Ed. 3. 40. * Fitzh. Voucher, pl. 135. cites S. C. —— Br. Jours, pl. 93. cites 10 H 7. 11. S. P. —— S. P though it be return'd Tarde, for the Miſchief of the Tenant. Br. Averment, contra &c. pl. 21. cites 11 E 4 9. —— *But* where upon *Warrantia Chartæ*, Nihil is return'd, and he appears, he ſhall not be receiv'd. Br. Averment, contra &c. pl. 21. cites 11 E. 4. 9. —— *So* upon *Summons ad Warrantizandum*, and ſo Alias, Pluries. Br. Averment contra &c. pl. cites 11 E. 4. 9.

* Br. Default, pl. 49. cites S. C. the Plaintiff could not be receiv'd to appear Gratis by the Roll, becauſe the Writ was not ſerved, and ſo he was forced to procure another Writ to warn himſelf; Quod Nota, & ſic fecit.

3. If the Defendant be out-lawed in Debt, and after hath a Charter of Pardon, and ſues a Scire Facias againſt the Plaintiff if the Writ be not returned, the Plaintiff cannot appear by the Roll, for he is to loſe nothing. * 39 Ed. 3. 7. b. Contra, † 27 Ed. 3. 77.

† Fitzh. Reſponder, pl. 85. cites S. C.

Fitzh. Reſponder, pl. 85. cites S. C. ——Br. Jours, pl. 48. cites 3 H. 7. 8. S. P.

4. But if the Writ be returned tarde, the Plaintiff may appear. 27 Ed. 3. 77.

* Br. Jours, pl. 93. cites S. C.—— Br. Default, pl. 64 cites 3 H. 7 8. S. P.——Br. Jours, pl. 48. cites 3 H. 7. 8 S. P.

5. When a Man is to have a Corporal Pain if he appears not, he may appear without the Return of the Sheriff gratis by the Day in the Roll. * 10 H. 7. 11. b. Curia. 39 Ed. 3. 7. b.

6. In Treſpaſs, if after the Exigent is iſſued, the Defendant renders himſelf, and hath a Superſedeas; though the Sheriff does not return the Exigent at the Day, yet he may appear by the Roll. 38 Edw. 3. 20. b. adjudged.

Br Averment contra &c. pl. 11. cites S. C. That he had a Day in Court by the Roll, and therefore was receiv'd. Per Cur. Quod Nota.

7. In a Scire Facias againſt a Garniſhee, if the Sheriff returns Nihil &c. and ſo upon the Alias, the Garniſhee cannot appear gratis by the Day in the Roll, becauſe he is not to have Corporal Puniſhment. Contra, 8 H. 6. 16.

In *Detinue* the *Defendant pray'd Garniſhment*, and had it, and the *Sheriff return'd Nihil*, and *Sicut Alias iſſued*, and the *Sheriff return'd Nihil again*, and the *Garniſhee* came and *pray'd, that the Plaintiff might declare againſt him*, and was received; For *he had Day by Roll*, and ſo appear'd contrary to the Return of the Sheriff, Quod Nota. Br. Default, pl. 37 cites 8 H. 6. 16.

8. In a Quod Permittat againſt a Bailiff and Commonalty, if at the Return of the Grand Diſtreſs no Writ is returned, the Bailiff cannot appear gratis by the Day in the Roll without the Commonalty (for they are but one Corporation.) 29 Ed. 3. 40. b. adjudged.

9. In an Audita Querela, if the Defendant be returned Nihil per quod poteſt Summoniri, yet he may appear gratis. 21 Ed. 3. 13. b. adjudged.

Br. Debt, pl. 109. S. P. cites 9 E. 4. 23.

10. In a Writ of Debt, if no Original be returned, nor any Return made, yet the Defendant may appear by the Roll. 29 Ed. 3. 18.

11. But he cannot compel the Plaintiff to count againſt him, becauſe perhaps there is no Original. 29 Ed. 3. 18.

S. P. Per Littleton. Br. Averment, contra &c. pl 21. cites 11 E 4 9.

12. In a Writ of Debt, if the Sheriff returns the Original Nihil &c. yet the Defendant may appear for fear of the Capias. H. 10 Ja. B. R. between Dame *Dame Slaney and Vawtry*, adjudged.

If *in Debt* or *Treſpaſs* the Sheriff returns the Capias Nihil, and the Defendant comes ready to plead, he ſhall be receiv'd, and the Reaſon ſeems to be, that in this Caſe there is Corporal Puniſhment. Br Averment, contra &c. pl. 6 cites 48 E. 3. 1.

But where there is no Corporal Puniſhment, nor the Party is at no Miſchief, he ſhall not be receiv'd to plead upon a Return of Nihil. Br. Averment, contra &c pl 6. cites 48 E. 3. 1.

For in Præcipe quod reddat, if the *Tenant Vouches*, the Vouchee may appear, and plead at the firſt Day. But *if he be return'd Nihil upon the Summons*, he ſhall not be receiv'd till the Sequatur; For then is the Land to be loſt, therefore *at the Sequatur he ſhall be receiv'd.* Br. Averment, contra &c. pl. 6. cites 48 E. 3. 1.

13. [So] **If the Sheriff returns** mandavi Ballivo Libertatis, qui Nihil inde fecit, **yet the Defendant may appear gratis.** 27 Ed. 3. 78. Br. Averment, contra &c. pl. 34. cites S C. and Fitzh. Proceſs, 15. But Brooke ſays, it does not appear there what Proceſs he made, which was ſo return'd.

14. Executors brought *Scire Facias* againſt the Defendant *for Damages recovered by the Grandfather of the Teſtator*, and the *Sheriff returned Nihil*, by which the *Plaintiff had Execution*, and the *Defendant brought Audita Querela upon a Releaſe of the Teſtator*, upon which Venire Facias iſſued againſt the Executor, which Writ was not ſerv'd, and yet the Executors came ready to plead, and were receiv'd by Award, notwithſtanding that the Writ was not ſerv'd. Br. Averment contra &c. pl. 25. cites 21 E. 3. 13.

15. In *Debt* the *Defendant was out-law'd, and had Charter of Pardon*, and *Scire Facias againſt the Plaintiff*, which *was not return'd*, and the *Plaintiff appear'd and pray'd that the Defendant be demanded, inaſmuch as the Plaintiff has Day by Roll* & non Allocatur, inaſmuch as the Proceſs was not ſerv'd; Contra, where the Party is to have *Corporal Puniſhment* or Dureſs, by which the Plaintiff, by Advice of the Court, ſued Scire Facias to have himſelf warn'd, ſo that he might appear. Br. Averment contra &c. pl. 26. cites 39 E. 3. 7.

16. In *Treſpaſs* the *Sheriff return'd* Quod *cepit Corpus, and had him not at the Day*, by which, upon Change of the Sheriff, iſſued *Diſtringas quondam Vicecom. ad habend. Corpus againſt the Old Sheriff*, and he amerc'd, and the New Sheriff return'd Quod Diſtrixit quondam Vicecom. but had not the Body; and per Thorp the Defendant may appear and plead, notwithſtanding the Return. Br. Averment contra &c. pl. 33. cites 44 E. 3. 2.

17. In *Second Deliverance*, the *Sheriff return'd No Writ*, but the *Defendant* appear'd, and *pray'd that the Plaintiff count againſt him, or that he might have Return irrepleviſable*, and could not have it, but Sicut Alias, and yet he had Day by the Roll. And ſo it ſeems that a Man ſhall not be received contrary to the Return of the Sheriff, nor where the Sheriff does not return, unleſs in Caſe *where he is to be at a Loſs, or to have Corporal Pain.* Br. Averment contra &c. pl. 28. cites 49 E. 3. 2.

18. In *Præcipe* quod reddat, the *Tenant vouch'd*, and *Proceſs continued* againſt the Vouchee *till the Sequatur*, which *Writ was not ſerv'd*, and the *Tenant ſaid that the Vouchee died between the iſſuing of the Writ of Sequatur, and the Day of the Return, and pray'd that he might re-vouch.* Br. Averment contra &c. pl. 27. cites 14 H. 6. 7. And the ſame Year, fol. 19. the better Opinion of the Juſtices was, that he ſhall have the Plea.

19. *So where* the *Tenant vouches, and the Summons and Grand Cape be return'd ſerv'd, and the Vouchee does not come*, the *Tenant may ſay that the Vouchee is dead*; for if Judgment be given againſt a dead Perſon, it is Error; for at thoſe times the *Land is to be loſt.* Br. Averment contra &c. pl. 27. cites 14 H. 6. 7. 19.

20. *So at the Second Return of Nihil upon Scire Facias upon Charter of Pardon after Outlawry*, he may appear gratis, otherwiſe the Charter ſhall be allow'd without Anſwer. Br. Averment contra &c. pl. 27. cites 14 H. 6. 7. 19.

21. In Replevin at the Pluries the Sheriff return'd Quod *Averia Elongata* ſunt, and *Withernam was awarded of the Goods of the Defendant* for the Plaintiff *returnable* 15 *Mich.* and the *Sheriff return'd tarde*, and the *Defendant came* and was ready, *and pray'd that the Plaintiff ſhould count againſt him.* And the beſt Opinion was, that becauſe *no Pledges de Proſequendo & de returno habendo* ſi &c. *are found*, and alſo the Writ is not ſerv'd, therefore *it is in a Manner contrary to the Return of the Sheriff.* And per Ardern

Ardern and Danby he cannot appear; for without Return of the Sheriff, it cannot appear to the Court if he be the ſame Perſon or not, and eſpecially as here, where *he is not to have Corporal Puniſhment.* But where Capias or Exigent is awarded, he may appear, by reaſon of avoiding Corporal Puniſhment. But where * *Iſſues are to be loſt*, and the Writ is not ſerved, there he cannot appear; and alſo he || cannot appear before Pledges are found; for in Debt if the Defendant be return'd Summonitus eſt, and no Pledges return'd, the Defendant ſhall not be put to anſwer, nor the Plaintiff ſhall not be demanded; for he cannot be nonſuited before Pledges found, Quod tota Curia conceſſit. And he who is vouch'd may enter into the Warranty the firſt Day, but if Proceſs be awarded which is not ſerved, he cannot enter gratis; and Newton agreed that he ſhall not anſwer as here. Br. Averment contra &c. pl. 12. cites 22 H. 6. 20.

* Br. Default, pl. 41. S. P. and cites S. C.

|| Br. Pledges, pl. 32. cites S. C.

22. In *Debt* at the Capias the *Sheriff return'd Cepi Corpus, & Languidus in Priſona* &c. by which *iſſued Duces tecum*, and the *Sheriff did not return the Writ*, but the *Defendant appear'd and pray'd that the Plaintiff count*, and it was greatly debated, if he might appear before the Writ came in; and the beſt Opinion was, that becauſe the *Plaintiff did not deny but that he who appeared is the ſame Perſon*, that therefore he ought to declare, notwithſtanding that he ſhall be intended to be in Ward of the Sheriff by the firſt Return; for it may ſtand with that that he was then in Priſon & Languidus, and now At large and Sound, and therefore the Plaintiff declar'd, and the Defendant pray'd to be by Attorney, and the Court advis'd. Br. Default, pl. 67. cites 5 E. 4. 69.

23. In *Audita Querela Venire Facias iſſued* againſt the Defendant, and the *Sheriff did not return the Writ*, and the *Defendant* came gratis and *pray'd that the Plaintiff be demanded* & non Allocatur, becauſe the Writ is not returned ſerv'd, and he is not to have Corporal Pain. Br. Averment contra &c. pl. 30. cites 6 E. 4. 9.

Br. Jours, pl. 81. cites S. C.

Br. Reſponder, pl. 52. cites S. C.

24. *Replevin ſicut Pluries*, the *Sheriff return'd that the Plaintiff was Eſloign'd, ſo that he could not have the View*; for it was in Homine Replegiando, and *no Day was given to the Defendant*, but to the Sheriff to know &c. and per tot. Cur. the Appearance is good for the *Miſchief of Withernam*; for when the Sheriff returns Elongata, and if the Defendant has not appear'd, Capias in Withernam ſhall be awarded, *by which he ſhall be impriſoned*; by which it was awarded that the Plaintiff recover his Damages, and ſo the Appearance of the Defendant good at the Day of the Return of the Eſloignment, Quod Nota. Br. Default, pl. 71. cites 7 E. 4. 5.

25. *Scire Facias upon Annuity recover'd*, the Sheriff *return'd* Quod *nihil habet nec eſt inventus*, the *Defendant* came and *ſaid that he had reſign'd before the Writ purchas'd to the Ordinary at D. and ſo Not Parſon*; and per Cur. the Defendant may plead this, though he has no Day in Court by Return of the Sheriff; becauſe the Defendant is at a *Miſchief*; for upon the firſt Scire Facias return'd upon a Recovery, the Plaintiff ſhall have Execution; for he who recovers ſhall have Favour, and the ſame at the Capias & Exigent; *But becauſe he is not Parſon, nor warn'd as Parſon*, J. B. Rector de D. *therefore no Miſchief*; for the Execution ſhall iſſue only againſt the Parſon. Br. Scire Facias, pl. 178. cites 8 E. 4. 15. 19.

26. *But* in Scire Facias *upon Charter of Pardon*, there *ſhall be two Nihils return'd* before that the Charter ſhall be allow'd, if the Plaintiff does not appear before. Br. Scire Facias, pl. 178. cites 8 E. 4. 15. 19.

27. Where a Man is *bound to appear upon Writ at a certain Day*, it is no Plea that the Writ is not returned; for he may have Special Entry of his Appearance; but it is a good Plea that the Bailiff to whom he is bound kept him in Priſon till the Day of his Appearance; for he ſhall not

not gain a Forfeiture by his own Act. Br. Dette, pl. 109. cites 9 E. 4. 23.

28. A Man *appeared by Capias Utlag. and pleaded the laſt Term, and had Day to* 15 *Mich.* and *came at Octab. Mich.* and *prayed that his Appearance be recorded for all the Term*, and Townſend would not before the Day, but Brian and Catesby [bid them] record it. Conisby ſaid, it has been done between Party and Party, but not where the King is Party as here. Per Townſend, in Appeal he ought to appear at every Day, and ſhall not have his Appearance recorded as here, but per Conisby the contrary has been done, where he is a poor Man. Br. Default pl. 63. cites 1 H. 7. 27.

29. In *Error* the *Scire Facias againſt the Defendant was returned Nihil*, and *Sicut alias iſſued*, the Defendant was not received to appear Gratis. Br. Default, pl. 64. cites 3 H. 7. 8. S. P. though he has Day by the Roll, becauſe he is not to have Corporal Pain. Br. Jours, pl. 48. cites S. C.

30. *Contra upon Capias or Diſtreſs, where Corporal Puniſhment is to be had, or Iſſues to be loſt*, and *the ſame in Scire Facias upon Charter of Pardon*, as upon this Scire Facias. Br. Default pl. 64. cites 3 H. 7. 8. Br. Jours, pl. 48. cites S. C.

31. *So* where the Sheriff *returns Tarde or embezils the Writ*; for it was ſaid that he *has Day by the Roll*, Et non Allocatur here. Ibid. Br. Jours, pl. 48. cites S. C.—— Br. Averment contra &c. pl. 32. cites S. C.

32. *Scire Facias upon Writ of Error*, the *Sheriff returned Nihil*, the *Defendant* came and *prayed that the Plaintiff ſhould aſſign the Errors*, Et non allocatur, inaſmuch as the Writ is not returned ſerved, and yet he has Day by the Roll. Br. Averment contra &c. pl. 32. cites 3 H. 7. 8.

33. *But*, per Cur. where the Sheriff returns *upon Capias* Quod *non eſt inventus*, the Defendant may appear and plead; for otherwiſe he ſhall have *Corporal Puniſhment* by Arreſt by other Capias, Per Cur. Br. Averment contra &c. pl. 32. cites 3. H. 7. 8.

34. *So upon Diſtreſs in Salvation of the Iſſues*; for this is a Loſs, Quod Nota, Per Cur. by which Sicut Alias iſſued. Br. Averment contra &c. pl. 32. cites 3 H. 7. 8.

35. Where a Man has *Day by the Roll ad reſpondendum*, he *may appear as well upon the Roll, as upon the Writ*; but when it is *Ad Satisfaciendum* he ſhall never be received to render himſelf to Priſon, unleſs the Writ be returned, viz. Cepi Corpus, or Capias ad Satisfaciendum, or Reddidit ſe upon exigent; Per Mordaunt. Kelw. 166. b. pl. 3. Hill. 5 H. 8.

36. Upon a *Capias* againſt A. the *Sheriff returns him Sick*, ſo that he cannot have his Body at the Day without the Danger of his Death; upon *Affidavit that A. is grown Well* a *Duces Tecum*, Subpœna of a certain Sum of Money ſhall be *awarded* to the Sheriff, *to have his Body in Court* at a certain Day. Jenk. 94. pl. 82.

37. In *Debt*, *Treſpaſs*, or other Perſonal Action againſt A. upon the *Summons or Attachment*, the Sheriff returns, *Non eſt inventus & Nihil habet* in his Bailiwick; at the Day of this Return A. cannot appear. Jenk. 94. pl. 82. & 122. pl. 47.

38. *But upon a Capias* againſt him to impriſon his Body, or upon a *Proceſs, upon which Iſſues are to be loſt, or Land* to be loſt, or his *Life brought into Danger* he may appear, although ſuch a Return, as above, were made by the Sheriff; for he has a Day in Court by the Roll, and his Non-Appearance would be of great Prejudice to him. Jenk. 94. pl. 82. & 122. pl. 47.

39. In an *Appeal* againſt A. *for* the *Death* of a Man, he Sheriff *returns*, that *the Writ came too late to* him; A. may appear and plead notwithſtanding this Return. Jenk. 94. pl. 82. & 122. pl. 47.

40. Whenever a *Writ returnable* is awarded, the Return Day is a Day to both Parties to appear, and though the Writ be returned not ſerved, the *Defendant may appear to prevent any Ill Conſequence*, *as* to prevent a *Capias*, 5 E. 4. 69. So here to ſave himſelf on a *Withernam*, Reſpond. 57. [52] 7 E. 4. 5. Upon a *Diſtringas Proximas Villas &c.* the Defendants *have no Day*, yet they may appear and traverſe. In a Common *Replevin* the Original *gives no Day*, for this is *Vicontiel*, and ſo is the Alias, but the Pluries is returnable in B. R. and though there is no Summons nor Attachment in the Writ, yet the *Day of the Return is a Day to the Parties* and the Entry is Attachiatus eſt ad Reſpondend' de Placito quare cepit &c. and the Reaſon is becauſe though in Truth there was not actually an Attachment, yet virtually and in Conſequence of Law it is ſo, he being bound upon Peril of a Withernam. 2 Salk. 583. pl. 3. Mich. 12 W. 3. B. R. Moor v. Watts.

41. By the ancient Rule of Court, there could not be a voluntary Appearance *without a Writ* was taken out, but even now there muſt be a Writ *taken out before or after*; for withont a Writ the Parties have no Day in Court, without which they cannot appear; and he ſees no *Difference between a Voluntary Appearance and one upon a Cepi Corpus*, for ſure the Plaintiff ought not to be put in a worſe Condition for his Kindneſs in not arreſting the Defendant. If a Writ be returnable Craſt' Animar' and a voluntary Appearance to it, it will be the ſame, as if it were upon a Cepi Corpns. Per Holt Ch. J. 12 Mod. 404. Trin. 12 W. 3. B. R. Anon.

(G) In what Caſes a Man ſhall be *compelled to appear* [*and anſwer*] *where* the *Proceſs is not ſerved.*

1. IF a Man ſues Execution upon a Statute, and the Conuſor ſues an Audita Querela upon the Acquittance of the Conuſee returnable immediately, which is not ſerved, and the Conuſee comes and prays Execution, he ſhall be put to anſwer to the Acquittance upon this Writ, for he hath Day by the Roll, though the Writ is not ſerved. 30 E. 3. 21. b. adjudged.

2. A. is *condemned in Treſpaſs* at the Suit of B. and is *outlaw'd upon the Judgment*, *and* is *in Execution upon a Cap. Utl. B. releaſes* to A. *all Executions*; A. upon this Releaſe brings an *Audita Querela*, upon this a *Venire Facias* againſt B. B. can't appear, for he is not to loſe his Liberty, or Iſſues, or Freehold; an Alias Venire Facias iſſues, and is ſerved and returned; B. appears, and pleads the ſaid Outlawry againſt A. and 'tis a good Plea; for the Audita Querela is only to defeat the Execution, and not to reverſe the Judgment as Error would do ex directo, and an Attaint ex conſequenti. Jenk. 126. pl. 55.

(G. 2) Ap-

(G. 2) Appearance. Neceſſary to what Purpoſes. Or, What cannot be done without Appearance.

1. IN *Informations* and *Indictments*, no *Judgment* can be given, unleſs the Defendant appears. Per Eyre J. 10 Mod. 250. Hill. 3 Geo. 1. B. R. in Caſe of the Queen v. Simpſon.

2. *But* Judgment of *Outlawry* may, becauſe of his Contempt for not appearing. Ut ſup.

3. *Conviction of Deer-Stealers* may be without their appearing, ſo that they be ſummoned, and make Default. 10 Mod. 378. Hill. 3 Geo. 1. B. R. The Queen v. Simpſon.

4. *Corruption of Blood*, and *Forfeiture of Eſtate*, may be by *Outlawry for Treaſon or Felony*; for the Law interprets Abſence in ſuch Caſe as a ſufficient Evidence of Guilt. 10 Mod. 379. Hill. 3 Geo. 1. B. R. in the Caſe of the Queen v. Simpſon.

5. In *Real Actions* the ſecond Default is final and concluſive, and the Court, without regarding the Merits of the Cauſe, will give Judgment that Defendant ſhall loſe the Land. 10 Mod. 379. in Caſe of the Queen v. Simpſon.

(H) In what Caſes the *Husband* ſhall be *obliged to appear for his Wife.*

See tit. Baron & Feme, (I. a) (K. a) Fol. 583.

1. IN an Action againſt Baron and Feme in B. R if the Baron appears upon the Exigent, he ſhall remain in Priſon till he puts in Bail for his Wife. Hill. 37 El. B. R. by Popham.

2. As in an Action of Debt againſt Baron and Feme, for the Debt of the Feme, if the Baron be taken by Capias or Exigent, he ſhall remain in Priſon till he hath put in Bail for his Feme. Hill. 37 El. B. R. by the Clerks this is the Common Courſe.

3. But in an Action againſt Baron and Feme in B. if the Baron comes upon the Capias or Exigent, he ſhall not be compelled to put in Bail for his Wife. Hill. 37 El. B. R.

4. If the Baron appears upon the Original in B. R. where it is againſt him and his Feme, he ought to put in Bail for his Wife. Hill. 37 El. B. R.

5. In an Action of Debt againſt Baron and Feme in B. R. upon the Statute of of Recuſants, for the Recuſancy of the Feme, the Baron, who is in Cuſtodia Mareſchalli, ſhall remain in Priſon till he hath put in Bail as well for his Wife as for himſelf. H. 37 El. B. R. adjudged, the Caſe of *Philpot and Young*, and their Wives. Cro. E. 370. pl. 9. Philpot's Caſe. S. C. ſays, this Court uſed not to let the Baron to Bail, but to continue him in Priſon for the Contempt of the Feme, until the Feme comes in, and therefore Bail was refuſed; Cites 8 H. 4 6. 21 H. 6. 4 —— Cro. J. 445. in pl. 23. Mich. 15 Jac. B. R. the S. P. Obiter ſaid, that this had been the Cuſtom.

6. But it is in the Election of the Court whether they will compel him to give Bail for his Wife or not, for all Bails are in the Diſcretion Cro. E. 370. pl. 9. S. C. & S. P. ac-

cordingly. ——Cro. J. 445. in pl. 3. S. P. Obiter.

cretion of the Court. Hill. 37 El. B. R. *Philpot and Young*, and their Wives.

This is imperfect.

7. In an Action of Debt brought againſt Baron and Feme in Banco, if the Baron appears, and the Feme makes Default——

In ſuch Caſe there cannot be any Declaration, and therefore in regard the Plaintiff cannot declare, the Baron being return'd Non

8. If Proceſs iſſues out of B. R. ſcilicet, a Latitat againſt Baron and Feme, and the Feme is arreſted, but not the Baron, the Baron in this Caſe ſhall not be compelled by the Courſe of the Court to appear for himſelf and his Wife, the Baron not being arreſted. Mich. 10 Car. B. R. between *Story and Smith*, per Curiam, and Clerks; but they ſaid, That if the Baron had been arreſted, and not the Feme, the Baron ſhould have been compelled to appear for himſelf and his Wife.

eſt inventus; the Feme was diſmiſſed. Cro. J. 445. pl. 23. Mich. 15 Jac. B. R. Anon. ——Mod. 8. pl. 24. Mich 21. Car. B. R. Twiſden J. cites S. C. and ſays, it is to be underſtood, that he ſhall be diſcharged upon Common Bail; and Liveſay ſaid, that ſo the Courſe was.

9. In *Debt* at the Capias the Sheriff return'd Quod *cepit Corpus*, and that he is *Languidus in Priſona*, and yet the Defendant was received to appear; for he *has Day by the Roll, and pray'd that the Plaintiff be demanded*, and ſo he was, and becauſe he did not come, therefore he was nonſuited, Quod Nota. Br. Retorn de Briefs, pl. 102. cites 3 H. 6. 3.

10. *And* at the *Capias in Treſpaſs againſt the Baron and Feme*, the Sheriff *return'd the Baron Non eſt inventus, and that he had taken the Feme, who was in Ward*, and *Protection was caſt for the Baron, and* was *allow'd*, and yet he had no Day by the Return of the Sheriff, Quod Nota. Brooke ſays, the Reaſon ſeems to be inaſmuch as he is to have *Corporal Puniſhment* upon Capias. Ibid.

(H. 2) Appearance. Againſt Return of the Sheriff.

Br. Averment contra &c. pl. 8. cites S. C.

1. IN *Treſpaſs* at the *Capias* the *Sheriff returned Non eſt inventus*, yet the *Defendant may appear at the ſame Day by Attorney, or in proper Perſon, at his Pleaſure.* Br. Jours, pl. 20. cites 3 H. 4. 2.

Br. Averment contra &c. pl. 8. cites S. C.

2. *But* it is ſaid that *after Exigent awarded*, he can't appear by Attorney, but *firſt in Perſon.* Br. Jours, pl. 20. cites 3 H. 4. 2.

Br. Jours. pl. 2. cites S. C ——Br. Averment contra &c. pl. 2. cites S. C.

3. In *Debt*, at the Capias the Sheriff return'd, Quod *cepit Corpus* & quod eſt *languid' in Priſona*, and yet the Defendant was received to appear; for *he has Day by the Roll, and pray'd that the Plaintiff be demanded*, and ſo he was, and becauſe he did not come, therefore he was nonſuited, Quod Nota. Br. Retorne de Brief, pl. 102. cites 3 H. 6. 3.

S. P. For though he has no Day by the Return of the Sheriff, yet he has Day by the Roll.

4. *And* at the *Capias in Treſpaſs againſt the Baron and Feme*, the Sheriff *return'd the Baron Non eſt inventus, & quod Cepit the Feme, who was in Ward*, and *Protection was caſt for the Baron, and* was *allowed*, and yet he had no Day by Return of the Sheriff, Quod Nota. Brook ſays, the Reaſon ſeems to be inaſmuch as he is to have *Corporal Puniſhment* upon Capias. Ibid.

Br. Jours pl. 2. cites S. C.——Br. Averment contra &c. pl. 2. cites S. C.

5. Defendants

5. Defendants plead in Bar to the Action, but do not appear and plead *Nec in propria Perſona Nec per* any Attorney but only thus, Et prædicti A. and B. per C. Attornatum ſuum Vim & Injuriam quando &c. and therefore Judgment per Quer. 2 Lutw. 1386. Trin. 4 Jac. 2. Gardiner v. Peyton.

(I) *Departure in Deſpite* of the Court. In *what* Caſes it *is*.

1. **If the Defendant or Tenant** imparl to another Day in the ſame Term, **and** makes Default at the Day, **this is a Departure in Deſpite of the Court.** 9 H. 6. 58. b. Br. Departure in Deſpite &c. pl. 2. cites S. C.——

Cro. J. 293. pl. 12. Mich. 9 Jac. B. R. in Caſe of Lilbourn v. Heron. S. P.——Bulſt. 161. S. P. in S. C.

2. [So] **If a Man imparls** till another Term, **if he makes Default at the Day of Appearance, this is a Departure in Deſpite of the Court.** 9 H. 6. 39. b. 41. b. Br. Bill, pl. 6. cites 7 H. 6. 41.——

3. But if the Court gives Day **to the Defendant** * till another Term, **if the Defendant makes Default at this Day, this is no Departure in Deſpite of the Court, for he departed by Leave of the Court.** Br. Continuances &c. pl. 22. cites S. C.

If a Man *appears and ſays nothing*, the *Plaintiff ſhall recover for want of Anſwer*, and if *he appears and make Default Term*, he ſhall be Condemn'd; For this is a Departure in Deſpight. Per Vampage. *in the ſame* pl. Default, pl. 34. cites 7 H. 6. 39. 41.

In Debt the *Defendant pleaded Releaſe*, the *Plaintiff deny'd it*, and the *Defendant made Default*; *and at another Day the Plaintiff recover'd his Debt, becauſe the Defendant did not maintain his Plea*; And it was ſaid, that this was no Departure in Deſpite of the Court; For *they had Day over*. Br. Default, pl. 24. cites 14 H. 4. 2.

* Cro. J. 293. pl. 12. the Court ſeemed to incline to that Opinion.

4. **In a** Real Action **if the** Tenant vouch, **and the** Demandant has Leave to imparl upon the Voucher, **and returns, and the** Tenant is demanded, **if he** makes Default, **this is a Departure in Deſpite of the Court.** 38 E. 3. 13. b.

5. In *Treſpaſs* the *Defendant appear'd and pleaded*, and *after Plea pleaded Departed in Deſpite*, and therefore *Writ of Inquiry of Damages was awarded*, and after the *Plaintiff releas'd the Departure*, and the *Defendant pleaded Not Guilty*. Br. Departure, pl. 4. cites 9. H. 5. 15.

6. Note, that Departure in Deſpite *is always of the Part of the Tenant or Defendant, when his Appearanee is of Record the ſame Day*, and *Retraxit is of Part of the Demandant or Tenant, or Plaintiff, when his Appearance is of Record the ſame Day, and upon this he ſhall be Barr'd, and of the Part of the Tenant or Defendant he ſhall be Condemn'd*. Br. Departure in Deſpite, pl. 1. cites 3 H. 6. 14.

7. But Ibid. ſays, that Note that it appears 9 H. 5. 5. and 3 H. 4. 2. that *where the Defendant appears and imparles the ſame Day*, as he may well, there *he is not Demandable*, and *therefore if he makes Default when the Defendant comes back and pleads Bar, or tenders his Law, the Plaintiff ſhall be barr'd, and ſhall not be ſuffer'd to be Nonſuited*; For *this is a Retraxit*, becauſe it is all One and the Same Day.

8. *But if he imparles till another Day*, be it *in the ſame Term or in another Term*, and notwithſtanding that it be to the next Day in the ſame

Term, there *he is Demandable*, and if *he makes Default he ſhall be Non-ſuited*, notwithſtanding it be all in one and the ſame Term; Note the Diverſity, where the Imparlance is all in one and the ſame Day, as in the Caſe of a Common Recovery, and where it is till another Day in the ſame Term. Br. Departure in Deſpite &c. pl. 1. cites 9 H. 5. 5. and 3 H. 4. 2.

9. *So* it ſeems *of the Part of the Defendant, Tenant, or Vouchee to Warranty*; for in a Common Recovery for Aſſurance of Land, the Vouchee imparles and is demanded again the ſame Day and makes Default, and therefore Judgment is given againſt the Tenant, and he to have over in Value. Br. Departure pl. 1. cites 9 H. 5. 5. & 3 H. 4. 2.

10. *Or if he had imparl'd till another Day, and had made Default* Petit Cape ad Valentiam ſhould Iſſue; Nota inde bene. Ibid.

11. A Departure in deſpite of the Court *is on the Part of the Tenant*, and is *when the Tenant* or Defendant *after Appearance*, and being preſent in Court, upon demand *makes departure* in deſpite of the Court; and then the Entry is, Et prædict' tenens ſeu defendens licet ſolemniter exactus, non revenit, ſed in contemptum Curiæ receſſit, & defaltam fecit, ideo &c. Co. Litt. 139. a.

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(K) *What* ſhall be ſaid a *Departure in Deſpite of the Court.*

Fitzh. Retraxit, pl. 9 cites S. C.

1. If at the Return of a Capias ad Valentiam the Vouchee makes Default, and the Attorney of the Tenant is eſſoined, and the Demandant prays Seiſin of the Land, and after the Attorney of the Tenant appears, and prays that the Eſſoin be drawn, which is done, and preſently he departs from the Bar, and then the Tenant is demanded, and no Body anſwers for him, yet this is not any Departure in Deſpite of the Court, though the Preſence of the Attorney be recorded, for he did not appear upon any Demand of the Demandant, and when he appeared, the Demandant ſaid nothing againſt him. 22 Ed. 3. 2. b. adjudged.

2. In *Præcipe quod reddat*, they were *at Iſſue* and the Parties appeared, and the *Inqueſt was ſworn*, and when the *Inqueſt came back to give their Verdict* the *Demandant appeared*, and the *Tenant made Default*, *by which the Demandant prayed Judgment upon the Departure*, and had it immediately, Quod Nota. Br. Departure in Deſpite, pl. 14. cites Itin. Derb. Tempore E. 3.

3. In *Quare Impedit*, if the *Defendant makes Default after Appearance*, the *Plaintiff ſhall recover immediately his Preſentation and his Damages*; *Contra if he has Day by Continuance and after makes Default*, there the Plaintiff ſhall have only Diſtreſs, as appears H. 6. R. 2. Br. Departure in Deſpite, pl. 11. cites 2 H. 4. 1.

4. In *Debt* the *Plaintiff appeared and declared*, and thereupon the *Defendant tendered to perform his Law immediately*, by which the *Plaintiff departed from the Bar to be nonſuited without Leave of the Court*, and therefore Rikhil *awarded, that the Defendant ſhould perform his Law*, but if he had imparled to the Law, he might have been nonſuited. Br. Departure in Deſpite, pl. 10. cites 3 H. 4. 2 & 3 H. 6. 14. accordingly.

5. In *Replevin*, the *Defendant juſtified the taking by Tenure of his Maſter*, and the *Plaintiff pleaded Jointenancy in the Land* &c. and *Day was given over in the ſame Term*, and the *Defendant made Default*, by which the *Plaintiff recovered 4 l. taxed by the Court*, and it was ſaid that this was no Departure becauſe they had Day over &c. ſcil. it was no Departure

Departure in Deſpite of the Court, and therefore it ſeems that it *is no Departure in Deſpite of the Court unleſs where they appear and have Imparlance to no Day certain, but are demanded immediately again the ſame Term, or the ſame Day*, and the Tenant or Defendant makes Default, this is a Departure in Deſpite &c. and ſo it appears in the Common Recoveries for Aſſurances. Br. Departure in Deſpite, pl. 3. cites 14 H. 4. 2.

6. If a Man *appears and has Day over in the ſame Term*, or *is demanded after without Day in the ſame Term and does not appear*, but makes Default, this is a Departure in Deſpite, quod nota, and ſo is the Experience in the Common Recoveries for Aſſurance of Lands and Tenements, where he imparles to no Day certain, and makes Default in the ſame Term. Br. Departure in Deſpite, pl. 6. cites 27 H. 6. 39. 41.

(K. 2) Departure in Deſpight of the Court. In what Caſes Judgment ſhall be given thereon.

1. IN *Præcipe in Capite* the *Tenant vouch'd*, and the *Demandant imparled, and came back the ſame Term*, and the *Tenant made Default*, and upon this Departure in Deſpite the Demandant recover'd Seiſin of the Land. Br. Departure in Deſpite, pl. 5. cites 38 E. 3. 13.

2. In *Præcipe quod* reddat the *Tenant appeared*, and *pleaded Bar*, and the *Demandant reply'd*, and the *Tenant was demanded at another Day in the ſame Term to have rejoin'd and made Default*, this is a Departure in Deſpight of the Court, therefore Seiſin of the Land ſhall be awarded, and not Petit Cape; contra it is ſaid elſewhere, if it was in another Term. Br. Departure in Deſpite, pl. 2. cites 9 H. 6. 58.

(L) *Retraxit. By whom*, and *in what Manner*, and *by what Words*, one may make a Retraxit.

1. A **Retraxit** is always of the Part of the Plaintiff **or Demandant. Co.** 8. **Beecher** 59.

2. **If the Plaintiff** ſays he will not ſue, **this is a Retraxit.** * 8 **H.** 6. 8. **Brook Departure in Deſpight** 13. † 21 **E.** 4. 43.

* This is miſprinted and ſhould be (7). Br. Departure in Deſpite, pl. 7. cites S. C.——Br. Default, pl. 36. cites 8 H. 6. 7. S. P.——Br. Nonſuit, pl. 20. cites 8 H. 6. 7. S. C——See pl. 3. and the Notes there.

† Br. Departure in Deſpite &c. pl. 12. cites S. C.

3. But **if he** ſays he will not appear, **this is not a Retraxit, but a Nonſuit.** 8 **H.** 6. 8. **contra.** Br. Departure in Deſpite &c. pl. 7. cites S. C. that a Nonſuit ſhall be enter'd —— Br. Default, pl. 36. cites 8 H. 6. 7. S. P.——Br. Nonſuit, pl. 20. cites S. C. & S. P.——June ſaid, that in both this and the former Caſe it ſhould be a Retraxit; but Brooke ſays, that the Contrary thereof ſeems to be Law here. Br. Default &c. pl. 36.

4. **A Retraxit** cannot be, **unleſs the Plaintiff or Demandant be** in Court in proper Perſon. **Co.** 8. **Beecher** 58. **reſolved.** 1 Salk. 89. pl. 9. Hill. 2 Ann. B. R. Obiter. S. P. per Cur.

The Plaintiff has a Verdict in Debt againſt the Defendant; after this Verdict, the Plaintiff's Attorney Non vult ulterius proſequi; and it is ſo entred; and Judgment is given for the Defendant; it is

is Error; for this is not a Retraxit. A Retraxit ought always to be by the Plaintiff, in his proper Perſon; ſuch Confeſſion is ſtronger againſt him than a Verdict. In Præparatoriis ad judicium favetur Actori; becauſe the Law preſumes, that no Man will ſue without a Cauſe, and therefore a Retraxit is only allowable, when the Plaintiff comes in Perſon. Jenk. 283. pl. 12. cites 8 Rep. 58. a. 6 Jac. Beecher's Caſe.

5. In *Aſſiſe by Baron and Feme*, Trem. *prayed, that Return be entered, for they were ſo agreed*; Stouff J. refuſed it, but *Trench agreed, that if the Baron came he ſhould be received to extinguiſh his Agreement during his Life, and to enter the Return upon him alone, but Stouff would not aſſent to it, becauſe they were Plaintiffs in Common*, and therefore nothing was done. Br. Departure in Deſpite, pl. 8. cites 15 Aſſ. 9.

6. It ſeems that *there is no Caſe where a Man may appear and be non-ſuited all at one and the ſame Day, but in the Caſe where the Plaintiff appears, when the Jury appears, and when they come with their Verdict he makes Default*, this ſhall be a Nonſuit and not a Retraxit, and in no other Caſe, as it ſeems. Br. Departure in Deſpite, pl. 1. cites 3 H. 6. 14.

7. In Error a Man was *bound to retract all Suits, which he had againſt W. C. by ſuch a Day* &c. and *ſaid that ſuch a Day (which was the Fourth Day of the Term after the Award made, that he ſhould retract it) did not purſue further after this Day, but ſuffered it to be diſcontinued*, and per Cur. this no retraxit; for *where there ſhall be a Retraxit he ſhall come into Court in Perſon, and ſay*, that he *will no further proſecute in this Plea*; for a Nonſuit or Diſcontinuance is no Retraxit; for *after Nonſuit or Diſcontinuance he may commence his Suit again*, but Retraxit is a Bar of the Action. Br. Departure in Deſpite, pl. 9. cites 21 E. 38.

8. *Dower againſt Two* Tenants, *one* of them *pleaded Non-tenure to the whole, the other Non-tenure as to Part, and in Bar to the Reſidue*, upon which they were at Iſſue; and afterwards *he who pleaded in Bar Relicta Verificatione ſua confeſſed the Action*; and the *Demandant had Judgment againſt him*, and ſaid, ſhe would no further proceed to try the Iſſue of Non-Tenure, but would enter a *Retraxit*, and ſo it was ordered by the Court. Bendl. 177. pl. 221. Paſch. 9 Eliz. Wharton v. Butler.

Dal. 19. pl. 10. S. C. and S. P. accordingly.

9. Note, It was ſaid by Weſton and Bendloes, That a Retraxit can *not* be *before a Declaration*; which Leonard and Filmer, Prothonotaries, granted; and Dyer ſaid, that it being *before a Declaration*, it *is but a Nonſuit*; and Wheatley and Filmer affirmed the ſame; and therefore it was adjudged, that ſuch a Retraxit in the Court of Huſtings before the Sheriff, is no Plea in Bar. 3 Le. 19. pl. 47. Paſch. 14 Eliz. C. B. Anon.

10. The Diverſity is between a *Retraxit before Judgment* and *after*, for if it be a Retraxit before Judgment to one, it is a *Releaſe* to all; Secus after Judgment againſt one, for there Retraxit againſt the others ſhall not ſerve for him, againſt whom Judgment is given. Roll R. 233. Parker v. Sir John Lawrence, cites Green's Caſe.

10. A Retraxit is ever, when the Demandant or Plaintiff is preſent in Court (as regularly he is ever by Intendment of Law, until a Day be given over, unleſs it be when a Verdict is to be given, for then he is demandable) and this is in two Sorts, one *Privative* and the other *Poſitive*. *Privative*, as upon Demand made, that he made Default and departed in Deſpight of the Court; and then the Entry is, *Et poſtea eodem Die devenit ad Barram prædict' tenens, & præd' petens tunc ſolenniter exactus non venit, ſed a Secta ſua prædicta in Contemptum Curiæ ſe retraxit, ideo Conſideratum eſt* &c. *Poſitive*, as when the Entry is, *Et ſuper hoc idem querens dicit quod ipſe non vult ulterius placitum ſuum Prædictum proſequi, ſed abinde omninoſe retraxit* &c. Ideo &c. Another Form thereof is, *quod*

quod idem querens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædict' defend' &c. de placito præd'. Co. Litt. 138. b. 139. a.

(M) *Retraxit.* The *Effect* thereof.

1. A **Retraxit** is a Bar for ever, **because it is a voluntary Acknowledgment that he will not pursue further &c. Co. 8. * Beecher 59. ‡ 15 E. 3. Ass. 36. 3 E. 3. Itinere North 180. 21 E. 4. 39. Brook Departure in Despite 13.**

* Cro. J. 211. pl. 3. Mich. 6 Jac. B. R. Beecher v. Shirley. S. C. accordingly.

‡ Br. Departure in Despite &c. pl. 13 cites S. C.——Ibid. pl 9. S P. cites 21. E. 4. 38. ——Ibid pl. 12. cites 21 E. 4. 43. —— Br. Default, pl. 36. cites 8 H. 6. 7. S. P. said for Law. ——A Retraxit is a Bar of all other Actions of like or inferiour Nature. Co. Litt. 139. a.

2. In Assise the *Defendant pleaded in Bar a Retraxit by the Plaintiff in another Assise*, and the *Tenant had Day to bring in the Record and failed.* And therefore the Plaintiff released his Damages and recovered, quod nota the Failer and also that a Retraxit is a Bar. Br. Assise, pl. 408. cites M. 15 E. 3.

3. In a *Prohibition by Three*, a *Retraxit of one shall not bar the others*; Per Popham and Fenner. Mo. 460. pl. 643. Mich. 38 & 39 Eliz. Sheppard v. Metcalfe.

4. *Trespass against C. and S.* they *imparle*, at the Day *S. did not appear and Judgment by Nil dicit* against him; *C. pleaded in Bar*; *Plaintiff replied*; *C. demurred, and Day given to the next Term, and then the Plaintiff had Judgment*; Plaintiff entered a *Nolle Prosepui against S.* and had a Writ of Inquiry of Damages against C. and upon Return thereof adjudged against him. *C and S. brought* a Writ of *Error*, *because* the *Nolle Prosequi is against S. only, where Judgment is entred against both C. and S* and that a Retraxit against one is as strong as a Release, which is a good Discharge as to both, and so the Judgment against C. is erroneous; and so it was adjudged, but the Judgment was reversed. Cro. Eliz. 762. pl. 25. Pasch. 42 Eliz. in the Exchequer Chamber. Green v. Charnock.

5. A Writ of *Error lies after* a Confession, or *Retraxit*; not after a Disclaimer. Jenk. 283. pl. 12.

6. *A. and B. were bound* in a Bond *jointly and severally to C. the Plaintiff*, C. brought *Debt against A. who pleaded.* Afterwards *C. entered a Retraxit* of his Suit *against A. and then sued B. who pleaded this Matter.* There were only Crooke and Berkley J. in Court, and they were divided in Opinion, whether this Plea was good and a Bar to the Plaintiff, as Berkley held it was; but Crooke J. thought it no Release in Facto, nor in Law, but Quasi an Agreement that he will not further prosecute, or that it is by Way of Estoppel only between A. and the Obligee; Adjornatur. Cro. C. 551. pl 3 Trin. 15 Car. B. R. Dennis v. Payne.

Jo. 451. pl. 2. S. C. and that as to this Point the Judges delivered no Opinion, but that Judgment was given for the Plaintiff for an Omission in the Defendant's Plea.—— Mar. 95. pl. 165. S. C. but states it, that Debt was brought against both A. and B. and Berkley and Crooke differ'd in Opinion.

As to the Difference between a Retraxit, Nonsuit, Departure &c. See tit. Nonsuit. (F. 2)

(N) *What* ſhall be ſaid *a Default.*

Fitzh. Enqueſt, pl. 8. S. P. cites Mich. 21 E. 3. 58.

1. IF a Man be eſſoined of the King's Service, and does not bring his Warrant at the Day, which he hath by the Eſſoin, this is a Default at the Common Law. 21 E. 3. 37. 62. b. 29 E. 3. 36. adjudged. 30 E. 3. 19. b.

2. *Præcipe quod reddat, if a Man makes Attorney, and after the Tenant is eſſoign'd and not his Attorney*, this is a Default, and if the Tenant cannot ſave it, Seiſin of the Land ſhall be awarded. Br. Default, pl. 90. cites 21 E. 3.

Br. Count pl. 33. cites S. C.

3. If the *Plaintiff in Debt appears, and will not count*, it ſhall be awarded that he take nothing by his Writ. Br. Default, pl. 13. cites 2 H. 4. 15.

Br Garrantie de Attorney pl. 11. cites 14 H. 4. 16.

4. Where the *Tenant in Præcipe quod reddat appears at the Niſi Prius by Attorney who has no Warrant*, this ſhall turn him in Default at the Day in Bank, though the *Jury be taken and paſs for the Demandant.* Br. Default, pl. 26. cites 14 H. 4. 16.

5. *Præcipe quod reddat againſt Baron and Feme, Protection quia Profecturus was caſt for the Baron*, and immediately *Innoteſcimus* was caſt, *by which the Protection was annulled.* And by all the Juſtices this was a Default of the Tenants, Quod Nota. Br. Default, pl. 55. cites 1 H. 6. 6.

Br. Protection, pl. 59. (bis) cites S. C.

6. *Where Protection is caſt for the Garniſhee at the Day of Niſi Prius, and is repealed at the Day in Bank*, yet this ſhall not turn the Party in Default, becauſe it was allowable at the firſt Day. Br. Default, pl. 44. cites 4 H. 6. 9.

7. A Man was bound in *a Recognizance to have J. N. in the Chancery ſuch a Day*, and *in Scire Facias he ſaid that he had him there that Day*, and becauſe *his Appearance was not entered of Record*, therefore no Plea; per Cott. Ball. June and Froy. *Quære.* Br. Default, pl. 32. cites 7 H. 6. 26.

8. *And* if *a Man* be *returned in Iſſues upon Diſtreſs and appears*, and his *Appearance is not of Record*, he ſhall not ſave his Iſſues, Quod Nota. Ibid.

Mo. 430. pl. 601. Hill. 38 Eliz. Corbet v. Downing. S. P. that

9. If one is *bound to appear in B. R. at Weſtminſter ſuch a Day* to anſwer &c. though the *Term is adjourned to H.* yet *he ought to appear in B. R.* or otherwiſe he ſhall forfeit his Bond; Per Cur. cites 9 E. 4. and ſays, that ſo are diverſe Precedents. Cro. E. 466. pl. 16. Hill. 38 Eliz. B. R. Corbet v. Cook.

by appearing at H. the Party has not forfeited his Obligation, but makes a Quære if he had not appear'd there, but at Weſtminiſter, whether he had forfeited it. Popham ſeemed that the Word (Weſtminſter) in the Condition, would make the Obligation * void by the Statute of 23 H. 6. becauſe there is not any ſuch Name in the Writ for Appearance.

* See Pl. C. 68. a. b.

(N. 2) What ſhall be ſuch a Default, on which Judgment ſhall be given.

1. IN *Præcipe quod* reddat the *Tenant vouch'd two*, and *by the Nonage of the one pray'd that the Parol demur*, and the *Demandant ſaid that he was of full Age, and pray'd that he might be view'd in Court*, by which

which *Proceſs iſſued till the Sequatur*, and *he did not come, nor any Writ returned*, by which the Demandant recover'd Seiſin of the Land. Br. Ven. Fac. pl. 6. cites 45 E. 3. 23.

2. Where a Man *ſays that he will not appear*, the *Plaintiff cannot recover Quia Nihil dicit*; for *this Appearance was not to the Action, but to ſhew that he would not appear*, and if he had not appeared to the Action, the Plaintiff could not declare, and without Declaration the Defendant ſhall not be condemned Quia Nihil dicit; for he is not bound to anſwer to the Writ, but to the Declaration, Quod Nota, and Declaration cannot be made; for he has not appear'd to the Action. Br. Default, pl. 36. cites 8 H. 6. 7. Br. Confeſſion, pl. 16. cites S. C.

3. *In Debt* if the *Plaintiff alleges that the Defendant is in the Fleet, and prays that the Warden bring him in, who does ſo*, and *ſays that he is the ſame Perſon, and that he will not appear, he ſhall be condemn'd*; Per June quod omnes conceſſerunt. Ibid. —— But contra 2 H. 5. and contra in the Caſe of **Cole**, becauſe he was Priſoner to another Court.

(O) In what Caſes the Default of the one ſhall be the Default of the other, Baron and Feme. [Corporations] pl. 12. 13.

1. **WHERE the Baron is to have a** Corporal Puniſhment **for the Default, there the Default of the Feme ſhall not be the Default of the Baron.** * 11 H. 4. 72. ‡ 9 H. 6. 8.

* Br. Baron and Feme, pl. 38. cites S. C. —— S. P. per Brook. Br. Default, pl. 52. cites 14 H. 6. 14.

‡ Br. Baron and Feme, pl. 5. cites S. C. —— Br. Proceſs, pl. 8. cites S. C. —— Fitzh. Proceſs, pl. 84. cites S. C.

2. As **if** at the Pluries Capias **the** Baron appears, **and the Feme makes Default, this ſhall not be the Default of the Baron for the Corporal Puniſhment.** * 11 H. 4. 72. **Contra** ‡ 3 H. 6. 19.

Br. Baron, and Feme, pl. 1. cites 3 H. 6. 19. contra, that *Exigent ſhall iſſue againſt both*, For the Feme is ameſnable by the Baron, and ſo the Default of the Baron, that the Feme had not come; Per Martin, quod non negatur. —— And S. P. Br. Baron and Feme, pl. 53. cites 9 E. 4. 23. Per Choke and Danby. Brook ſays, Quod mirum, where Corporal Puniſhment ſhall be as here.

* Br. Baron and Feme, pl. 38. cites S. C.

‡ Br. Baron and Feme, pl. 1. cites S. C.

3. So upon the Capias **if the Baron makes Default, and the Feme appears, this ſhall not be the Default of the Feme.** * 12 H. 4. 1. **Placito** 1. † 3 H. 6. 19.

* Fitzh. Default, pl. 11. cites S. C.

† Br. Baron and Feme, pl. 1. cites S. C. that *Exigi Facias iſſued againſt Baron, and Idem Dies given to the Feme.* —— Br. Proceſs, pl. 6. cites S. C. —— Fitzh. Proceſs, pl. 65. cites S. C.

4. **At the** Exigent **return'd againſt the Baron and Feme, if the** Baron appears, **and Feme makes Default, this ſhall not be the Default of the Baron for the Corporal Puniſhment.** 9 H. 6. 8. b. * 44 E. 3. 1. b. **adjudged.** † 39 E. 3. 18. b. **adjudged.**

And therefore he went Sine Die, though the Plaintiff pray'd, that he might remain in Priſon. Br. Baron and Feme, pl. 37 cites 11 H. 4. 54. —— Br. Default, pl. 84. cites S. C. but contra in Treſpaſs. —— But he ſhall anſwer alone. Br. Baron and Feme, pl. 47. cites 21 H. 6. 4. —— Br. Reſponder, pl 19. cites S. C.

* Br. Baron and Feme, pl. 76. cites S. C. but the Feme was waived. —— Ibid. pl. 18. cites S. C.

† Br. Reſponder, pl. 26. cites S. C. that the Baron came ready to anſwer, and becauſe the Exigent was ill againſt the Feme, it was diſcontinued, and *Exigent de Novo* was awarded againſt her, and the

the Baron was awarded to anſwer. Finch ſaid, that the Action being againſt the Baron and Feme, ſhe cannot plead without the Baron, and therefore he ſhall anſwer again with his Feme; and after he anſwer'd, and Idem Dies given him to the Return of the Exigent, to anſwer for the Feme.—Br. Baron and Feme, pl. 87. cites S. C.

Fol. 585.

5. So **if upon the Exigent the Baron and Feme have a** Superſedeas, **and notwithſtanding this they are return'd Outlaw'd, and at the Return the** Baron appears, **and the Feme makes Default, this ſhall not be the Default of the Baron for the Corporal Puniſhment.** * 9 H. 6. 8.

* Br. Baron and Feme, pl. 5 cites S. C. by which Exigent de Novo iſſued againſt the Feme, and the Baron had Idem Dies. And if the Baron makes Default at the Day &c. Diſtringas ſhall Iſſue againſt him.——Br. Barre, pl. 6. cites S. C. ——Br. Proceſs, pl. 8. cites S. C. ——Fitzh. Proceſs, pl. 84. cites S. C.

Br. Baron and Feme, pl. 38. cites S. C.

6 **But** otherwiſe **it is** where **the** Baron is not to have **any** Corporal Puniſhment **by the Default.** 11 H. 4. 72.

——Ibid. pl. 65. cites S. C. —— Fitzh. Default, pl. 10 cites S. C.

* Br. Baron and Feme, 38. cites S. C —— Fitzh. Default, pl. 10 cites S C.

7. As in a Plea of Land **if the Baron appears, and the Feme makes Default,** a Grand Cape **ſhall iſſue of the Whole.** * 11 H. 4. 72. † 28 E. 3. 91. b. **adjudged.**

† Fitzh. Grand Cape, pl. 21. cites S. C.

S. P. Br. Baron and Feme, pl. 75 cites 43 E. 3. 18.

8. So **if** Iſſues **be** return'd **againſt Baron and Feme, the Default of the Feme is of both.** * 11 H. 4. 72. 12 H. 4. 1. **Placito** 1. ‖ 14 H. 6. 14.

* Br. Baron and Feme, pl. 38. cites S. C.——Fitzh. Default, pl. 10. cites S. C.
‖ Br. Default, pl 52. cites S. C.

* Br. Default, pl. 52. cites S. C.

9. So **if Baron and Feme are** attach'd in a Treſpaſs, **the Default of the Feme is the Default of both, and ſo the Iſſues forfeited.** * 14 H. 6. 14. **Contra** ‖ 22 Aſſ. 46. **adjudged.**

‖ In *Treſpaſs*, if the Baron and Feme are Defendants, and the Baron comes and the Feme not, he ſhall be receiv'd to anſwer alone, but if ſhe comes, and the Baron not, ſhe ſhall not be receiv'd to anſwer, till her Baron comes, or be Outlaw'd. Br. Default, pl. 61. cites 22. Aſſ. 46.——Br. Reſponder &c. pl. 32. cites S. C.——Fitzh. Reſponder, pl. 40. cites S. C.

10. **If** Aid **be** granted of Baron and Feme in Reverſion, **the Default of the Baron ſhall not be of both.** 21 E. 3. 13. **adjudged.**

Fitzh. Aſſiſe, pl. 293. cites. S. C.

11. **In an** Aſſiſe **the Default of the Feme ſhall be the Default of the Baron.** 29 Aſſ. 67.

12. **In a** Quod Permittat againſt Bailiff and Commonalty, **the** Default of the Commonalty **ſhall be the Default of the Bailiff at the Grand Diſtreſs; for both are but one Corporation, and ſo one Defendant.** 29 E. 3. 40. **admitted.**

13. So **where there are** Two Bailiffs and one Commonalty, **the** Default of one Bailiff **ſhall be the Default of all.** 30 E. 3. 1.

Br. Default, pl. 74. cites S. C.

14. In *Præcipe quod reddat, againſt Baron and Feme* the *Baron is Eſſoigned de Servicio Regis* and *at the Day did not bring his Warrant*, but the *Feme was eſſoign'd de Servitio Regis without warranting the Eſſoign of the Baron*, and well; for ſhe ſhall not warrant it. Br. Default, pl. 99. cites 30 E. 3. 19. and Fitzh. Eſſoign. 7.

15. *And*

15. *And if the Baron had appeared and had not warranted the Eſſoign*, he had loſt the Land, but by his Default and the Eſſoign of the Feme, the Land is ſaved, and ſo the Default more profitable than the Appearance, as here, qnod nota bene. Ibid. Br. Default pl. 74 cites S. C.

16. *Feme was received in Default of her Baron* and *after made Default*, and Judgment was given upon the Default of the Baron, Br. Default, pl. 85. cites 38 E. 3. 12. and now no mention ſhall be made of the Reſceipt as it is ſaid in the Time of H. 8.

17. *Dower againſt Baron and Feme who made Default*, and *Grand Cape iſſued*, and *at the Day the Baron came, and the Feme not*, and *he ſaid, that he is Tenant of the whole, abſque hoc, that the Feme any Thing has, ready* to anſwer, and becauſe the Default of the Feme is the Default of the Baron and Feme, therefore the Demandant recovered Seiſin of the Land, quod nota. Br. Default, pl. 5. cites 41 E. 3. 24. in the Old Book. Br. Baron and Feme pl. 12. cites S. C. — Br. Saver Default pl. 11. cites S. C.

18. *Detinue againſt the Baron and Feme*, the *Feme was waived*, and the *Baron appeared at the Exigent*, and the *Plaintiff counted of a Bailment to the Feme dum ſola* fuit, and therefore becauſe the Proceſs is determined, and this is of the Act of the Feme to which he cannot anſwer without her, therefore by Award, the Baron went Sine Die; for as to loſing Iſſues &c. upon Diſtreſs returned againſt Baron and Feme, the Default of the Feme is the Default of the Baron and Feme; contra in Caſe of Capias and Exigent &c. which are Corporal Puniſhments, quod nota. Br. Default, pl. 7. cites 43. E. 3. 18. & 44 E. 3. 1. & 34 H. 6. concordat. Br. Baron and Feme, pl. 75. cites S. C.—S. P. and if it was in Præcipe quod reddat *Grand Cape ſhall iſſue againſt the Feme*. Br. Exigent, pl. 52. cites S. C.

19. *Appeal of Mayhem* againſt Baron and Feme *after the Exigent awarded, the Baron rendered himſelf*, and found Mainpriſe, and had Superſedeas notwithſtanding the *Feme did not come*. Br. Baron and Feme, pl. 33. cites 8 H. 4. 6.

20. In *Præcipe quod reddat* againſt Baron and Feme, the Default of one is the Default of both; for one cannot anſwer without the other. This no Inconvenience to the Wife; for upon Default, after Default of the Husband, ſhe may be received to defend her Right. Jenk. 27. in pl. 50. cites 26 H. 6. Default 4.

21. In *Forcible Entry and in Treſpaſs* againſt Baron and Feme, if the Baron appears at the Pluries Capias, and the Feme not, the Baron ſhall anſwer alone, and the Reaſon is, *where the Entry is ſuppoſed to be by both, then he ſhall anſwer alone*, but *contra where the Entry is ſuppoſed by the Feme dum Sola fuit*; for in this Caſe, the Default of the Feme ſhall not be the Default of the Baron and Feme, *contra, where the Entry is ſuppoſed by both*, there the Default of the Feme is the Default of the Baron and Feme, and ſo he ſhall anſwer alone; and *in Debt againſt Baron and Feme* it ſhall be intended the Debt of the Feme, and ſo if the *Baron appears, and the Feme is waiv'd* at the *Exigent againſt both*, the Baron ſhall go without Mainpriſe. Br. Reſponder, pl. 29. cites 36 H. 6. 1. Br. Baron and Feme, pl. 73. cites S. C.

22. In *Debt* the *Default of the Feme, where the Baron appears is the Default of both, and Capias ſhall Iſſue againſt both*; Per Choke and Danby, Quod *mirum* where there ſhall be Corporal Pain. Br. Default, pl. 47. cites 9 E. 4. 23.

Where the Default of the Baron ſhall be the Default of the Feme, ſo that the one ſhall not anſwer without the other. See tit. Baron and Feme. (I. a)

(O. 2) Default of one (not Baron and Feme,) where it ſhall be the Default of another.

1. ASSISE *againſt two Tenants in Common*, the *one appeared* and the *other made Default*, and he who appear'd was ſuffer'd to plead for the Whole, but in ſuch a Caſe *Semper* awarded the Aſſiſe by Default for the Moiety. Br. Default, pl. 89. cites 9 Aſſ. 16.

2. *Debt againſt two who wag'd their Law*, and at the Day the one makes makes Default, this is the Default of both; and the Plaintiff ſhall recover, but if he ſuffers the one to wage his Law, he ſhall take nothing by his Writ. Br. Default, pl. 96. cites 40 E. 3. 35.

Br. Scire Facias, pl. 46. cites S. C.

3. *Two were Outlaw'd in Debt at the Suit of two*, and the *one purchas'd Charter of Pardon*, and *Scire Facias againſt the Plaintiffs*, and the *one was return'd warned and did not come*, and the *other was return'd Nihil*, and the Defendant would have gone quit by the Default of him who was warned, becauſe the Default of the one Plaintiff in Action of Debt, is the Nonſuit of both; Tamen quære as here, where the Action is againſt them, by which he had Sicut Alias againſt the other, and at the Day if both the Plaintiffs appear, and this Defendant only without his Companion, the Plaintiff ſhall not count againſt him, till the other has ſued his Charter, and appear'd likewiſe, for they were impleaded jointly. Br. Default, pl. 12. cites 48 E. 3. 3.

4. *When two are to recover a Perſonal Thing*, there the Default of one, is the Default of both; *but* when they are *to diſcharge themſelves of a Perſonalty*, it is otherwiſe. 6 Rep. 25. b. Per Cur. cites this Diverſity taken, and agreed in 2 H. 4. 16. a. b.

5. *Scire Facias by three, two were eſſoin'd*, and the *Eſſoin was quaſh'd* per Cur. becauſe Delays are ouſted in Scire Facias by the Statute of Weſtminſter 2. cap. 45. Quia de hiis que recordat. ſunt &c. and *Scire Facias ad ſequend' ſimul againſt the two*, and the *one of the Tenants made Default, and* his Default was *Recorded*, and Day given over. Br. Eſſoine, pl. 120. cites 10 H. 6. 1.

6. A Man *recovered Debt*, and the *Defendant was committed to Priſon* for Execution thereof, and after the *Plaintiff made Three Executors and died*, and the *one Executor releaſed* to the Defendant, by which Scire Facias iſſued againſt the Three Executors to diſmiſs the Defendant, and they were returned warned, and two appeared, and he who made the Releaſe made Default, and the Two pleaded that the Third Ne releſſa Pas by the Deed; and the beſt Opinion was, that the Default of the Third is peremptory, and that the Priſoner ſhall be delivered; Quære. Br. Scire Facias, pl. 232. cites 10 H. 6. 2.

7. In Debt *againſt two Executors*, and *they are at Iſſue*, and after *one makes Default*, yet the Inqueſt ſhall not be taken by Default againſt the other, Quære if it was not as Executor. Br. Default, pl. 86. cites 21 H. 6. 45.

8. If a Man is *bound to Two in a Statute Staple*, and the *one releaſes* and *both ſue Execution*, the Defendant brings *Audita Querela againſt both*, and the *one comes* and the *other not*, the Default of the one is the Default of both, and by this the Conuſor ſhall go quite diſcharged againſt both. Br. Default, pl. 94. cites 11 E. 4. 8.

9. In *Præcipe* quod reddat *againſt two*, if *they imparle jointly*, and after *the one makes Default*, this is the Default of both, per Davers; but Brian & Kebil contra. Br. Default, pl. 65. cites 4 H. 7. 17.

10. But

10. But *in Debt againſt Two* the Default of the one, after joint Imparlance, is the Default of both. Ibid.

11. Where a *Grand Cape* is awarded *againſt Two Tenants of full Age*, and the *one excuſes himſelf by a Flood of Water*, and the *other ſays nothing*, the Writ ſhall abate againg him that excuſed himſelf, and ſhall ſtand good againſt the other; Per Frowike. Keilw. 51. b. pl. 2. Trin. 19 H. 7.

12. In *Writ of Entry*, two *Executors* came *and prayed to be received to ſave their Term by Default of the Tenant*, by the Statute of Glouceſter, and after the *one relinquiſhed the Reſceipt and made Default*, and per Rede Ch. J. this *ſhall not be the Default of both*; for that *which is moſt Beneficial for the Teſtator ſhall be taken*; for *where they plead two Pleas*, the Plea which is moſt beneficial ſhall be taken and firſt tried, and if they plead Releaſe, and the one makes Default after, the other ſhall be permitted to proſecute for the Advantage of the Teſtator. Per Kingsmill. J. after they have joined in Plea the Default of the one is the Default of both. But the ſaying of Rede ſeems to be Law, and he who relinquiſhed would have ſurrendered and was not ſuffered; for the Court has no Warrant but to record his Default, the Reaſon ſeems to be inaſmuch as he is not Party to the Original. Br. Reſceit, pl. 79. cites 21 H. 7. 25. Br. Default, pl. 53. cites S. C.—— Br. Executors, pl. 94. cites S. C.

13 An *Information* was brought *againſt 6 for an Aſſault*; they *all plead, Not Guilty*. Upon the Trial all but one make Default. The Court held, that the Default of the reſt ſhall not bind him; for though they joined in the Plea of Not Guilty, yet being in a Criminal Caſe, *it is Quaſi Several Pleas*; and the Default of one ſhall not be the Default of others; and the Inqueſt was taken by Default only againſt thoſe that did not appear. Cro. C. 251. pl. 1. Paſch. 8 Car. B. R. The King v. Wingfield & al.'

(P) *Of* the *Plaintiffs*.

1. IF two Obligees ſue one Bailee **of the Obligation, if one of the Plaintiffs makes Default, this is the Default of both.** 2 H. 4. 16. *Br. Default, pl. 14. cites S. C. and Bailee pray'd Garniſhment againſt the three

2. But **if** divers Obligors are warned, and one makes Default, **this is not the Default of all, although upon the Matter all are Plaintiffs, for they** claim not a Duty, but a Diſcharge. *2 H. 4. 16. 3 H. 4. 7. b.

Obligors, and had it, and at the Day they were return'd warn'd, and *two came, and the third made Default*, and there it was awarded, that the Default of the one ſhall not condemn his Companions. —— *For in Debt upon the ſame Obligation againſt the three, the Default* or Plea of the *one, ſhall not charge the other*; *But* ex altera Parte *the Nonſuit or Releaſe of one of the Plaintiffs ſhall prejudice the other*, Br. Ibid ——*But if the three Obligors had brought Writ of Detinue* of the Obligation *and* Defendant had had *Garniſhment againſt the Obligees, and the one of them had made Default*, Quære, if the other two ſhall be received to enter-plead; for the two Obligors above, were received to enter-plead. Br. Ibid.——Fitzh. Enter-Pleader. pl. 12. cites S. C.

3. *Two brought Præcipe quod reddat againt N.* the *Tenant, and the one of the Demandants made Default*, and *Summons ad Sequendum ſimul was awarded, and Grand Cape of the Whole*; for if the other Demandant will appear, then they ſhall recover the Whole upon the Default of the Tenant, and if not, then only the Moiety for the one Demandant. Br. Default, pl. 46, cites 4 H. 6. 28. Br. Proceſs, pl. 79. cites 9 E. 4. 2.

4. If

4. If a Man is *outlaw'd in Debt*, and the *Defendant purchaſes Charter of Pardon* and *Scire Facias againſt the Plaintiff, and he makes Default*, this is peremptory, and the Defendant ſhall go quit. Br. Default, pl. 87. cites 22 H. 6. 7.

5. *Surety of the Peace* was taken *againſt E. B.* who had Day by Mainpriſe Menſe Paſchæ, and *did not appear at the Day*, there *his Mainpernors have forfeited the Bond, though J. N. who took the Peace, did not appear at the Day and demand the ſaid E. B.* and yet Scire Facias was awarded to anſwer the Sum. Br. Default, pl. 60. cites 39 H. 6. 26.

6. *But* where a Man is *taken by Capias at the Suit of J. N. and is bound with Mainpernors to appear* ſuch a Day, *and neither he or the Plaintiff appears*, there the Defendant or his Mainpernors ſhall forfeit nothing, becauſe the Plaintiff did not appear; quod fuit conceſſum, but it was ſaid that the Caſes are not alike. Ibid.

(P. 2) Excuſed or Diſcharged. By What.

1. A Man *recover'd by Default againſt an Infant*, and the *Infant brought Writ of Error, and revers'd it for his Nonage*; and *contra if he had appear'd and loſt by Plea or by Voucher*, he ſhall not reverſe it by Nonage. Br. Saver Default, pl. 50. cites 6 H. 8. B. R. 22. and concord. 7 E. 3.

2. A Man is *bound, and Mainpernors with him, to appear at Weſtminſter in B. Oct. Mich.* and at the Day *he does not appear, but Protection is caſt for him*, this ſaves his Default, and the Bond ſhall not be forfeited; per tot. Cur. Quod Nota bene. Br. Saver Default, pl. 39. cites 11 H. 4. 57.

3. Note by Award of Babbington Ch. J. that *in Præcipe quod reddat at the Grand Cape the Tenant appears, and* the *Demandant counted*; by this the Default is releaſed, and the Tenant need not ſave the Default. Br. Saver Default, pl. 41. cites 8 H. 6. 3.

Præcipe quod reddat *at the Grand Cape, the Tenant waged his Law of Non-ſummons,* and *at the Day*

4. The Demandant may *releaſe the Default againſt the Will of the Tenant*, per Fitzh. and Shelly; *but* per Fitzh. *if the Tenant had tendered his Law by Attorney*, the Demandant cannot releaſe the Default without the Will of the Tenant, by many Books, as it is ſaid, *Quære* inde. Br. Saver Default. pl. 1. cites 27 H. 6. 13.

the Demandant would have waived the Default, and could not, Per Cur. without the Aſſent of the Tenant, and the Tenant would not, but did it, and therefore the Writ was abated; Quod Nota; and the Reaſon ſeems to be inaſmuch as there is *an Iſſue tender'd which ought to be tried*; For *before this he might have releaſed the Default.* Br. Saver Default, pl. 13. cites 42. E. 3. 7. [But ſeems miſcited.]

|| *Malady* is good Excuſe againſt Outlawry, Quære Legem, and if the ſame Law be to ſave Default

5. The beſt Opinion was, that *Infirmity*, or *a Fall from a Horſe in a Journey*, that he was in Danger of Death of the Hurt *is not ſufficient* Cauſe to ſave Default, but in Præcipe quod reddat, but Impriſonment and Inundation of Water are good Cauſes to ſave Default; and yet per Grynſlad and Moyle, in the Time of Sir R. Hankeford, || Outlawry was reverſed by Infirmity at the Time of the Outlawry; Contra per Priſot. Br. Saver Default, pl. 28. cites 38 H. 6. 12.

in Præcipe quod reddat, it ſeems that it is not; for Malady may *be feigned*; *Contra of Floods of Water, and Impriſonment*, and *Nonage*. Br. Saver Default, pl 45. cites 4 H. 5. & Fitzh. Challenge 153.—Co. Litt. 159. b. S. P.——S. P that Malady was pleaded in Avoidance of Outlawry and accepted 4 H. 4. therefore, Quære, if it be Cauſe to ſave Default in Plea of Land. Ibid. pl. 48. cites the printed Book of Abridgment of Aſſ. fo. 48.

6. *Præcipe*

6. *Præcipe quod* reddat, *at the Niſi Prius the Tenant and his Attorney made Default*, and the Default recorded, and *at the Day in Bank the Tenant came and had his Preſence recorded for all the Term, and* he *pleaded that* he *and his Attorney had only three Days Notice before the Niſi Prius, and ſhewed where this was held in the County of York, and the Diſtance, and that he and his Attorney were ſearching for their Evidences to have come at the Niſi Prius and were hindered by Water in the County of Durham.* See the Pleading there at large, good Matter, pleaded by a Prothonary; for Chocke and Littleton, Serjeants of the Tenant refuſed to plead for him, becauſe it was ſuſpicious, and the Demandant demurred upon the Plea, and it was much debated if it ſhould ſerve or not; and it was admitted that his Plea goes as well to the Attorney, and for him, as for the Tenant; but it was ſaid that this ſhall not ſerve the Attorney becauſe he refuſed to plead it; and this was, becauſe the Court did not favour the Matter for the Suſpicion; and this per Billing and Laicon Serjeants for the Demandant. Br. Saver Default, pl. 29. cites 38 H. 6. 31.

7. *Præcipe quod* reddat *againſt Four, who made Default at the Day of the Grande Cape, two appeared in Perſon and tendered their Law of Non-ſummons*, and the *other two by Attorney tendered their Law of Non-ſummons*, and the Demandant releaſed the Default of the two who appeared in Perſon, and would have Advantage of the Default of the other two. And per Danby Ch. J. and ſeveral others, the Releaſe of the Default of one, is ſo of all, for the Sum is intire; for one Jointenant in Action againſt ſeveral cannot be ſummoned, but it is the Summons of all. Br. Saver Default, pl. 32. cites 3 E. 4. 21.

8. There be divers Cauſes allowed by Law for ſaving a Man's Default; at firſt by *Impriſonment*, whereof Littleton here ſpeaks. 2dly, Per *Undationem Aquarum.* 3dly, Per *Tempeſtatem.* 4thly, Per *Pontem Fractum.* 5thly, Per *Navigium ſubſtractum, Per Fraudem petentis*; non enim debet quis ſe periculis & infortuniis gratis exponere, vel ſubjicere. 6thly, Per *Minoremn Ætatem.* 7thly, Per *Defenſionem* [Defaltam vel omiſſionem] *ſummonionis per Legem.* 8thly, Per *Mortem Attornati*, ſi tenens in Tempore non novit. 9thly, *Si Petens eſſoniatus ſit.* 10thly, *Si placitum mittatur ſine Die.* 11thly, *Per Breve de Warrantia Diei.* Co. Litt. 259. b.

(P. 3) Declaration; neceſſary in what Caſes, notwithſtanding the Default of the Defendant.

1. *AT the Grand Cape in Præcipe quod reddat, if the Tenant wages his Law of Non Summons*, there at the Day the Demandant cannot releaſe the Default and count againſt the Tenant. *Contra at the firſt Day*, as it is ſaid elſewhere. Br. Default, pl. 96. (bis) cites 42 E. 3. 8.

2. *Ceſſavit againſt an Infant* who *made Default at the Summons*, and after *came at the Grand Cape*, and was not compelled to ſave his Default, by reaſon of the Infancy; but the *Demandant counted againſt him without taking him at the Default*; for otherwiſe his Writ ſhall abate; for an Infant ſhall not ſave his Default; for he can't gage his Law of Non Summons. Br. Saver Default, pl. 51. cites 3 H. 6. 10.

3. *So* it ſeems *of Coverture.* Ibid.

4. In *Scire Facias* where the *Aſſize is taken by Default*, yet the *Plaintiff ſhall make his Plaint.* Br. Default, pl. 56. cites 38 H. 6. 18.

5. *So in Dower* by Default the Plaintiff ſhall make his Demand; for thoſe Writs do not comprehend Certainty. Ibid.

6. *Contra in Præcipe quod reddat*; for there appears Certainty, note the Difference. Ibid.

(P. 4) Pleadings to the Writ after Default.

1. IN *Attaint* if the Defendant makes Default, he cannot plead to the Writ afterwards. Thel. Dig. 210. Lib. 14. cap. 16. S. 1. cites 12 E. 1. Attaint 71. Ut dicitur.

2. Nor at the Return of the Writ. Ibid. cites 12 Aſſ. 2.

3. In *Writ of Entry* after it was *pleaded to the Inqueſt*, the Tenant made Default, and *at the Day of Petit Cape return'd he was Eſſoign'd de Servitio Regis*, and at the Day *fail'd of his Warranty*, and *afterwards he would have pleaded* that he was Villein to ſuch a one, and held in *Villeinage* &c. and was not received, but Seiſin was awarded. Thel. Dig. 210 Lib. 14. cap. 16. S. 2. cites Paſch. 32 E. 1. Saver Default 83.

4. In Writ againſt *Baron and Feme* the Baron appear'd at all times, and the *Feme made Default* after Default, upon which the Baron was received to ſay that his *Feme was eſſoign'd by the Demandant*. Thel. Dig. 210. Lib. 14 cap. 16. S. 3. cites Paſch. 16 E. 2. Saver Default 77. and ſays ſee 10 E. 3. 522. and Paſch. 11 E. 3. Viſne 59.

5. In Formedon by two Parceners the one was ſummon'd and ſever'd, and the Tenant after made Default after Appearance, and at the Day of the Petit Cape return'd, he was received to plead the Death of him who was ſever'd after the Severance without ſaving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 5. cites Hill. 5 E. 3. 174.

6. At the *Grand Cape againſt a Prior* he *ſaid, that the Priory is a Cell to ſuch an Abbey*, and that he is Commoign to the Abbot, *and ſo the Franktenement in the Abbot* &c. Sed non Allocatur. Thel. Dig. 210. Lib. 14. cap. 16. S. 6. cites Hill. 5 E. 3. Saver Default 64.

7. In *Writ againſt two*, if the *one appears*, and the other makes Default, and the *Grand Cape of the Moiety returned*, if he make Default at another Time, the *one may take the intire Tenancy and plead*. Thel. Dig. 211. Lib. 14. cap. 16. S. 34. cites Mich. 5 E. 3. 209.

8. After the Tenant has *failed of his Warranty of Eſſoign de Servitio Regis*, he may *ſhew how the Proceſs is diſcontinued* againſt him. Thel. Dig. 210. Lib. 14. cap. 26. S. 10. cites Trin. 12 E. 3. Eſſoign 59.

9. In *Dower* at the Grand Cape returned, the Tenant was received to ſay *that the Demandant after Default made, has received certain Tenements in Allowance of her Dower* without ſaving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 11. cites Trin. 13 E. 3. Saver Default 36.

10. At the *Petit Cape retured againſt an Infant* he was *eſſoigned de Servitio Regis*, and at the Day given he *failed of his Waranty, and would have pleaded by Guardian, that he was within Age and that the Demandant diſſeiſed him* &c. and was not received. Thel. Dig. 210. Lib. 14. cap. 16. S. 12. cites Trin. 14 E. 3. Saver Default 40.

11. At the *Petit Cape* returned *againſt Two, each* of them ſeverally *took the Entire Tenancy, and alleged Impriſonment* to ſave their Defaults ſeverally, upon which the Demandant was compelled to maintain his Writ. Thel. Dig. 210. Lib. 14. cap. 16. S. 14. cites Trin. 18 E. 3. 27.

12. At the *Grand Cape* returned *againſt the Baron and Feme*, the *Feme* came and *was received to ſhew Diſcontinuance of Proceſs, inaſmuch as the Grand Cape was only of the Moiety*, without being received

ceived to defend his Right. Thel. Dig. 210. Lib. 14. cap. 16. S. 15. cites Mich. 20 E. 3. Diſcontinuance 8. and ſays, ſee Trin. 24 E. 3. 20.

13. At the *Grand Cape returned executed againſt the Baron and Feme*, the *Baron was not received to ſay that his Feme was dead the Day of the Writ purchaſed* without ſaving his Default, becauſe the Writ was ſerved. Thel. Dig. 210. Lib. 14. cap. 16. S. 17. cites Mich. 26 E. 3. 68.

14. It is ſaid that at the *Petit Cape ad Valentiam* the *Vouchee ſhall not ſay that the Tenant is dead* without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 33. cites Mich. 27 E. 3. 88. Quære.

15. At the *Day given to make his Law of Non Summons*, the *Tenant was eſſoigned*, and *at the Day given by the Eſſoign he would have pleaded that the Demandant had taken Baron after the Ley-gager*, without making his Law and was not received. Thel. Dig. 210. Lib. 14. cap. 16. S. 19. cites Hill. 38 E. 3. 7. & 20 H. 6. 2.

16. It is adjudged that at the *Grand Cape* returned *againſt ſeveral*, *each* of them *may take ſeveral Tenancy of Parcel, and wage Law of Non-Summons ſeverally*, and the Demandant ſhall maintain his Writ, otherwiſe it ſhall abate. Thel. Dig. 210. Lib. 14. cap. 16. S. 20. cites Mich. 38 E. 3. 33.

17. At the *Petit Cape* returned, the *Tenant cannot ſay that the Demandant has taken Baron after the laſt Continuance*, but he ſhall plead *Profeſſion* in the Demandant; for this extinguiſhes Right. Thel. Dig. 210. Lib. 14. cap. 16. S. 21. cites Trin. 39 E. 3. 20.

18. At the *Grand Cape*, the Tenant was received to plead *Miſnomer* of himſelf. Thel. Dig. 211. Lib. 14. cap. 16. S. 23. cites Hill. 40 E. 3. 1.——*In his Surname and in Name of Baptiſm* Ibid. S. 23. cites 40 E. 3. 46.——And Miſpriſion Apparent of his Name in the Writ. Ibid. cites 42 E. 3. 3.

19. After *Ley-gager of Non-Summons by ſeveral Tenants in Common*, the one of them cannot take the intire Tenancy. Thel. Dig. 211. Lib. 14. cap. 16. S. 25. cites Mich. 40 E. 3. 40. & Hill. 41 E. 3. 2. and ſays ſee 42 E. 3. 16. & Hill. 8 H. 6. 37 Quære.

20. At the *Grand Cape* the Tenant ſhall *plead ſeveral Tenancy, and Jointenancy, with Ley-gager of Non-Summons*, but *not Non-Tenure*. Thel. 211. Lib. 14. cap. 16. S. 32. cites Trin. 33 H. 6. 24. & Paſch. 12 E. 4. 1

(Q) In what Caſes the *Inqueſt* ſhall be *taken by Default*. [*And in what, Proceſs ſhall iſſue.*]

1. IN ſuch Actions which deſcend in the Realty, if the Parties plead to Iſſue, the Inqueſt cannot be taken by Default upon Default of the Defendant, but a Diſtringas ſhall iſſue in Lieu of a Petit Cape. 30 E. 3. 29.

No Inqueſt in any Action Real can be taken by Default. 2 Inſt. 127.

2. As in a Writ of Cuſtoms and Services, the Inqueſt ought not to be taken by Default, for this is to affirm the Seigniory. 30 E. 3. 29.

3. So in a Writ of Meſne, if the Seigniory be denied, 30 E. 3. 29. will prove it.

4. In a Præcipe quod reddat, if after the Petit Cape the Tenant pleads Impriſonment in another County, ſcilicet, in Middleſex, upon which they are at Iſſue in Middleſex, and there tried againſt the Tenant, and he brings an Attaint in Middleſex, and the Sheriff returns that he hath nothing to be ſummoned by, the Inqueſt ſhall not be taken by

Br. Proceſs, pl. 104. cites S. C.—Br. Attaint, pl. 81. cites S. C.

by his Default, but a Writ ſhall iſſue to the County where the Land is. 42 Aſſ. 14. adjudged.

5. If an Attaint had been brought at the Common Law againſt the Petit Jury, and they had been returned attached, and yet had made Default, yet the Inqueſt ſhould not be taken by Default, but Proceſs ſhould be awarded.

* Fol. 586.

6. So at Common Law, in this Caſe if ſome of the Jurors had appeared, and others had made Default, yet the Inqueſt ſhould not be taken by Default, but Proceſs ſhould have been awarded till all had appeared (*) || 27 H. 6. 8. b. And ſo is the Statute de Attinctis of 13 E. 2. but this is now aided by the ‡ Statute upon the Grand Diſtreſs returned. 21 H. 6. 42.

|| Br Attaint, pl. 5. cites S. C — Fitzh. Attaint, pl. 5. cites S. C.

‡ 23 H. 8. cap. 23.

7. In *Annuity*, the *Defendant ſaid, that* at the Time of the Gift made *he was within Age*, and upon this they were at Iſſue, and *at the Day the Inqueſt appear'd, the Defendant made Default*, by which the Inqueſt was taken by Default, which ſee in the Addition of the Writ of Venire Facias, in Natura Brevium, 172, P. E. 3. Br. Enqueſt. pl. 91. cites 7 E. 3.

8. In *Mortdanceſtor, if at the Summons the Tenant is eſſoign'd and after makes Default*, Re-Summons ſhall Iſſue, and not Aſſiſe by Default. Br. Default, pl. 88. cites 8 Aſſ. 13.

In *Quid Juris clamat* the *Inqueſt was taken by Default*, by which the Defendant was not permitted to Challenge or ſay any Thing in Evidence, Br. General Iſſue, pl. 86. cites 10 E. 3. and Fitzh. tit. Inqueſt, 47.

9. In *Quod juris clamat*, the *Defendant claimed Fee*, and upon this they were at Iſſue, and *Venire Facias iſſued, returnable* &c. *at which Day the Attorney of the Defendant was eſſoigned*, and the *Eſſoine quaſhed*, and therefore the Inqueſt ſhall be taken by his Default. Br. Enqueſt, pl. 92. cites 10 E. 3.

Br. Inqueſt, pl. 76. cites 10 E. 3. 32. and Fitzh. Inqueſt, 46.——Br. Challenge, pl. 214. cites S. C. Bbt Brooke makes a Wonder of the Evidence, becauſe the contrary thereof is now uſed.

S. P. Br. Inqueſt, pl. 10. cites 2 H. 4. 14, and 28 Aſſ. 42.

10. In *Ward*, the *Parol was Sine Die by Protection, and revived by Re-ſummons*, and the *Sheriff returned* the Defendant *Nihil*, and yet the Plaintiff cannot have the Inqueſt by Default. Br. Inqueſt. pl. 96. cites 14 E. 3. and Fitzh. Inqueſt, 9.

Br. Inqueſt, pl. 28 cites S. C. accordingly, becauſe in Caſe of Felony.——

11. In an *Appeal of Rape* the Defendant pleaded Not Guilty, he was let go by Mainprize, and made Default at the Day of Trial; an Inqueſt ſhall not be taken by Default *in favorem Vitæ*, but a Capias ſhall iſſue, and an Alias & Pluries, and an Exigent. Jenk. 68. pl. 30. cites 16 Aſſ. pl. 13.

Br. Appeal, pl. 54. cites S. C ——Br. Exigent, pl. 67. cites S. C.——Br. Proceſs, pl. 148. cites S. C.——Br. Waiver de Choſes, pl. 39. cites S. C.

1 Salk. 217. S. P. by Holt, Ch. J. Obiter, cites Jenk. 68. and ‡ 18 Aſſ. 13. and 34 H. 6. 24.

‡ This was an Indictment for receiving one A. a Clerk attainted, and he pleaded Not Guilty; but the Juſtices would not take the Inqueſt, becauſe the Clerk might make his Purgation after the other was hanged.

But in Writ of *Waſt* if the Defendant makes Default at the Niſi Prius, the Inqueſt ſhall be taken by his Default. 20 E. 3. quod nota, in a mixed Action. Br. Enqueſt, pl. 55. cites 22 H. 6. 2.

12. In *Waſte, at the Venire Facias returned, the Defendant made Default*, and the Plaintiff prayed the Inqueſt by his Default, and could not have it, but had Diſtringas ad audiendum Juratores. Br. Inqueſt, pl. 94. cites 18 E. 3. and Fitzh. Inqueſt. 3.

Br. Default, pl. 75 cites S. C.

13. In *Avowry after Iſſue, the Defendant made Default at the firſt Day*, Diſtreſs ſhall iſſue ad audiend' Jurat', but *if he makes Default at the ſecond Day*, the Inqueſt ſhall be taken by his Default, Br. Inqueſt, pl. 71. cites 20 E. 3. and Fitzh. Inqueſt, 11.

14. *Debt*

14. *Debt againſt C. who pleaded Nihil Debet*, and *at the Venire Facias the Defendant was Eſſoign'd*, and *at the Day was eſſoign'd de Servitio Regis, and at the Day did not bring his Warranty thereof*, and the Plaintiff pray'd the Inqueſt by Default, where *the Statute gives 40s. for the Journey*, and could have only 40 s. Damages for the Delay, and the *Defendant was amerc'd, and Niſi Prius awarded.* Br. Default, pl. 31. cites 21 E. 3. 37.

15. Where *Aſſiſe is awarded againſt a Man by his Default*, yet he ſhall have the Challenges. Br. Challenge, pl. 113. cites 22 Aſſ. 26. Per Huſſey.

16. In *Attant* where the Grand Jury is awarded againſt the Petit Jury by Default, there by their Default they have loſt their Challenge to the 24, Quod Nota. Br. Challenge, pl. 114. cites 22 Aſſ. 31.

S. P. Br. Challenge, pl. 162. cites 4 E. 4. 1. But Brooke ſays, it is ſaid elſewhere, that he may *give Evidence.*

17. *Action of Land againſt the Baron and Feme, and J. S.* and *at the Niſt Prius J. S. appear'd by Attorney*, and the *Baron and Feme made Default*, and the *Demandant prayed the Inqueſt of the Moiety*, and could not have it. The Reaſon ſeems to be inaſmuch as upon the Default recorded *Petit Cape ſhall iſſue of the Moiety at the Day in Bank.* Br. Inqueſt, pl. 62. cites 28 E. 3. 27.

18. *Scire Facias by two Coparceners*, the *one made Default at the Niſi Prius.* Per Fiſher, it in Suit againſt two Tenants, the one makes Default at the Niſi Prius, yet the Inqueſt ſhall be taken; and the Juſtices would have taken the Inqueſt, but it remained for Default of Jurors. Br. Inqueſt, pl. 69. cites 32 E. 3, and Fitzh. Inqueſt, 6.

But in *Writ of Entry againſt two*, the *one made Default* at the Niſi Prius. Per Paſton, we cannot take the Inqueſt; For if he can *ſave the Default at the Petit Cape*, all the Writ ſhall abate, or if the *Demandant releaſes the Default*, all the Writ ſhall abate; which Babbington Ch. J. agreed. Br. Inqueſt, pl. 78. cites 12 H. 6. 7. and Fitzh. Inqueſt. 56.

19 In *Waſte*, if the *Defendant makes Default after Appearance*, the Plaintiff ſhall have Diſtreſs infinite, and not Writ to Inquire of the Waſte. Br. Default, pl. 82. cites 7 H. 4. 15.

20. If the *Prayee in Aid makes Default at the Day of Niſi Prius*, the Inqueſt ſhall be taken immediately. Br. Default, pl. 98. cites 7 H. 4. 21.

21. If *Niſi Prius ceaſes by Protection*, and *at the Day in Bank is repeal'd*, new Proceſs ſhall be made againſt the Jury, but if it be *diſallowed at the Day*, the Inqueſt ſhall be taken by his Default. Br. Proceſs, pl. 170. cites 14 H. 4. 16.

At the Niſi Prius in Plea Perſonal Protection was ſhewn for the Defendant, and *at the Day in Bank which the Defendant ſhew'd Repellance, which was allow'd*, and yet *the Inqueſt not awarded by Default of the Defendant at the Niſi Prius*; *For the Protection was then in Force*, and yet the Day of Niſi Prius, and the Day in Bank is all one to diverſe Reſpects, by which they demanded the Defendant, and he made Default, wherefore then the Inqueſt was awarded by Default. *But where Protection is ſhewn forth at the Day of Niſi Prius, and the Juſtices do not take the Inqueſt, but record it, and at the Day in Bank the Protection is diſallow'd*, there the Inqueſt ſhall be taken by Default, for in this Caſe the Default was never ſaved, contra above. Br. Inqueſt, pl. 23. cites 21 H. 6. 20.

In Action Perſonal *at the Niſi Prius, the Defendant made Default*, and the *Default recorded*, and after *Protection was caſt by A. B. and recorded*, and *at the Day in Bank, Repellance was caſt*, and therefore the Inqueſt was awarded by Default, and the Reaſon ſeems to be, inaſmuch as the Default was recorded before the Protection was caſt, and in this Caſe the Defendant has *loſt his Challenges*; but it is ſaid elſewhere, that he may give Evidence. Br. Inqueſt, pl. 41. cites 4 E. 4. 1.——Br. Protection, pl. 71. cites S. C.

22. Quare Impedit againſt *Patron and Incumbent*, who *came at the Diſtreſs*, and had *Oyer of the Writ*, and *ſaid, that the Pone was not ſerved againſt the Incumbent*, and yet, becauſe he was preſent and ready in Court, therefore he was compell'd to anſwer; And ſo it ſeems that ill

Br. Diſcontinuance de Proceſs, pl. 14. cites S. C.

ſerving of Proceſs, or ill Return, is material, where the *Party appears*; and where the Judgment is not upon the Default, but upon the Plea and Appearance of the Party. Br. Proceſs, pl. 47. cites 9 H. 5. 3.

23. If *in Præcipe quod* reddat the *Tenant makes Default after Appearance*, by which *Petit Cape Iſſues, and after this is releas'd or ſaved, and are at Iſſue*, and the *Tenant makes Default again*, now the Inqueſt ſhall be taken by Default, as in Plea Perſonal, and ſhall not have Petit Cape; For *Petit Cape ſhall not Iſſue after Petit Cape*. Per Weſtbury; *Quære*. Br. Inqueſt, pl. 52. cites 9 H, 5. 12.

24. If the *Defendant makes Default at the Day of the Imparlance*, he ſhall be condemn'd by his Default. Br. Default, pl. 78. cites 11 H. 6. 31.

25. *Debt againſt four* Executors *of* 200 *l.* the *Plaintiff recovered the* 200 *l. of the Goods of the deceaſed, and* 20 *l. Damages de bonis propriis, and* after the Plaintiff *brought Scire Facias againſt the four Executors*, and they *were at iſſue*, and *at the Niſi Prius one appear'd* and *three made Default*, and by the beſt Opinion, the Inqueſt ſhall be taken, and not Judgment be given by Default of the three. For *that Executor who beſt pleads, or does, for the Teſtator ſhall be admitted*; Per Newton, Paſton, and Aſcue, J. and if *the one Executor confeſſes the Action or releaſes*, this ſhall bind the others; *but if the one be Nonſuited*; yet the others ſhall ſue forth; and the Opinion was, that if Judgment ſhall be given by Default, yet of the 20 l. which was de bonis propriis, Judgment ſhall not be given by Default againſt all for the Default of any of them, but only of the 200 l. which was of the Goods of the Deceaſed; but by the beſt Opinion, the Inqueſt ſhall be taken. Br. Executors, pl. 77. cites 21 H. 6. 45.

26. In *Treſpaſs*, they are at Iſſue, and Venire Facias iſſued, and after other Venire Facias iſſued the Defendant made Default, the Inqueſt ſhall be awarded by his Default. Br. Inqueſt, pl. 56. cites 22 H. 6. 4. Per Newton.

S. P. Br. Inqueſt, pl. 90. cites S. C.——— S. P. Ibid. pl. 96. cites S. C.

27. *Re-attachment* was ſued *in Treſpaſs, and Re-habeas Corpora againſt the Jury*, and the *Defendant made Default*; by which the Inqueſt was taken by his Default; Per Cur. Br. Inqueſt, pl. 74. cites 1 R. 3. 4. and Fitzh. Inqueſt, 26.

28. The *Defendant does not appear*, Inqueſt may be taken by Default. G. Hiſt. C. B. 60. 62. 81.

(R) [*Inqueſt taken by Default.*] *In Reſpect of the Iſſue* in the Action.

1. IN a Writ of Meſne, if the Iſſue be whether the Plaintiff was diſtrained in Default of the Defendant, and **after the** Defendant makes Default, **the Inqueſt may be taken by Default, becauſe** by the Iſſue the Acquittal, which makes the Action real, is acknowledged, and **the Iſſue** is only in Right of Damages. 30 **Ed.** 3. 28. **b. adjudged.**

2. In *Debt* the *Defendant came by Capias* and pleaded *to Iſſue*, and *found Mainpriſe* to keep his Day, *and failed at his Day*, by which the Inqueſt was awarded by his Default, but no Capias upon the Mainpriſe; for this ſhall be double Pain. Br. Inqueſt, pl. 21. cites 38 E. 3. 14.

3. In *Debt* the *Defendant pleaded a Releaſe*, and the *Plaintiff ſaid*, that *Non eſt Factum*, and at the Day of Venire Facias, the *Defendant made Default*, and the *Inqueſt was taken* by his Default, *and found for the*

the Defendant, by which the Plaintiff took nothing by his Writ; and yet if the Plaintiff had prayed it, he might have had him condemned by the Default before the taking of the Verdict; and ſo ſee Folly in the Plaintiff. Br. Inqueſt, pl. 5. cites 40 E. 3. 15.

4. In *Treſpaſs*, the *Defendant confeſſed* the Treſpaſs, *and juſtified*, and after *made Default at the Day of Adjournment*, by which the Inqueſt was taken by Default, and not Writ to inquire of the Damages. Br. Inqueſt, pl. 20. cites 9 H. 5. 15.

5. In *Debt* it was ſaid for Law by Forteſcue, that if the *Defendant pleads a Releaſe* upon which they are *at Iſſue*, and after the *Defendant makes Default*, he *ſhall be condemned by Default*. Br. Inqueſt, pl. 3. cites 34 H. 6. 24.

6. *But* upon ſuch Releaſe and Default *in Treſpaſs*, the Inqueſt ſhall be taken by Default, and no Diverſity or Reaſon is given by him, but that the Uſage has been ſo; But Brook ſays it ſeems to him, that the Reaſon is, that the *Debt is certain*, and the *Damages in Treſpaſs is uncertain*. Br. Inqueſt, pl. 3. cites 34 H. 6. 24.

7. In *Debt* the Defendant *pleads a Releaſe* made to him by the Plaintiff, the Plaintiff *replies*, that this Releaſe was made *by Dureſs*, and upon this they are at Iſſue, the Defendant makes Default, the Inqueſt ſhall be taken by Default. Jenk. 81. pl. 59. This has been the Practice of the Law formerly. The *Reaſon* ſeems to be, if the Defendant had appeared, and an Inqueſt had been taken, and it had been found againſt him, the King ſhould have a Fine; and the Default of the Defendant hinders this. Jenk. 81. pl. 59.

8. *But if* the Defendant being ſued in Debt, had pleaded *Non eſt Factum*, and had made Default at the Trial, he ſhould be condemned without taking an Inqueſt. Jenk. 81. pl. 59. In neither of theſe Caſes is the Obligation *acknowledged by the Plea*. See Roll. 586. pl. 2. and pl. 7.

9. *But* in *Treſpaſs* the Defendant pleads a *Releaſe*, and Iſſue is joined upon it that it is *not the Plaintiff's Deed*, and the Defendant makes Default, in this Caſe an Inqueſt ſhall be taken; for *Treſpaſs is uncertain for the Damages*, and a Jury ought to find them; the *Debt is certain*, and appears to the Court. Jenk. 81. pl. 59.

10. Upon an Iſſue, whether *Payment* was *made or not*, the Inqueſt ſhall be taken, although the Defendant makes Default. Jenk. 68. pl. 30. cites 1 H. 7. 2. and 15 Ed. 4. 25.

11. In Treſpaſs the Defendant *juſtified for a Way* &c. and Iſſue being joined, *the Cauſe came down to be tried at Niſi Prius*. But the *Defendant made Default*, *and* ſo the *Inqueſt was taken by Default*; and now *the Iſſue being immaterial*, *the Court was moved for a Repleader*. Et per Holt Ch. J. the Defendant is out of Court by the Default, and that to all Purpoſes but this, viz. That *Judgment may be given* againſt him; therefore being out of Court, *there cannot be a Repleader*, unleſs the Default could be waiv'd, or the Party could be brought into Court again. 1 Salk. 216. Trin. 2 Ann. B. R. Staple v. Hayden.

(S) *In what Caſes* upon a Default *Judgment ſhall be given, or Inqueſt taken by Default.*

Fitzh. Aſſiſe, pl. 302. cites S. C.

1. IN an Aſſiſe, if the Tenant makes Default at the firſt Day, the Inqueſt ſhall be taken by Default. 30 Aſſ. 17. adjudged.

——Aſſiſe of the Office of Serjeant at Mace, to the Houſe of Commons; The Plaintiff arraign'd the Aſſiſe the firſt Day of the Term; The Tenant being demanded, made Default; Ideo Capiatur Aſſiſa, per Defaltam. Then the Demandant counted, and ſhew'd the King's Patent of the Office, which is read. The Jury not being yet ſworn, Day was given to Wedneſday next, at which time Court held, that the Defendant may give what Evidence he can, but not to plead in Abatement, or Bar of the Aſſiſe, nor to Challenge; and the Wedneſday the Cauſe was tried at the Bar. 2 Lev. 120. Hill. 25 & 26 Car. 2. B. R. Cragge v. Norfolk.

2. [So] In an Aſſiſe, if the Tenant be attached and makes Default, Judgment ſhall not be given, but the Inqueſt ſhall be taken by Default. 8 H. 6. 2. 7. b.

In *Debt* the *Defendant was eſſoin'd at the Venire Facias*, and *at the Day thereof was eſſoin'd de Servitio Regis*, and at the Day of this *did not bring his Warrant*, and the *Plaintiff pray'd the Inqueſt by Default*, and could have only 40s. Damages for the Delay, and Niſi Prius awarded where the Statute of Glouceſter cap. 7, is, that by ſuch not warranting, he ſhall loſe 20s. for the Journey, or more, as the Diſcretion of the Juſtices ſhall ſerve. Br. Eſſoine, pl. 57. cites 21 E. 3. 37. —— Fitzh. Enqueſt, pl. 8 cites 21 E. 3. 58. S. P. [but ſeems miſprinted, and that it ſhould be 21 E. 3. 62 a pl. 9.]

3. In Debt or other Action, if the Defendant pleads he owes him nothing, upon which they are at Iſſue, and after he is eſſoined de Servitio Regis, and does not bring his Warrant at the Day, it ſeems the Inqueſt ſhall be taken by Default, though the Statute of Glouceſter, cap. 8. hath given a Penalty for it. 21 E. 3. 62. b. But quære ‡ 29 E. 3. 36. adjudged.

‡ Fitzh. Eſſoine, pl. 180. cites S. C.

(T) *In what Caſes* upon a Default an *Inqueſt ſhall be taken by Default, or Judgment is to be given.*

1. IT ſeems that where before Iſſue upon Default Proceſs ſhall iſſue, and Judgment is not to be given, there after Iſſue upon Default, the Inqueſt ſhall be taken by Default. 11 H. 4. 32.

Br. Default, pl. 20. cites S. C.—Br Enqueſt pl. 16. cites S. C.——

2. If by the Iſſue the Action is confeſſed, and a Matter ſubſequent in Diſcharge in Trial, if the Defendant makes Default, Judgment ſhall be given without taking the Inqueſt, but otherwiſe e contra. 11 H. 4. 32.

Jenk. 81. pl. 59. cites S. C —— In *Debt*, if the *Defendant pleads Releaſe, and after makes Default*, Judgment ſhall be given by his Default, *For by ſuch Plea the Debt is confeſs'd.* Per. Cur. Br. Default, pl. 92. cites 5 E. 4. 6.

See (X) pl. 5. S C —Br. Default, pl. 20. cites 11 H. 4 31. S. C.——

3. If in Debt upon an Obligation, the Defendant ſays he made it by Dureſs, upon which they are at Iſſue, if the Defendant afterwards makes Default, the Inqueſt ſhall be taken, for the Obligation was never acknowledged. 11 H. 4. 32.

Br. Enqueſt, pl. 16. cites S. C.—— Jenk. 81. pl. 59. S. C.

4. But

4. But **in Debt upon an Obligation, if the Defendant** pleads the Releaſe of the Plaintiff, **upon which they are** at Iſſue **upon the Denial thereof, and after the Defendant makes Default, Judgment ſhall be given againſt the Defendant, for by the pleading of the Releaſe** he hath acknowledged the Debt. 14 H. 4. 2. 12 H. 6. 7.

S. P. And *ſo* if he pleads *Acquittance.* Br. Default, pl. 4 cites 34 H. 6. 32.

Per Forteſcue, and others.——Br. Inqueſt, pl. 16. S. P. cites 11 H. 4 32. ——*But upon ſuch Releaſe pleaded in Treſpaſs, and Default made after*, the Inqueſt ſhall be awarded by Default, and no Condemnation by Default, and the Reaſon ſeems to be inaſmuch as in the one Caſe the Debt is certain, and the Damages in Treſpaſs not. But Forteſcue ſaid, there is no Difference in Reaſon, but the Uſage has been ſo. Br. Default, pl. 4. cites 34 H. 6 32.

5. **If a** Man, in Execution upon a Condemnation in Treſpaſs, ſues a Scire Facias againſt the Recoveror upon his Releaſe, who denies it, **upon which they are** at Iſſue, **if the** Recoveror makes Default at the Trial, **Judgment ſhall be given upon the Default, that the Plaintiff ſhall be quit, and the Inqueſt not taken upon the Default.** 12 H. 6. 7. **adjudged.**

Fitzh Scire Facias, pl. 148. cites S. C.

6. In Detinue, **if the** Garniſhee and Plaintiff are at Iſſue, **and the** Garniſhee makes Default at the Niſi Prius, **Judgment ſhall be given againſt him upon the Default, and the Inqueſt ought not to be taken by Default.** 8 H. 6. 5.

Br. Default, pl. 35. cites S. C.—— The Inqueſt ſhall not be taken upon

the Iſſue; For *by the Default the Iſſue is waiv'd*, and the Inqueſt ſhall inquire of the Damages, and the Garniſhee ſhall not have Attaint. Br. Inqueſt, pl. 57. cites S. C.—— Jenk. 81. pl. 59. S. P. In *Detinue* the *Defendant pray'd Garniſhment* and had it, and *at the Day the Garniſhee and the Plaintiff appear'd*, and the *Defendant made Default*, yet the Plaintiff could not have Judgment by Default; For the Defendant has done all that he can do, and the Action is now between the Plaintiff and the Garniſhee upon Inter-pleader, and upon this the Garniſhee pleaded Releaſe of all Actions, and it was accepted. Br. Default, pl. 91. cites 39 E. 3.

7. In Debt upon an Obligation, **if the** Defendant denies the Deed, **and** after Iſſue makes Default, **the Inqueſt ought to be taken by Default, and not Judgment given, for he does** not acknowledge the Obligation by the Plea. 12 H. 6. 7.

Generally, if *after Iſſue joined*, the *Defendant makes Default*, the

Plaintiff may proceed to Trial, *and have the Inqueſt taken by Default*; *but he* ſhall *not have Judgment by Default, unleſs in ſome ſpecial Caſes.* In *Debt upon a Bond*, if the Defendant *pleads a Releaſe*, and *Iſſue is thereupon joined*, and at the Trial the *Defendant makes Default*, the Plaintiff may pray Judgment by Default and the *Inqueſt need not be taken* by Default, *for by this Plea the Duty is confeſſed*, and the Plea is not made good; *Aliter upon Non eſt factum*, for thereby the Duty is denied, therefore in that Caſe the Inqueſt muſt be taken by Default; *But in Treſpaſs*, if the Defendant *pleads Releaſe, and makes Default*, the Plaintiff cannot pray Judgment by Default, but *muſt pray the Inqueſt by Default*; for the Debt was certain, but the *Damages* are uncertain. 1 Salk. 216, 217. Trin. 2 Ann. B. R. Staple v. Hayden.

8 In Account as Receiver, **if the** Defendant traverſes the Reſceipt, **upon which the Parties are** at Iſſue, **and after the** Defendant makes Default, **no Judgment ſhall be given, but a Capias to hear the Jury; and if he makes Default** (*) **thereupon, the Inqueſt ſhall be taken by Default.** 30 E. 3. 12. **adjudged.**

Fol. 587.

8. In a Quid Juris clamat, **if the** Defendant claims a Fee, **upon which they are** at Iſſue, **and after the** Defendant makes Default, **the Inqueſt ſhall not be taken by Default, but the Plaintiff ſhall recover the Land.** 30 E. 3. 29.

9. So **in a Quid Juris clamat, if the** Iſſue **be** upon any Matter præter the claiming a Fee, **and after the Defendant makes Default, the Inqueſt ſhall not be taken by Default, but a Diſtreſs ſhall iſſue againſt the Defendant to attorn.** 30 E. 3. 29.

10. In a Quare impedit, **if the** Defendant comes at the Grand Diſtreſs returned, and pleads to the contrary, and after makes Default, **the Writ ſhall be awarded to the Biſhop without taking the Inqueſt.** 12 E. 2. **Quare impedit** 168.

11. In *Debt* if the *Defendant pleads Releaſe* and the *Plaintiff denies the Deed*, and at *the Day of Venire Facias returned, the Defendant makes Default* now he ſhall be condemned by Default if the Plaintiff prays it, but if he takes the Inqueſt by Default, and they find againſt him, he ſhall be barr'd quod nota. Br. Default, pl. 6. cites 42 E. 3. 1.

12. *Debt upon an Obligation*, the *Defendant pleaded Releaſe of all Actions*, and the *Plaintiff denied the Deed*, and ſo *to Iſſue*, and *at the Day he did not come by which he had another Day*, and *at the Day the Defendant did not come*, by which he *was condemned by Default* quod nota; for by the pleading of the Releaſe the Obligation is not denied, quod nota, and is as confeſſed. Br. Default pl. 9. cites 45 E. 3. 10.

13. *And* note there, that *if the Defendant, after that he had pleaded to the Inqueſt upon the Releaſe had made Default at the firſt Day after that he had joined Iſſue*, he ſhall not be condemned at this Day; for *the Statute gives him one Eſſoign, or one Default, ſo that at the next Day he may purſue* &c. Ibid.

14. If *Four bring Writ of Error upon Outlawry pronounced againſt them in Appeal of the Death of the Baron brought by the Feme*, and *ſhe is returned warned* and *does not come*, and two of the Plaintiffs appear and two not, the *Feme* Defendant *ſhall not be demanded if all the Plaintiffs do not come, and Severance does not lie.* Br. Demand. pl. 3. cites 7 H. 4. 45.

15. Where *Protection is caſt at the Day of the Niſi Prius, and repealed at the Day in Bank*, and the *Defendant makes Default*, the Plaintiff ſhall not recover by Default, but ſhall have the Inqueſt by Default; for the *Default at the Niſi Prius was ſaved by the Protection.* Br. Default, pl. 27. cites 14 H. 4. 23.

Br. Diſcontinuance of Proceſs, pl. 13. cites S. C.—Br. Protection, pl. 38. cites S. C.——Br. Enqueſt, pl. 18. cites S C.——The Jury ſhall not in ſuch Caſes be demanded, but by Award new Proceſs ſhall iſſue againſt the Jury; But if the Protection had been diſallow'd at the Day in Bank, there in Debt the Inqueſt ſhall be taken by Default; Per Hank. Quære. Br. Enqueſt, pl. 51. cites S. C.

Br. Enqueſt, pl. 19. cites S. C.

16. In *Debt* the *Defendant pleaded Releaſe of all Actions Perſonal*, the *Plaintiff ſaid that he made the Deed by Dureſs*, and at *the Niſi Prius the Defendant made Default*, and yet per tot. Cur. the Defendant ſhall not be condemned by Default, but the Inqueſt ſhall be taken by Default, for *the Deed is not denied, but* is *avoided by Dureſs and by Matter in Law*, and ſo ſee upon Deed denied and Default made after, the Plaintiff ſhall recover, and the Defendant ſhall be condemned by Default. Br. Default, pl. 28 cites 9 H. 5. 13.

17. *A Man condemned by Ca. Sa. got Releaſe of the Plaintiff and had Scire Facias ad cognoſcend. factum*, and the other comes and denies the Deed, by which they are at Iſſue, and after the Plaintiff makes Default, the Defendant ſhall go quit. Br. Default, pl. 76. cites 12 H. 6. 7. and Fitzh. Scire Facias 148.

18. *Treſpaſs againſt Three who imparled to another Term*, and *at the Day one made Default*, and *the Two pleaded to Iſſue in a Foreign Place*, and therefore Inqueſt to inquire of Damages was awarded againſt him who made Default. And ſo ſee that *by Default after Imparlance* the Defendant ſhall be condemned, quod nota, and yet the other two pleaded, which intitled the Third to the whole. Br. Default, pl. 38. cites 19 H. 6. 8.

19. If *Tenant by Receipt joins Iſſue upon Jeofail, and* after *makes Default*, by this all the Iſſue and Jeofail is waived, and Judgment ſhall be given upon the firſt Default of Tenant for Term of Life, and all done by the Tenant by Reſceipt is waived. Br. Waiver des Choſes, pl. 46. cites 20 H. 6. 37.

Br. Enqueſt, pl. 37. cites S. C.

20, *Debt upon an Obligation of* 40 *l.* the *Defendant pleaded Releaſe of all Actions* &c. and *Ven. Facias returned*, and the *Defendant made Default*, and it was argued, if he ſhall be condemned by Default, as *if he had pleaded Acquittance*, which confeſſes the Debt, and after had made

made Default, and after ſeveral Precedents were ſhewn, that *all was one* by which the Defendant was condemned by Default; Nota. Br. Default pl. 68. cites 5 E. 4. 86.

21. *Contra* where he pleads *Matter in Fact*, as *Condition in Arbitrement*, or the like, after Default made, there the Inqueſt ſhall be awarded by Default, but he ſhall not be condemned by Default; Per Choke J. Quod non negatur. Ibid. Br. Enqueſt, pl. 37. cites S. C.

22. In *Account* the *Defendant pleaded that he was not his Receiver* &c. and *found againſt him*, by which he *was adjudged to account*, and he *alleged Payment before the Auditors, and* after he *made Default*, and the Plaintiff prayed Judgment by his Default and could have only Inqueſt by Default. Br. Default pl. 62. cites 1 H. 7. 2. Br. Enqueſt, pl. 33. cites S. C See (X) pl. 6.

23. *Contra*, where *a Man in Debt upon an Obligation pleads Acquittance, and* after *makes Default* he ſhall be condemned by Default; Note the *Diverſity*, where he *pleads Deed* of the Plaintiff, and where he *pleads a Matter without writing*. Ibid. Br. Enqueſt, pl. 33. cites S. C.

24. In a *Writ of Right* brought by the Lord Windſor, the *Plaintiff and Four Knights, and Eleven of the Grand Aſſiſe appeared*, and the *Tenant made Default*; The Prothonotaries ſaid, that the Default of the Tenant ſhall only be recorded, and the Jurors ſhall not be demanded, for the *Inqueſt ſhall not be taken by Default in this Caſe, as in Perſonal Actions*. But ſays that Glanvil in his Treatiſe De Magna Aſſiſa &c. is to the contrary. Dy. 98. a. pl. 51. 52. Paſch. 1 Mar. Ld. Windſor v. St. John.

25. *Husband and Wife Tenants* in Writ of Right, they *made Default, after the Miſe joined*, and after the *Wife was received to join the Miſe again*, but if the Party ſhall have Seiſin of the Land without a *Petit-Cape*, in that the Books differ. Dy. 98. a. pl. 53. Paſch. 1 Mar. Ld. Windſor v. St. John and Ux. But Ibid. 103. b. S. C. a Petit Cape was awarded.

26. Holt Ch. J. ſaid, that *ſome old Books held, that where the Defendant made Default after Iſſue joined, Judgment ſhould be given by Default, and not the Inqueſt taken by Default*. Some old Books indeed are ſo, but I never underſtood the Reaſon of them. A *Difference* has been taken indeed, *where a Releaſe was pleaded, and where other Matter*; in the firſt Caſe, becauſe that Plea confeſſes the Debt, if the Defendant made Default at the Trial, Judgment ſhall be given againſt him by Default; but even in that Caſe they agree, that the Plaintiff may go on to Trial, if he will. As to all other Caſes it is a general Rule, that there ſhall be no Judgment by Default after Iſſue joined. By the Statutes of Weſtm. 2. & Marlb. the Defendant can have but one Default after Iſſue joined, and that muſt be Ad proximum Diem. Now you always appear upon the Return of the Venire Facias. But in thoſe Days the Defendant was called ſolemnly upon the Return of the Venire Facias; and if he made Default, then went a Diſtringas, in which was inſerted a Clauſe to diſtrain the Defendant to appear; but if he made Default, then there was no other Proceſs to bring him into Court again, and ſo his Default was peremptory. And warned the Bar never to make Defaults any more; for it will be hard to maintain, that any Judgment can be given for the Defendant, after he has made Default. Powell J. ſaid, that a Defendant that has made Default, is not ſo out of Court, but that Judgment may be given againſt him, but he can never have a Day in Court again. 2 Ld. Raym. Rep. 925. Trin. 2 Ann. in Caſe of Staples v. Heydon. || 1 Salk. 216. S. C. & S. P. Per Holt Ch. J. and he ſaid, that in Perſonal Actions before Iſſue joined, every Default was peremptory, but after Iſſue join'd the firſt Default is not peremptory, but the ſecond is, and this is by the Statute of Weſtm. 2. cap 27. and Marlb.

(U) *In*

(U) *In what Caſes Judgment* ſhall be *given* upon a Default.

[*And in what Caſes a Writ ſhall iſſue ad Audiendum Judicium.*]

Fitzh. Jour. pl. 33. cites S. C. —— *In Debt* if the *Parties are at Iſſue or demur*, and after the *Defendant makes Default*, the *Judgment ſhall be upon Default*, and the Demurrer or Iſſue waiv'd. Br. Default, pl. 58. cites 38 H. 6. 33. Per Moyle.

1. IN Debt, **if there be a** Demurrer in Judgment upon a Plea in Bar, **and after the** Plaintiff makes Default, **a** Writ **ſhall iſſue againſt him** ad Audiendum Judicium. 20 H. 6. 44. b.

Br. Audita Querela, pl. 7. cites S. C. — Fitzh. Audita Querela, pl. 2. cites S. C —— Br. Default, pl. 79. cites S. C.

2. In an Audita Querela **the** Defendant appears, **and the** Plaintiff declares, and was let to Mainpriſe, **and after the** Defendant makes Default, **the Plaintiff ſhall not have Judgment againſt him becauſe he never pleaded, but a** Diſtreſs ſhall iſſue. 47 E. 3. 1. b.

Br. Audita Querela, pl. 7. cites S. C —— Fitzh. Audita Querela, pl. 2. cites S. C. —— Br. Default, pl. 79. cites S. C.

3. But if he pleads, and after makes Default, **a** Writ ad Audiendum Judicium **ſhall iſſue.** 47 E. 3. 1. b.

A Man *demanded Surety of the* J. N. *in* B. R. *by which he remain'd in Ward*, and upon this he *brought Bill of Maihem againſt him*, and they appear'd to the Bill, and Day was given in this Form viz. Ad iſtam billam comparentibus tam Querente quam Defendente ſuper hoc dies datus eſt uſque in Diem Jovis &c. ſalvis defendenti exceptionibus ſuis ad billam, ad Perſonam, et avantagiis quibuſcunque, and after the Defendant was demanded and made Default. Vampage ſaid, if a Man *appears and ſays nothing*, the *Plaintiff ſhall recover for want of Anſwer*, and if *he appears and makes Default in the ſame Term*, he ſhall be condemn'd; For this is a Departure in deſpite, and if he *imparles and makes Default* at the Day, he ſhall be condemn'd; by which he pray'd, that he ſhall be condem'd. And the firſt Caſes were not denied which Vampage put, but *in this Caſe*, becauſe the *Day was given by the Court*, therefore he is out of the Caſe, and ſhall not be condemn'd, Quod Nota, for he did not demand the Day as upon Imparlance, nor had Oyer of the Bill, therefore ſhall not be condemned, Quod Nota, by Award, and thoſe Matters are *in Perſonal Actions*, and *not in Actions Real*, but there *upon Imparlance* it ſeems, that the *Tenant ſhall loſe Seiſin of the Land*, and *in the other Caſe Petit Cape ſhall Iſſue*, as it ſeems. Br. Default, pl 34. cites 7 H. 6. 39. 41. ——— Br. Bille, pl. 6. cites S. C.

4. **If the** Defendant after Appearance departs in Deſpite of the Court, **Judgment ſhall be againſt him.** 7 H. 6. 39. b.

5. **If the** Defendant appears, **and the** Court gives a Day to another Term, **at which Day** he makes Default, **yet no Judgment ſhall be given.** 7 H. 6. 39. b. 41. b.

6. But Proceſs ſhall be awarded **in this Caſe.** 7 H. 6. 41. b. **dubitatur.**

Br. Bille, pl. 6. cites S C.

7. In **a Writ of** Annuity, **if the** Defendant makes Default after Appearance, **the Plaintiff ſhall recover the Annuity.** 2 H. 4. 4.

In *Annuity* if the *Defendant makes Default after Appearance*, Diſtreſs ad Audiendum Judicium ſhall iſſue. *Quære* H. 6. R. 2. Br. Default, pl. 81. (82) cites 2 H. 4. 1. S. C. ——— Fitzh. Proceſs, pl. 116. cites S. C.

8. But 2 H. 4. 1. b. **per Curiam, a** Writ ſhall iſſue to hear Judgment.

9. In **a Writ of** Annuity, **if the** Defendant hath Aid of the King Patron, and of the Ordinary, **and after a** Procedendo comes, **and the** Defendant

Defendant and the other Praiees make Default, **no Writ ſhall iſſue ad Audiendum Judicium, but** he ſhall be ſummoned **to anſwer.** 29 E. 3. 3.

10. Where no certain Thing is demanded, **if the** Defendant after Appearance makes Default, **no Judgment ſhall be given, for it cannot be adjudged by the Juſtices,** otherwiſe where the Thing **demanded** is certain. * 2 H. 4. 23.

* Br. Default, pl. 15. cites S. C.

11. As † in Treſpaſs, **if the** Defendant pleads a Releaſe, and **after** makes Default, **the Plaintiff ſhall not have Judgment.** 2 H. 4. 23.

12. But ‖ in Debt **it is** otherwiſe, **for there the** Demand is certain. 2 H. 4. 23.

In *Debt* the *Defendant pleaded in abatement of the Writ*, and the *Plaintiff imparl'd*, and *at the Day of the Imparlance the Defendant made Default*, and the Plaintiff demanded Judgment to recover by his Default, and per tot Cur. except Moyle, he ſhall have Judgment to recover by the Default after Appearance, Quia Nihil dicit; for if *he who appears and pleads, does not maintain it, this is Quaſi Nihil Dicit* and after by Advice of all the Juſtices, the Plaintiff recovered his Debt, and Damages, tax'd by the Court. Br. Default, pl. 58. cites 38 H. 6. 33.

† Br. Inqueſt, pl. 11. cites S. C.——*But in Plea Real, upon ſuch Default after Imparlance, ſhall iſſue Petit Cape* Br. Ibid.——*But* it ſeems, that *in Treſpaſs* upon ſuch Default, *where there is no Demand certain*, there Inqueſt ſhall be taken by his Default. Br. Ibid.——Br. Peremptory, pl. 27. cites S. C.

‖ Br. Inqueſt, pl. 11. cites S. C——But in *Debt of* 20 *Quarters of Corn*, the *Defendant had peremptory Day after Imparlance, to anſwer, and did not come*, and the *Plaintiff pray'd his Debt and Damages to be aſſeſs'd by the Court*; Brian denied it; for *this varies from the Common Action of Debt of Money* which is Debet and Detinet; But *this Action is in the Detinet only*, and therefore the *Value of the Corn ſhall be inquir'd at the Time* &c and therefore Writ ſhall be to inquire of the Value, per Judicium. Br Default, pl. 104. cites 11 H. 7. 5.——See (T) pl. 7. and the Notes there.

13. **When an** Iſſue is found for the Demandant, **if the** Tenant makes Default after, **Judgment ſhall be given; for after Iſſue nothing remains but to give Judgment.** 4 H. 6. 28.

Br. Judgment, pl. 108. cites S. C.—— Br. Default, pl. 45. cites S. C.——Fitzh. Judgment, pl. 7. cites S. C.

14. In **a Writ of** Coſinage, **if** Baſtardy is pleaded in the Demandant, **and** returned **by the Biſhop that he is a** Mulier, **if at this Return** the Tenant makes Default, **the Demandant recover, and no Petit-Cape ſhall iſſue, for the** Iſſue is found for him. 4 H. 6. 28

S. P but Rolf and ſome Juſtices ſaid, the Demandant ſhall not have Judgment to recover, but ſhall have Petit Cape; But per Martin, *This is a Trial as Trial by Verdict*, and after Trial by Verdict, the Demandant ſhall recover the Land, notwithſtanding, that the Tenant makes Default, by which the Demandant pray'd his Judgment at his Peril, and had it. Br. Default, pl 45. cites 4 H. 6. 28.—— Fitzh. Judgment, pl. 7. cites S. C.——Br. Judgment, pl 108. cites S. C.

15. **So if** after Iſſue found for the Plaintiff at the Niſi Prius, if a Day be given in Banco, and **the** Defendant makes Default, **Judgment ſhall be given againſt him.** 4 H. 6. 28.

Fitzh. Judgment, pl 7. cites S. C.

16. In *Quare impedit*, if the *Defendant makes Default after Appearance*, the *Plaintiff ſhall recover the Preſentment and his Damages*, and have Writ to the Biſhop, but if he had taken Continuance and had made Default, Diſtreſs ad Audiendum Judicium ſhould Iſſue. Br. Default, pl. 80 cites 2 H. 4. 1. & 6 R. 2.

17. If *Vouchee appears by Attorney, and after caſts Protection, which is repealed the next Day*, Seiſin of the Land ſhall be awarded; for Default and Appearance cannot be all at one and the ſame Day. Br. Default, pl. 18. cites 7 H. 4. 19.

18. Where *Tenant in Præcipe quod reddat appears at the Niſi Prius by Attorney, who has no Warrant*, this ſhall turn him in Default at the Day in Bank, though the *Jury be taken and paſs for the Demandant* and *Petit Cape ſhall be awarded and no Seiſin of the Land.* Br. Default, pl. 26. cites 14 H. 4. 16.

Br Garrantie de Attorney, pl. 11. cites S. C. that at the Day in Bank, Hull would not record any Warrant, and ſo it was taken as a Default.

Br. Judgment, pl. 110. cites 37. H. 6 27. Per Priſot.

19. In Debt, the *Defendant pleaded Miſnomer*, and the *Plaintiff imparled* and at the Day the *Defendant made Default*, and by the Opinion of all the Juſtices, except Moile, the Plaintiff ſhall recover, and no Diſtreſs ad Manutenendum placitum ſhall iſſue. Br. Default, pl. 51. cites 27 H. 6. 27.

S. P For a Man ſhall recover by

20. *So* if he had *pleaded in Bar*, and after had made Default, and this *in Plea Perſonal*; but *in Plea Real, Petit Cape ſhall iſſue.* Ibid.

Default after Appearance, as well in Plea Perſonal, as he ſhall have Seiſin of the Land in Plea Real by Default after Imparlance in one and the ſame Term, and if in another Term, then Petit Cape in Plea Real, and upon ſuch Default in Plea Perſonal, if the Thing be uncertain, as Damages in Treſpaſs &c. he ſhall have Writ to inquire of the Damages. Br Judgment, pl. 110. cites 37. H. 6. 27.

21. If *Tenant in Præcipe* quod reddat appears and *imparles*, and *after makes Default*, Seiſin of the Land ſhall be awarded and not Petit-Cape; Per Priſot quod non negatur quod nota. Br. Default, pl. 58. cites 38. H. 6. 33.

22. *And* per Priſot in Conſimili Caſu 39 H. 6. 16. every Default *after Imparlance* is peremptory, and *ſo in Writ of Right* if the *Tenant Vouches*, and the *Vouchee appears and enters into the Warranty, and imparles, and after makes Default*, the Demandant ſhall recover Seiſin of the Land againſt the Tenant, and the Tenant over in Value &c. Ibid.

23. In a *Writ of Right*, *Quia Dominus remiſit Curiam ſuam Domino Regi, by Baron and Feme*, where the *Wife appeared per Prochein amy being within Age*, the *Tenants vouched the Common Vouchee, who entred* and joined the Miſe upon the meer Right, and afterwards made Default, and Judgment final was given againſt the Vouchee and his Heirs, and againſt the Tenants and their Heirs. Dyer. 56. a. pl. 17. Trin. 35 H. 8. Anon.

S. C. cited 5 Rep. 86. a. Trin.

24. In a *Writ of Right* if the Tenant makes *Default after the Miſe joined* the Judgment ſhall be final. F. N. B. 6. (N)

38 Eliz in Penryn's Caſe, and reſolv'd e contra, viz. That final Judgment ſhall not be given in ſuch Caſe, but a Petit Cape ſhall iſſue; For peradventure he may ſave his Default.——Bulſt. 161, 162. Trin. 9 Jac. the Reſolution in Penryn's Caſe. 5 Rep. 86 cited, and denied per Cur.——2 Saund. 46. Hill. 21 & 22 Car. 2. S. P. accordingly, in Caſe of Williams v. Gwyn.

25. Error of a *Judgment in Dower*; after Iſſue the *Tenant being an Infant made Default*, a Petit Cape was awarded, and Judgment given by Default; the Court held it no Error, eſpecially it being *after Appearance*, for *he cannot ſave his Default by Non-Summons.* Cro. E. 308. pl. 16. Mich. 35 & 36 Eliz. B. R. Gore v. Purdue.

Bulſt. 159. Herne v. Whitlock. S. C. the whole Court ſeem'd all clear of Opinion, that the Judgment given at Durham was erroneous, but the Reverſal of it was not pronounced,

26. Error of a Judgment in a *Writ of Right* of Lands in T. The Writ was Quia Dominus nobis remiſit Curiam ſuam; The *Defendant after divers Imparlances made Default* and final Judgment was given in Durham, Error aſſigned was, becauſe final Judgment was given upon a Default after Imparlance, where it ought to have been only a Petit Cape; the Court did did not give any Reſolution in that Point, but ſeemed to incline that a Judgment final ſhould not be given, unleſs upon a *Departure in Deſpite of the Court, which is upon a Default of the Tenants the ſame Term after Imparlance.* But if Day be given to any other Term, or Time certain, and then the Tenant makes Default, it ſhall be otherwiſe. Cro. J. 292. pl. 2. Mich. 9 Jac. Lilburn v. Heron.

and upon the declaring the Opinion of the Court, the Parties ended the ſame between themſelves, without further moving of the Court herein ——Yelv. 211. S. C. and the Difference taken between General and Special Imparlance, which is to a Day certain, in which Caſe the Tenant is not bound to appear till the Day, and there may be ſome Cauſe whereby to excuſe his Default, and then no Laches in him, and conſeqnently no Reaſon that he ſhould loſe his Land peremptorily, where the Right appears not to the Court, and where he is not guilty of any Contempt. Quod Nota; Per tot. Cur.

27. *Error*

27. *Error* was brought *of a Judgment in Quod ei deforceat* at the Grand Seſſions in Wales, and aſſigned for Error that Judgment final was given upon Default after Appearance, where it *ought to be Petit Cape in all Real Actions* upon Default after Appearance, *and Grand Cape upon Default before Appearance*, which the Court held manifeſt Error. Lev. 105. Trin. 15 Car. 2 B. R. Slaughter v. Tucker.

28. If the Tenant makes Default *in a Real Action*, a *Grand Cape is awarded*, and *upon the Return* of it, *if the Demandant inſiſts upon the Default, he muſt have Judgment final; but the Demandant may waive the Default, and take an Appearance* upon the Grand Cape; and that is regular becauſe the Tenant comes in by Proceſs; and *ſo it is* of a *Default on a Petit Cape*, but *in a Perſonal Action there is no Proceſs to bring the Party into Court again*; alſo the Day of the Niſi Prius not being the ſame with the Day in Bank, a *Default at Niſi Prius cannot be waived at the Day in Bank.* Per Holt Ch. J. 1 Salk. 217. Trin. 2 Ann. B. R. in Caſe of Staple v. Hayden. 2 Ld. Raym. Rep. 924, 925. S. P. by Holt Ch. J. in S. C.

29. A *Writ of Right* for Land is brought againſt A. he *does not appear*; a *Grand Cape iſſues*, he *makes Default at the Grand Cape*; *Judgment final ſhall not be given till* Appearance and Trial by Battle after the Miſe joined upon the meer Right, or Trial by the Grand Aſſiſe; or after the Miſe joined, and a Departure in Deſpite of the Court; or after the Miſe joined, and a Default and a Petit Cape awarded, and upon this the Default not ſaved. In theſe ſeveral Caſes final Judgment ſhall be given. Jenk. 141. pl. 91.

(X) *In what Caſes after Plea pleaded Judgment ſhall be* given *upon Default without a Writ ad Audiendum Judicium.*

Fol. 588.

1. IF the Defendant makes Default after ſuch Plea pleaded, which is a Confeſſion of the Action, and only a Matter of Diſcharge ſubſequent, **Judgment ſhall be given upon the Default, but otherwiſe e contra.** 11 H. 4. 32. Br. Enqueſt, pl. 16. cites S. C. where S. P. is admitted.—— Br. Default, pl. 20. cites S. C.

2. As in **an Action of** Debt, **if the** Defendant pleads an Acquittance **or Releaſe**, and after makes Default, **Judgment ſhall be upon the Default, becauſe the** Duty is acknowledged. * 11 H. 4. 32. || 1 H. 7. 1. † 2 H. 4. 23. 12 H. 6. 7. * Br. Enqueſt, pl. 16. cites S. C.——Br. Default, pl. 20. cites 11 H. 4. 31. Per Hank. S. C.——S. P. Br. Default, pl. 92. cites 5 E. 4. 6. Per Cur.
|| Br. Default, pl. 62. cites 1 H. 7. 2. S. C ——Fitzh. Condemnation, pl. 5. cites S. C.
† Br. Default, pl. 15 cites S. C.

3. In Replevin, **if the** Defendant avows, and **after** makes Default, **Judgment ſhall be thereupon for the Damages, becauſe the** Taking and Detinue are acknowledged. * 11 H. 4. 32. || 14 H. 4. 2. Br. Default, pl. 20. cites 11. H. 4. 31. S. C. Per Thirning and Hank.
* Br. Enqueſt, pl. 16. cites S. C. but not S. P.——Fitzh. Condemnation, pl. 10. cites S. C.
|| Fitzh. Condemnation, pl. 11. cites S C.

4. **But** otherwiſe **it is** e contra.

5. As

Br. Enqueſt, pl. 16. cites S. C——
Br. Default, pl 20. cites 11 H. 4 31.
S. C.——See (T) pl. 3. and the Notes there.

5. As in Debt upon an Obligation, **the** Defendant pleads **that he made it** by Dureſs, and **after** makes Default, **no Judgment ſhall be, but** Proceſs ſhall iſſue **for it, becauſe here the** Deed was never acknowledged. 11 H. 4. 32.

6. In Account as Receiver, **if the** Defendant traverſes the Reſceipt, and **after** makes Default, **no Judgment ſhall be, but Proceſs.** 30 E. 3. 12. **adjudged.**

7. Where the Defendant *in Action Perſonal* appears and *pleads, and after makes Default*, he ſhall be condemn'd by Default, *quia Nihil dicit.* Br. Default, pl. 58. cites 38 H. 6. 33. per Priſot.

8. In *Treſpaſs* the *Defendant came by Cepi Corpus and pleaded in Bar*, and the *Plaintiff replied*, upon which the *Defendant demurr'd, and was let to Mainpriſe de die in diem, and at the Day made Default*, and by Award he was condemn'd by Default, and Writ awarded to inquire of the Damages and Cape pro fine Regis againſt the Mainpernors. Br. Default, pl 73. cites 18. E. 4. 7.

9. *So* where he *pleads to Iſſue and makes Default*; and if he *pleads to Iſſue and remains in Ward*, there he ſhall not be condemn'd by Default, but the Warden ſhall be commanded to bring him in, but if he was by Mainpriſe, the Inqueſt ſhall be awarded by his Default. Ibid.

(Y) After Default. *Where a Writ is to be* awarded *ad Audiendum Judicium, what Proceſs there ſhall be.*

Fitzh. Condemnation, pl. 10. cites S. C.

1. IN **a Writ of** Debt, **if the** Defendant comes by Exigent, and pleads in Bar, and **after** makes Default, **a** Capias ſhall be awarded. 11 H. 4. 32.

Fitzh. Condemnation, pl. 10. cites S. C.

2. And if he makes Default upon the Capias, **what Proceſs ſhall be awarded,** quære. 11 H. 4. 32.

S. P. Br. Default, pl. 46. cites 4 H. 6. 28.

3. Where the *one of the Demandants and the Tenant make Default at the Summons, Grand Cape ſhall iſſue of the Whole, and Summons ad ſequend' ſimul*, and if the other Demandant who made Default, appears, and the Tenant makes Default again, they ſhall recover the Whole, but if the other Demandant and the Tenant make Default again, there the other Demandant who appears ſhall recover the Moiety only, Quod Nota. Br. Proceſs, pl. 79. cites 9 E. 4. 2.

(Y. 2) Judgment for Default. At what Time.

1. A Man ſhall *not* be condemn'd by his Default, *but after Plea pleaded or Imparlance*; For the Dies datus is always before the Count, and the Imparlance is after the Count. Note the Difference, for it is good. Br. Default, pl. 1. cites 19 H. 8 6.

(Z) *Who*

(Z) *Who* ſhall be *put to anſwer.* [One who comes or is brought into Court for another Purpoſe.]

1. If a Man comes in Bank upon a Cepi Corpus, and I have a Writ depending againſt him there, he ſhall be put to anſwer thereto. 9 H. 6. 55. for there he is in ward of the Court. Br. Reſponder, pl. 48. cites S. C. and that ſo it is, if he be in the Cuſtody of a Sheriff, who has Proceſs againſt him out of Bank, he ſhall anſwer, *unleſs he denies that he is the ſame Perſon*, but if he denies his being the ſame Perſon, then he ſhall not. *Contra, if he comes by Writ in Ward of the Sheriff of London, upon a Plaint there*, for in that Caſe he is a Priſoner to London, and not to the Bank.

2. If a Man be committed to the Fleet by the Common Pleas, and another ſues a Writ againſt him, the Warden of the Fleet ſhall be commanded to bring him in, and when he comes into Court, he ſhall be put to anſwer thereto without Writ. 9 H. 6. 55. *Two Writ of Treſpaſs were brought againſt one and the ſame Man, he came upon the one Writ by Exigent Quarto exactus*, and therefore by Newton, he ſhall be *Priſoner to the Fleet*, and ſhall pay Fees; and he *would not have appear'd to the other Writ*, but becauſe he is the ſame Perſon, and is Priſoner to the Fleet, therefore the Court compell'd him to anſwer to the other Writ alſo, Quod Nota; For they may ſend for him to the Warden of the Fleet, and if he will not anſwer, he ſhall be Condemn'd. Br. Default, pl. 42. cites 22 H. 6. 51.——Br. Reſponder, pl. 21. cites S. C.

3. If a Man impriſoned in B. R. be brought in Banco by Habeas Corpus to anſwer a Writ there depending, when he comes he ſhall be put to anſwer thereto, for he was brought there for this Purpoſe, yet he is not committed in Banco. 9 H. 6. 54. b. Br. Default, pl. 57. S. P. and this by Priſot, where he is impleaded by Writ, but contra if he be *impleaded by Plaint*, cites 38 H 6. 30.——Br. Impriſonment, pl. 28. cites S. C. but a Quære is there added, if this Suit by Writ or by Plaint, ſhall be intended of the Suit in B. R. or of the Suit in C. B.

4. If a Man be brought in Banco upon an Habeas Corpus to have the Privilege becauſe he was arreſted coming to Court, if another hath a Writ againſt him, he ſhall not be put to anſwer thereto, becauſe he is not in Ward of the Court, but in the Cuſtody of the Serjeant who brings him in; and the Queſtion only is, Whether he is to be delivered, or to be remanded. 9 H. 6. 54. b. Br. Reſponder, pl. 51. cites 39 H. 6. 50. S. P. ——[and the Opinion of the Court there was, that he ſhould be re-manded.

5. *In Plea of Land at the Petit Cape return'd the Demandant was eſſoin'd*, and *had Day till now*, and the Demandant held him to the Default. Trewe ſaid, the *Default* cannot be taken; for it *is gone by the Eſſoin*, and notwithſtanding this, the *Tenant was compelled to anſwer to anſwer to the Default.* Br. Eſſoine, pl. 87. cites 5 Aſſ. 10.

6. *He who is taken in Pais by Warrant of a Juſtice of Peace*, and *after* is taken *by Capias* out of C. B. he *ſhall anſwer in Bank*, and ſhall be *by Mainpriſe*, and then ſhall be *remitted into Pais* to anſwer before the Juſtices of Peace there. Br. Reſponder, pl. 33. cites 2 H. 7. Br. Retorne de Brief, pl. 83. cites 2 H. 7. 2. S. C.

7. *H. upon a Habeas Corpus was return'd by the Warden of the Fleet*, and now *a Stranger would declare againſt him here in B R. in an Action.* But Coke Ch. J. cites 31 H. 6. 10. that if a Man declares againſt another in B. R. before he is in the Marſhalſea by Writ, this is Coram non Judice, but it is not material what Writ it is he comes into the Marſhalſea by, if he is there; And ſo in this Caſe no Declaration can be

good againſt H. if he be remanded to the Fleet immediately upon the firſt return, and not committed to the Marſhal; and H. was committed to the Marſhal, becauſe he ſaid alſo, that he would not put in Bail to anſwer the Action. Roll Rep. 217. pl. 18. Trin. 13 Jac. B. R. Hilderſham's Caſe.

(A. a) *To what* Thing the *Anſwer ought to be* made.

1. IF a Bill be in B. R. de Placito Tranſgreſſionis & de inſultu, & verberatione vi & Armis, and the Plaintiff declares of an Aſſault and Battery, and that the Defendant at the ſame Time took of him extorſive 10s. &c.

2. *If the Parties are at Iſſue, or Demurrer* be *in Plea Real*, there *Petit Cape ſhall be awarded to anſwer to the Default only*, and all the *Iſſue and Demurrer is waiv'd.* Br. Default, pl. 58. cites 38 H. 6. 33

3. *And* per Priſot *upon the Grand Cape*, the Tenant ſhall anſwer *to the Default and to the Demand alſo*, but *upon Petit Cape* the Tenant ſhall anſwer *to the Default only, and not to the Matter*; Per Priſot. Ibid.

(B. a) *At what Time* he ſhall be *put to anſwer.* [Where there are two Defendants, and one makes Default.]

Fol. 589.

1. IN a Præcipe quod reddat againſt Two, if one appears, and the other makes Default, by which the Grand Cape iſſues of a Moiety, he that appears ſhall not be put to anſwer till the Grand Cape be returned, becauſe that at this Day he that made Default may accept the intire Tenancy, and ſave his Default. 12 H. 6. 6. b.

No Part ſhall be recover'd by the Default. Br. Default, pl. 79. cites 49 E. 3. 26.

2. In a Writ of Ward againſt Two, if one appears, and the other makes Default, he that appears ſhall not be put to anſwer before the other comes, becauſe the Ward is intire. 17 E. 3. 70. b.

3. But otherwiſe it is in an Ejectment of Ward, becauſe this is but in Nature of a Treſpaſs. 17 E. 3. 70. b.

4. The ſame Law is for the ſame Reaſon in a Raviſhment of Ward. 17 E. 3. 70. b.

Br. Reſponder, pl. 32. cites S. C. accordingly, but if ſhe comes, and he does not, ſhe ſhall not anſwer till he comes, or till he be Outlaw'd. ——— Br. Default, pl. 61 cites S. C. ——— Fitzh. Reſpond, pl. 40. cites S. C.

5. In Treſpaſs againſt Baron and Feme, if the Baron appears, and the Feme makes Default, admitting this is not the Default of both, the Baron ſhall be put to anſwer preſently. 22 Aſſ. 46. adjudged.

6. In an Action of Treſpaſs againſt Baron and Feme, if the Baron comes by the Exigent, and the Feme does not come, and becauſe it appears to the Court that the Exigent was diſcontinued againſt the Feme

Feme, they award a new Exigent againſt her, yet the Baron ſhall be put to anſwer preſently, and ſhall not ſtay till the Feme comes, tho' he ought to make Anſwer again with the Feme when ſhe comes, and when he has pleaded, he ſhall have idem dies with the Feme. 39 E. 3. 18. b. adjudged.

7. In Treſpaſs againſt Baron and Feme, if the Baron makes Default, and the Feme appears, the Feme ſhall not be put to anſwer till the Baron comes or be outlawed. 22 Aſſ. 46.

S. P. *but if the Baron comes*, and the Feme not, he ſhall be received to anſwer alone. Br. Default, pl. 61. cites S. C.——Fitzh. Reſpond. pl. 40. cites S. C.——Br. Reſponder pl. 32. cites S. C.

8. In an Action of Debt againſt Baron and Feme, if the Baron appears, and the Feme makes Default, the Baron ſhall not be put to anſwer, but Proceſs ſhall iſſue againſt the Feme, and idem dies given to the Baron. Mich. 11 Ja. B. between *Throwgood and Dunnam.*

9. In all real Actions where the Proceſs is by Attachment and Diſtreſs, and the Action is brought againſt Two, and one comes by the Diſtreſs, yet he ſhall not be put to anſwer without the other, which did not appear, for the other ſhall not loſe his Freehold by his Plea. 39 E. 3. 15. b.

10. As in a Quod permittat againſt Two, if one comes by Attachment and Diſtreſs, yet he ſhall not be put to anſwer without the other. 39 E. 3. 15. b.

11. In an Action againſt Two, if the Proceſs be determined againſt one, and the other appears, he ſhall be put to anſwer. 39 E. 3. 15. b.

12. As in an Action of Waſte againſt Two, if at the Great Diſtreſs returned one makes Default, and the other appears, he ſhall be put to anſwer, becauſe by the Statute the Proceſs is determined againſt the other. 39 E. 3. 15. b. adjudged.

13. *Scire Facias upon a Recovery againſt Baron and Feme*, the *Baron came, and not the Feme*, and the *Tenant took the intire Tenancy Abſque hoc that his Feme any Thing had*, and well notwithſtanding the firſt Judgment againſt both; for the Tenancy may be tranſpos'd after. Br. Default, pl. 97. cites 45 E. 3. 5.

14. A Writ of *Conſpiracy* is brought againſt Two; *one appears and pleads Not Guilty*, the other makes Default; the *Jury finds that he who pleads, conſpired with the other* who makes Default; the Plaintiff has Judgment and affirmed in Error; For although he who makes Default cannot be convicted of the ſaid Conſpiracy, becauſe he does not appear, yet the Law gives ſuch Credit to this Verdict, that it ſhall be intended to be true as to the Conſpiracy againſt him who pleaded, until it be diſproved by an Attaint. Jenk. 27. pl. 51.

(C. a) Saved in Plea Real. By what Plea.

1. IN *Writ againſt Two*, at the Grand Cape the *one took the entire Tenancy*, and was *received to Wage his Law of Non-Summons for all* Thel. Dig. 189. Lib. 12. cap. 27. S. 2. cites Paſch. 4 E. 3. 131. Mich. 6 E. 3. 284.

2. In *Writ* brought *by two againſt three* at the Grand Cape returned againſt all, the Tenants came and *Waged their Law of Non-Summons in Common, and at the Day given two came and the Third made Default*, upon which it was ſaid that *he who made Default is Dead*, yet the other two made their Law, by which the Writ abated for the two Parts,

Parts, and Seiſin awarded of the third Part. Thel. Dig. 189. Lib. 12. cap. 27. S 3. cites Mich. 6. E. 3. 278.

3. In *Writ againſt ſeveral*, if the *Demandant holds himſelf to the Default made by one* of them, *and he makes his Law or ſaves his Default* all the *Writ ſhall abate*. Thel. Dig. 189. Lib. 12. cap. 27. S. 4. cites Mich. 7 E. 3. 345. For there all the Writ abated becauſe the Demandant held himſelf to the Default made by one who was an Infant at the Time of the Default made, and it is ſaid there, that the *Demandant cannot releaſe the Default of the one and hold to the Default of the other*, 13 E. 3 Ley 50.

4. In *Writ by two againſt one* at the Grand Cape returned the Tenant came, and *againſt one of the Demandants pleaded his Releaſe of all Rights made after the Default*, and *againſt the other he waged his Law of Non-Summons*, and was received to it. Thel. Dig. 189. Lib. 12. cap. 27. S. 5. cites Mich. 9 E. 470.

5. At the Grand Cape returned, the Tenant was *eſſoign'd de Servitio Regis*, and *at the Day given* by the Eſſoign, he came and *diſavowed the Eſſoign, and tendered his Law of Non-Summons*, and ſaid that the Eſſoign was not caſt for him &c. but the *Demandant refuſed his Law*, bywhich the Writ was abated. Thel. Dig. 189. Lib. 12. cap. 27. S. 6. cites Trin. 11 E. 3. Ley 44.

6. The *Tenant was eſſoigned* and after *made Default*, and *at the Grand Cape returned he was eſſoigned de Servitio*, and *at the Day given he would have waged his Law, that the Eſſoign de Servitio Regis was not caſt for him*, and was not received, but Seiſin was awarded to the Demandant; but if the Tenant be *eſſoigned of Common Eſſoign, and afterwards eſſoigned de Servitio Regis, and then makes Default*, there at the Day of the Grand Cape returned he may defeat all by his Law and abate the Writ. Thel. Dig. 189. Lib. 12. cap. 27. S. 8. cites Hill. 12 E. 3. Saver Default 43, and ſays ſee 12 H. 4. 14, 15.

Thel. Dig. 189. Lib. 12. cap. 27. S. 9. ſays, it ſeems by the Opinion of Trin. 7 E. 3. 41. That in ſuch Caſe where the Tenant is eſſoign'd of Common Eſſoign, and afterwards of Eſſoign de Servitio Regis, and after make Default of the Grand Cape, if the Demandant takes himſelf to the Default only, it *ſuffices for the Tenant to wage his Law of Non Summons* only, *without defending that the Eſſoigns were not caſt for him*. But otherwiſe, it is, if the Demandant holds himſelf to all. And ſays, See ſuch Law of Non-Summons, and that the Eſſoign was not caſt for him. 10 H. 6. 9.

7. The *Tenant being Dumb*, but he *could hear and underſtand* that which one ſaid to him, *put his Hand upon the Book, and the Words of the Charge were read to him*, and then the Demandant waived the Default, by which the Writ abated. Thel. Dig. 189. Lib. 12. cap. 27. S. 7. cites Paſch. 13 E. 3. Ley 49.

8. In *Writ againſt two*, at the Grand Cape they *waged their Law of Non-Summons*, and at the Day given the *one did not come, but the other* came and *made his Law*, by which all the Writ abated &c. Thel. Dig. 189. Lib. 12. cap. 27. S. 10. cites Hill. 18 E. 3. 6. Quære. And ſays ſee 7 E. 3. Ca. 29 E. 3. 11. That it ſhall not abate but only for the Moiety. And that ſo agrees 38 E. 3. 33. & 41 E. 3. 2.

9. In *Writ againſt Four* at the Grand Cape returned, *one* of the Tenants came, and *took ſeveral Tenancy of the Moiety, and made his Law of Non-Summons by Aſſent of the Demandant immediately*, by which the Writ abated for the Moiety, and Seiſin awarded of the reſt. Thel. Dig. 189. Lib. 12. cap. 27. S. 11. cites Hill. 22 E. 3. 2.

10. The *Baron and Feme and a Third Perſon waged their Law of Non-Summons*, and at the Day given they came, but the *Third was within Age*, by which Thorp *made the Baron and Feme to ſwear alone* and the Writ abated. Thel. Dig. 189. Lib. 12. cap. 27. S. 12. cites Paſch. 38. E. 3. 10.

11. In

11. In *Writ againſt Two*, if they *wage their Law of Non-Summons in Common*, and at the Day given, if the *one makes Default* and the other comes, *he who comes* then *cannot take the intire Tenancy and make his Law for all*, but only for the Moiety. Thel. Dig. 190. Lib. 12. cap. 27. S. 15. cites Hill. 41 E. 3. 2.

12. *But* in ſuch Caſe he who comes *may* make his Law *for his Portion*, and abate the Writ for this Portion, notwithſtanding the Wager in Common. Thel. Dig. 190. Lib. 12. cap. 27. S. 15. Hill. 41 E. 3. 2. and 48 E. 3. 13.

13. If the *Tenant wages his Law of Non-Summons*, and *at the Day given is ready to* make his Law, at this Day the *Demandant cannot waive the Default and put the Tenant to plead over* without the Aſſent of the Tenant. Thel. Dig. 189. Lib. 12. cap. 27. S. 13. cites Hill. 42 E. 3. 8. and cites Hill. 19 E. 2. Saver Default 81.

14. In *Writ againſt Baron and Feme*, the *Baron made Default*, and the *Feme appeared always by Attorney*, and at *the Day of the Grand Cape* returned *both appeared*, and the *Baron alone* waged and *made his Law of Non-Summons*, and the Feme not, by which the Writ abated. Quære; For it was ſaid, that the Law ought to be made by the Baron and Feme. Thel. Dig. 189. Lib. 12. cap. 27. S. 14. cites Mich. 44 E. 3. 38.

15. *Præcipe quod* reddat, *at the Petit Cape the Demandant held him to the Default*; by which the *Tenant ſaid, that he had an Attorney, who died before the Day, we not knowing it*, and the *Demandant ſaid, that he had Notice of his Death*; and per Cur. he *ſhew at what Place he had Notice* by Reaſon of the Viſne; and ſo a good Plea; Quod Nota. Br. Saver Default, pl. 15. cites 50 E. 3. 9. S. P. Br. Saver Default, pl. 31. cites 5 H. 7. 3.

16. The *Vouchee in Præcipe* quod reddat, ſhall not wage his Law, *that he was ſummoned upon the Summons*, for he need not ſave his Default at the Grand Cape ad Valentiam; *but if he be returned ſummoned, when he was not ſummoned, and after Grand Cape ad Valentiam iſſues*, he ſhall have *Diſceit* of the Return &c. Br. Ley-gager, pl. 27. cites 50 E. 3. 16.

17. Note, per Belknap, that the *Vouchee* who *came by the Grand Cape ad Valentiam need not ſave his Default at the Summons*, nor ſhall any take Advantage thereof; for Land is demand againſt him in certain &c. yet by *Nonſummons at the Writ of Summons and Grand Cape* the Vouchee ſhall have Writ of Diſceit, and yet the Summons cannot be defeated by Ley gager of Non-ſummons, nor by any other Iſſue; Quod Nemo negavit &c. in Action of Diſceit. Br. Saver Default, pl. 42. cites 50 E. 3. 17. Thel. Dig. 190. Lib. 12. cap. 27. S. 16. cites S. C. and 33 E 3. Saver Default, 72. *but* it is otherwiſe where the 76.

Vouchee makes Default after Appearance. Cites Mich. 9 E. 2. Saver Default,

18. In *Formedon* the *Petit Cape iſſued* againſt the Tenant, and afterwards the *Parol was put without Day by Demiſe of the King*, and *at the Re-ſummons the Tenant made Default and Grand Cape awarded*, by which the *Tenant came and waged his Law of Non-Summons*, and was received. Thel. Dig. 190. Lib. 12. cap. 27. S. 17. cites Mich. 2 H. 4. 14. and ſays ſee 13 H. 4 9. that Thirning agreed to it, and Hankford denied it.

19. *Petit Cape iſſued* returnable ſuch a Day, the *Tenant* came and *ſaid that his Attorney died a little before the Day in Court, of whoſe Death he had no Notice before the Petit Cape awarded, and was ready to anſwer*; and the *Demandant held him to the Default, and ſaid that the other died Three Weeks before the Petit Cape awarded*; by which the Tenant had Notice before the Petit Cape awarded; and the Tenant durſt not demur, but *pleaded an overflowing of Water* at a certain Place, upon which

which they were at Iſſue. Br. Saver Default, pl. 17. cites 12 H. 4. 1.

20. *Præcipe quod* reddat *againſt Baron and Feme*, the *Baron at the Grand Cape* came and *ſaid that he is ſole Tenant and tendered his Law of Non-ſummons*, and the Demandant ſaid, that the Baron and Feme were Tenants the Day of the Writ purchaſed; Per Cot. this is no Plea. Quære. Br. Saver Default, pl. 3. cites 3 H. 6. 23.

21. *Writ of Aiel*, the *Tenant made Default at the Summons*, and came *at the Grand Cape*, and *ſaid that he was impriſoned in the Caſtle of O. upon a Statute Merchant at the Suit of J. S. at the Teme of the Summons returned*, and by the Opinion of the Court this a good Plea; for he is impriſoned by the Order of the Law, notwithſtanding it was by Reaſon of his own Act; Quod Nota, and Outlawry ſhall be reverſed for ſuch Cauſe. Br. Saver Default, pl. 4. cites 3 H. 6. 46.

22. It is ſaid, that *Corporation*, *Recluſe*, *and Decrepit*, cannot make their Law, but that their *Summons ſhall be tried per Pais*. Quære. Thel. Dig. 190. Lib. 12. cap. 27. S. 18. cites Hill. 33 H. 6. 8.

23. Thel. Dig. 189. Lib. 12. cap. 27. S. 1. ſays, it ſeems that at the Time of Bracton, the Writ ſhould not abate notwithſtanding that the *Tenant made his Law of Non-Summons*, for he wrote in his Treatiſe, 3 Lib. 5. cap. 1. fol. 366. Ad Diem vero Legis, aut tenens facit Legem ſuam, aut deficit in Lege facienda, ſi autem Legem fecerit tanquam excuſatus a Defalta eodem Die ad placitum Principale reſpondebit, ſufficit enim ad Dilationem & pro Rationabili Summonitione tenentis Tempus intermedium inter Legem vadiatam & Legem factam. And a little afterwards in anſwering to the Queſtion, for what Reaſon the Writ ſhould not abate by the making of the Law of Non-Summons, he ſays, ſufficit ei pro commodo propriæ Seiſinæ Reformatio.

(D. a) In Real Actions. What Plea may be pleaded before the ſaving the Default.

1. AT the *Grand Cape* returned *againſt the Baron and Feme*, the *Baron* appear'd and *was received to ſay that he had no Feme the Day of the Writ purchaſed*, without ſaving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 4. cites Trin. 19 E. 2. Saver Default 33.

2. At the *Grand Cape* returned the Tenant was received to *ſay*, *that he was the Villein of ſuch a one*, *and held the Land in Villeinage* &c. without ſaving his Default; becauſe he had not appeared before to affirm the Tenancy in his Perſon. Thel. Dig. 210. Lib. 14. cap. 16. S. 7. cites Paſch. 6 E. 3. 254.

3. At the *Grand Cape* return'd the Tenant was received to *ſay*, *that the Demandant had diſſeiſed him after the Default*, *and is yet Tenant by this Diſſeiſin* without ſaving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Paſch. 8 E. 3. 388.

4. *But* ſuch Plea is *not good*, *without ſaying that the Demandant is yet ſeiſed* of the Land. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Paſch. 9 E. 3. 455.

5. *But* at the *Petit Cape* return'd, the firſt Plea is adjudged no Plea without ſaving the Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 9. cites Mich. 10 E. 3. 541. Saver Default 59.

6. In *Dower* at the *Petit Cape* return'd, the Tenant was received to *ſay*, *that the Demandant had diſſeiſed him after the Default made*, without ſaving

ſaving his Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 13. cites Hill. 16 E. 3 32.

7. At the *Grand Cape* return'd *againſt ſeveral* it is ſaid, that *they cannot plead ſeveral Tenancy of the Moiety* to the Writ without ſaving their Default. Thel. Dig. 210. Lib. 14. cap. 16. S. 16. cites Hill. 22 E. 3. 2.

8. *Præcipe quod* reddat *by a Feme*; *at the Petit Cape returned, the Tenant ſaid, that the Demandant had taken Baron after the laſt Continuance, Judgment of the Writ*, per Belke; *A Releaſe of Right* ſhe may plead before the Default ſaved &c. but not this Plea. Per Chelr. ſhe may plead *Diſſeiſin by the Demandant* done to the Tenant, *and* may allege *Profeſſion in the Demandant*, which Knivet agreed; for *this extinguiſhes the Right*; by which it was awarded that the Demandant recover Seiſin of the Land; Quod Nota. Br. Saver Default, pl. 23. cites 29 E. 3.

9. At the *Petit Cape* the *Tenant cannot ſay that the Tenements are ſeiſed into the Hands of the King by Office, by which it was found that they were the Tenements of an Ideot* &c. notwithſtanding that he ſhews Writ of the King teſtifying it, and Patent of the King of Grant made of them for this Cauſe &c. without ſaving his Default. But Execution was ſtay'd. Thel. Dig. 210. Lib. 14. cap. 16. S. 18. cites Mich. 31 E. 3. Saver Default 37.

10. *Præcipe quod* reddat *againſt Three who made Default*, and *at the Grand Cape they appear'd*, and *each pleaded ſeveral Tenancy of Parcel to the Writ, and tender'd their Law of Non-Summons*. Per Belk. you cannot plead to the Writ before your Default ſaved. And per Mombray, becauſe you do not deny the ſeveral Tenancy, you ſhall take nothing by your Writ. Br. Saver Default, pl. 20. cites 38 E. 3. 28.

11. *Præcipe quod* reddat; *at the Grand Cape the Tenant* came and *ſaid, that A. was ſeiſed before the Writ brought, and leaſed to him in Fee by Deed rendring Rent upon Condition that if ſhe paid* 40*l. that ſhe ſhould re-enter, and that after the Default made A. paid the* 40*l. and re-enter'd*, and ſo the Writ abated in Law, Judgment of the Writ; and it was admitted there that it is a good Plea before the Default ſaved; by which the Demandant relinquiſhed the Default and counted, and the Tenant pleaded in Bar. Br. Saver Default, pl. 24. cites 39 E. 3. 28.

12. At the *Grand Cape* return'd the *Tenant cannot ſay that he held the Land in Mortgage*, and *that the Mortgagor had paid the Money to him after the Default made, and enter'd* &c. without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 22. cites Mich. 39 E. 3. 36.

13. At the *Grand Cape in Ceſſavit* the Tenant *may tender the Arrearages* without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S 28. cites 40 E. 3. 40. 50 E. 3. 22. and 27 E. 3.

14. At the *Petit Cape* the Tenant was received to *ſhew Diſcontinuance of Proceſs* without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 29. cites Mich. 40 E. 3. 34. and 2 H. 5. 2.

15. *And* to ſhew *that his firſt Appearance was by Attorney*, where he had not any Warrant of Attorney &c. Thel. Dig. 211. Lib. 14 cap. 16. S. 29. cites Trin. 43 E. 3. 19.

16. *Formedon*; *at the Petit Cape by Default after Appearance, the Tenant* came and *ſaid that the Demandant had entered upon him after the laſt Continuance*, and ſo abated his own Writ; and becauſe he did not ſave his Default, *Seiſin of the Land was awarded and Proteſtation entered of this Entry made by the Demandant* to ſave Aſſiſe for the Tenant. Br. Saver Default, pl. 10. cites 40 E. 3. 43.

Thel. Dig. 211. Lib. 14 cap. 16. S. 24. cites S. C. and 20 H. 6. 2. and that ſo it was done, 10 E. 3. 541.

17. *Præcipe quod* reddat, *at the Grand Cape the Tenant came and pleaded Join-tenancy with J. N.* &c. *ready to perform his Law*, and was not ſuffered to have the Plea before the Default ſaved; by which he waged his Law of Non-Summons, and yet per Finch, he *ſhall not be ſtopped at another Time to plead Jointenancy*; for *in another Action he ſhall*

ſhall have the View, and by Conſequence plead Jointenancy. Br. Saver Default, pl. 14. cites 42 E. 3 10.

18. At the *Grand Cape* returned, the *Tenant cannot plead jointly with one not named* without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 26. cites Paſch. 42 E. 3. 11. Hill. 8. H. 6. 37. but ſays, Martyn denied it there, and cites 14 H. 6. 4. 33 H. 6. 24 Quære.

19. At the *Grand Cape* the Tenant may *plead Nontenure* without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 27. cites Trin. 47 E. 3. Saver Default 26. but cites 33 H. 6. 2. 24 contra.

20. Ceſſavit, the *Tenant appeared at the Grand Cape, and tender'd the Arrearages, as the Demandant had counted*, and it was accepted; and it was not ſpoken of there, of ſaving his Default firſt; Quod Nota; For the *Statute of Glouceſter, cap.* 4. wills, that if the Tenant comes before Judgment, and tenders the Arrearages and Damages, and finds Sureties &c. that he ſhall retain the Land; and ſo it ſeems, that the *Saver of the Default is only in Præcipe quod* reddat *at Common Law, and not in Actions given by Statute of Ceſſavit*. Br. Saver Default, pl. 43. cites 50 E. 3. 22.

21. At the *Petit Cape* return'd, the Tenant *ſaid, that he held for Term of Life of one A. which A. is dead, and he in Reverſion has enter'd* &c. without ſaving his Default, and admitted a good Plea, and Iſſne taken thereupon. Thel. Dig. 211. Lib. 14. cap. 16. S. 30. cites Mich. 7 R. 2. Saver Default, 30.

Br. Re-ſummons, pl. 6. cites S. C.

22. *Formedon, Petit Cape iſſued*, and after the *Parol was put without Day by Demiſe of the King*, and Re-ſummons was ſued, and the *Tenant made Default*, and *Grand Cape iſſued* returnable &c. at which Day *he made Default*, and the *Demandant prayed Seiſin* of the Land, and the *Tenant tender'd his Law of Non-ſummons*; Read ſaid, he ought to ſave the firſt Default upon the Petit Cape. But per Cur. he need not; For the Parol was without Day by Demiſe; and there per Cur. if Petit Cape was awarded in a Franchiſe upon Conuſance of a Plea granted, and the Demandant ſues a Re-ſummons for failure of Right there &c. the Tenant ſhall not ſave this Default; and after the Attorney waged his Law and was received. Br. Saver Default, pl. 16. cites 2 H. 4. 8.

23. *Præcipe quod* reddat, the *Tenant waged his Law of Non-ſummons*, and *at the Day caſt Protection*, and after the *Re-ſummons is ſued*, the Tenant ſhall not be compelled to ſave his firſt Default; Per Culpepper J. Br. Saver Default, pl. 18. cites 12 H. 4. 14.

24. *Præcipe quod* reddat *againſt two*, the *one made Default after Default*, and *the other appear'd at the Grand Cape, and pleaded Jointenancy with a Stranger not named, and to ſave his Default, tender'd his Law of Non-ſummons*; In this Caſe the Demandant ſhall not count againſt the Tenant before he has ſaved his Default. Br. Saver Default, pl. 25. cites 14 H. 6. 3.

25. *Præcipe quod* reddat, the *Tenant pleaded Jointenancy with a Stranger at the Grand Cape, and tender'd his Law of Non-ſummons.* Per Newton, he ſhall not plead the Jointenancy before he has ſaved his Default, but firſt he ſhall ſave his Default, and after he ſhall plead Jointenancy in a new Action. Per Chaunt, No; For this ſhall be Eſtoppel to us, if we wage our Law of Non-ſummons, as ſole Tenant. But Juyn, and all the Juſtices held, that he ſhall have the View in a new Writ, and therefore he may plead Jointenancy; For this is a Plea which goes upon the View; Quod Nota, that the *Ley gager of Non-ſummons is always before the View*, therefore he ſhall have the View in the new Writ, and by conſequence the Jointenancy. Br. Saver Default, pl. 26. cites 14 H. 6. 4.

26. *Præcipe quod* reddat, *againſt two who made Default at the Summons, and* after came at the Grand Cape and tendered to *wage their Law of Non-ſummons*, and at the Day &c. the *one came and ſaid, that his Companion is dead, and he is ready to perform his Law*; and by the beſt Opinion there, *he ſhall not plead this to the Writ before he has ſaved his Default*; For Forteſcue ſaid, that a Man ſhall not ſay upon the Grand Cape, *that the Feme Demandant has taken Baron after the laſt Continuance*, nor that the *Demandant has entered after the laſt Continuance*; for thoſe Plea proves that the Writ is only abatable. But to ſay that one of the Demandants is dead, proves, that the Writ is abated, which he ſhall have before his Default ſaved; for if the Tenant does not plead it, but ſuffers Judgment, he ſhall have Writ of Error after, by which the other Gratis averr'd the Life of the other at ſuch a Place; Quære of the Matter ſupra? for the ſame Law ſeems to be of the Death of one of the Tenants, and of an Entry pending the Writ; but taking of Baron, Miſnoſmer, Falſe-Latin &c. are otherwiſe. Br. Saver Default, pl. 6. cites 20 H. 6. 2.

Contra, per all the Juſtices, that he ſhall have the Plea without ſaving his Default; For by Death the Writ is abated in Fact, and therefore the Default, is ſaved; and if they give Judgment againſt the Tenements, this ſhall be Error. Br. Saver de Default, 38. cites 21. E. 4. 80.——But it was touched, whether they ought to plead the Death after the laſt Continuance, or no; For per Brian, be the Death before the laſt Continuance or after, the Writ is abated in Fact. Ibid.

27. *Præcipe quod* reddat *againſt two, at the Grand Cape he may plead Nontenure*, without ſaving his Default; For he *need not ſave his Default when he has nothing in the Land*; for then he cannot loſe his Land; Per Priſot, in a Nota; Quære. Br. Saver Default, pl. 40. cites 33 H. 6. 2.

28. *Præcipe quod* reddat, the *Tenant after two Defaults upon the Original, and upon the Grand Cape ſhewed Matter to ſave the Default upon the Grand Cape*, and ill, per tot. Cur. becauſe he did not ſave the firſt Default alſo. Br. Saver Default, pl. 28. cites 38 H. 6. 12.

29. *Dower againſt Two, at the Grand Cape the one made Default*, the *other appeared and ſaid that he was Tenant of the whole jointly with N. not named* in the Writ *abſque hoc, that he who made Default for any thing had, and tendered his Law*; Per Jenny and Pigot, he ſhall not have the Plea of the Jointenancy, but ought firſt to ſave his Default, and in a new Writ he may plead this Plea. Brian, Littleton, and Neale, contra, and that the Tenant cannot do otherwiſe, as here; for otherwiſe the Demandant ſhall recover the Moiety againſt him who made Default, and in a new Writ the Tenant ſhall be eſtopped, to ſay, but that the other was Tenant with him by Reaſon of his General Ley-gager of Non-ſummons. Br. Saver Default, pl. 35. cites 12 E. 4. 1.

30. *Præcipe quod* reddat *againſt Two, who made Default*, and *Grand Cape iſſued*, and *at the one came and ſaid, that after their Default the other is dead*; Judgment of the Writ; and per Briggs he ſhall have the Plea before the Default ſaved, for this Plea proves the Writ abated in Fact. *Contra, of Entry into the Land after the laſt Continuance, Coverture* and taking of Baron &c. Saver Default, pl. 37. cites 21 E. 4. 16.

31. At the *Petit Cape* returned, the Tenant ſhall *plead Out-lawry in the Demandant after the laſt Continuance* without ſaving his Default. Thel. Dig. 211. Lib. 14. cap. 16. S. 31. cites Mich. 14 H. 4. 15 But ſays, the contrary is ſaid, Mich. 20 H. 6. 2. Saver Default 5. Where at the *Grand Cape* returned *againſt two*, the one came and *ſaid that the other is Dead and waged his Law of Non-Summons*, but it was held that the Plea was good without waging his Law; for if the Demandant accepts the Law, the Writ ſhall abate, and if he ſays nothing it ſhall abate, but it was granted that in ſuch Caſe the *Tenant ſhall plead the Death of one of*

the Demandants without waging his Law &c. and ſays ſee 21 E. 4. 19. 95 agreeing.

32. In *Præcipe quod* reddat, the Tenant may plead a *Releaſe of all the Right* before the Default ſaved. Br. Saver Default, pl. 38. cites 21 E. 4. 80.

33. And by ſome *the ſame Law* of a Releaſe *of all Actions*; for where the Action or Right is releaſed, the Demandant cannot recover. *Contra of Pleas, which prove the Writ to be only abatable, as taking of Baron* after the laſt Continuance, *Entry into the Land, Jointenancy* &c Ibid.

(E. a) Sav'd in Plea Real. By what Appearance.

1. PRÆCIPE *quod* reddat *againſt Baron and Feme*; *Protection quia Profecturus was caſt for the Baron*, and immediately *Innoteſcimus was caſt, by which the Protection was annulled*, and therefore it was awarded by Advice of all the Juſtices, that this ſhall turn the Tenants into a Default; and ſo ſee that ſuch Protection ſhall not ſave the Default. Br. Saver Default, pl. 27. cites 1 H. 6. 6.

2. *Formedon againſt Baron and Feme*, the *Feme was received in Default of her Baron, and pleaded to Iſſue*, and *at the Niſi Prius ſhe made Default*, and *at the Day in Bank the Demandant prayed Seiſin of the Land, and had it, notwithſtanding that the Feme tendered to ſave her Default by Floods of Water*; Per tot. Cur. ſhe cannot ſave this Default by this Means, nor any other, becauſe immediately *upon the Default ſhe is out of the Court*, and ſo the Demandant recovers. *Contra of the Tertenant.* But here ſhe was as Tenant by Reſceit; for as Tertenant ſhe and her Baron made Default before, upon which Default now the Land ſhall be loſt. Br. Saver Default, pl. 22. cites 22 H. 6. 13.

3. Note that if the *Vouchee makes Default at the Summons, and* after *appears at the Grand Cape*, he ſhall not ſave the Default, but may enter into the Warranty and plead, and the ſame Law of him who makes Default at the Summons and Pone in Quare Impedit, Writ of Meſne or Action of Waſt, and appears at the Diſtreſs, he ſhall not ſave the firſt Default. Br. Saver Default, pl. 7. cites 27 H. 6. 8.

(F. a) Judgment. How the Judgment ſhall be.

1. WHERE *ſome of the Demandants appear, and ſome not*, and the *Tenants make Default after Default*, and the Proceſs ſhall ſerve againſt the Tenants, and the Summons ad ſequend' ſimul againſt ſome of the Demandants. Br. Proceſs, pl. 175. cites 13 E. 3. and Fitzh. Grand Cape 15.

2. *Petit Cape* was awarded *upon Default of the Tenant in Scire Facias after Iſſue join'd* between the Plaintiff and the Tenant, Quod Nota, which is the Proceſs upon Default after Appearance in Scire Facias. Br. Proceſs, pl. 185. cites 42 E. 3. 2.

3. In

3. In Aſſiſe of *Nuſance* if the *Defendant had the View*, and after *is eſſoin'd*, and then *makes Default*, the Plaintiff ſhall not have *Diſtreſs ad reſpondend.* to the Plaintiff, and to the Default alſo in Liew of Petit Cape, but Diſtreſs ad reſpondend. parti only. Br. Proceſs, pl. 124. cites 42 E. 3. 9.

4. *The ſame Law in Quod permittat.* Ibid.

5. In Debt; per Priſot clearly, where the *Tenant imparls in Præcipe quod* reddat, and after *makes Default*, Seiſin of the Land ſhall be awarded, and not Petit Cape, but upon other Default after Appearance Petit Cape ſhall iſſue. Br. Saver Default, pl. 30. cites 38 H. 6. 33.

6. *Formedon*, the *Tenant appear'd and vouch'd*, and the *Vouchee enter'd into the Warranty and vouch'd over*, by which *Summons ad Warrantizandum iſſued*, and the *Sheriff returned him ſummoned*, and *he made Default*, by which *iſſued Grand Cape ad valentiam*; and Pigot offer'd to appear and plead for the Vouchee; Per Brian Ch. J. if you will not ſave your Default at the Grand Cape, you ſhall loſe your Land. Pigot e contra. Br. Saver Default, pl. 36. cites 19 E. 4. 3.

7. Note that if Parties are at *iſſue* to ſave the Default of the Tenant which *paſſes for the Tenant*, the *Judgment ſhall be that the Writ ſhall abate*; Quod Nota; per Cur. Br. Saver Default, pl. 49. cites 10 H. 7. 21.

8. In *Debt or Treſpaſs*, if the *Defendant appears upon the Exigent, and has Dies datus, and after makes Default, Diſtreſs ſhall iſſue*, and if he be *return'd Nihil*, three Capias's and Exigent ſhall iſſue again, Quod Nota; per Cur. Br. Default, pl. 1. cites 19 H. 8. 6.

9. In *Writ of falſe Judgment* the *Defendant after Appearance made Default, Grand Diſtreſs iſſued againſt him*; and if he made Default at another Time, or came and would not ſave his Default, the Plaintiff ſhall have Judgment to recover Seiſin of the Land. Br. Saver Default, pl. 44. cites F. N. B. fo. 19.

10. A *Quo Warranto* is brought in B. R. The *Defendant being ſummon'd, makes Default; and another Default at the Return of the Venire Facias*; Judgment ſhall be, that the Franchiſe ſhall be ſeiſed into the King's Hands; and not that it ſhall be forfeited; for it does not yet appear whether there be Cauſe of Forfeiture. No Man ſhall finally loſe his Land or his Franchiſe upon any Default, if he has never appeared. By the Judges of both Benches. Jenk. 141. pl. 91.

11. *Two Nichils* returned upon a Scire & alias Scire Facias amount to a Sciri Feci; whereupon if the *Plaintiff give a Rule*, and the Defendant doth not appear, the Plaintiff ſhall have his Judgment quod habeat Executionem by Default. But where a Man hath a Releaſe, or any other Matter which he might have pleaded, there he ſhall not be abſolutely concluded without a *Sciri Feci* returned; for after two Nichils he may have his Writ of *Audita Querela*, which he cannot have after the Return of a Sciri Feci. L. P. R. 86.

(G. a) Recovery by Default. What is; and pleaded How.

1. IN pleading a Recovery by Default, the Party *ought to aver that he againſt whom* &c. *then was Tenant of the Land*, and therefore it ſeems that the other may have Anſwer to it without being put to Writ of Error. Br. Judgment, pl. 63. cites 19 Aſſ. 4.

2. Every Recovery upon Departure in Deſpite of the Court, is a Recovery by Default. Br. Re overy, pl. 1. cites 26. H. 88. per Fitzh.

For more of Default, See Eſſoign, Nonſuit, And other proper Titles.

Defeaſance

Defeaſance.

Fol. 590.

(A) *What Perſons* may make it.

Br. Defeaſance, pl. 2. cites S. C. For as the Prior had Power to make an Acquittance, ſo he had likewiſe to make a Defeaſance; Quod Nota; For it is only a Chattle or Action Perſonal.

1. IF an Obligation **be made** to a Prior, his Defeaſance **is a good Diſcharge** without the Convent, **without an Averment that the Thing in the Defeaſance was for the Advantage of the Houſe.** 47 E. 3. 23. b. **adjudged, for it is in Nature of an Acquittance.**

Br. Defeaſance, pl. 3. cites S. C.

3. **If a** Statute **be acknowledged** to Baron and Feme, **the Defeaſance made** by the Baron **is a good Diſcharge.** 48 E. 3. 12. b.

Br. Defeaſance, pl. 3 cites S. C.

3. So **where a Statute is acknowledged** to Two, **and** one makes a Defeaſance, **it is a good Diſcharge.** 48 E. 3. 12. b.

(A. 2.) Defeaſance where Good.

1. A Man *granted a Rent in Fee* and after the *Grantee and another made a Grant* to the Grantor, that *if he, the ſame Grantee, brought ſuch Writ againſt the Grantor, that then the Rent ſhould ceaſe*; this is a good Grant, and upon this the Grantor after an Aſſiſe paſſed againſt him by Default for the ſame, the Grantee of the ſame Rent brought Certificate of Aſſiſe, and it well lies, and the Grant good, and it ſeems to be good Reaſon, for the Crantee may releaſe his Rent, and therefore he may determine it by his Grant. Br. Grants, pl. 163. cites 32. Aſſ. p. 1.

Br. Grants, pl. 79. S. C.

2. If a makes *a ſimple Feoffment, or* ſimple *Releaſe* and after the other grants *to him, that if he pays him* 10 *l.* ſuch a Day, that *the Feoffment, or Releaſe ſhall be void*, this is not good, for this cannot reſtrain the ſimple Deed that was made before, ſo if he grants to the other *to re-enter*. Br Grants, pl. 139. cites 43. Aſſ 44.

Br. Grants, pl. 79 S. C.

3. *But if* one, *who has warranty* of Land from me, *grants* to me, that if he be afterwards impleaded, *that he will not vouch, nor rebut by this Warranty*; this is a good Grant, for it is a Thing *Executory*, but the Feoffment and Releaſe before were executed. Br. Grants, pl. 139. cites 43 Aſſ. 44.

4. If

4. If a Man *grants by Deed to his* Tenant for Life *that he ſhall not be impleaded for Waſt*, and after the *Tenant grants to the Leſſor that he will not plead his Deed in an Action of Waſt*, nor will not have Action thereupon, this is a good Grant, for it is of a thing Executory, and of a thing of which the force cannot be taken, but by Action taken. Br. Grants, pl. 79. cites 43 Aſſ. 44. Br. Grants, pl. 139, cites S. C. and S. P.

5. If a Man grant to me that *if he does not pay to me* 100 l. at ſuch a Day, that *I may enter into his Land*, there if he does not pay, yet I cannot enter; Per Perle. Br. Grants, pl. 79. cites 43. Aſſ. 44.

6. If the *Diſſeiſee releaſe to the Diſſeiſor*, and after the *Diſſeiſor grant to the Diſſeiſee by Deed, that if he be impleaded* by the Deſſeiſee that *he will not plead the Releaſe*; this is good Grant, for the Pleading is a Thing Executory. Br. Grants, pl. 79. cites 43. Aſſ. 44. Per Wich and Perle.

7. Debt upon *a ſingle Obligation*, the Defendant pleaded Defeaſance of the Plaintiff by Deed Poll and good; though it was not indented, for it is the Deed of the Plaintiff, which ſuffices, Quod Nota. Br. Defeiſance, pl. 12. cites 7. E. 4. 29.

8. If a Man pleads Defeaſance *in Debt upon an Obligation of a Thing to be done Beyond-Sea*, which cannot be tried here, *or in two Counties*, as London and Wiltſhire, *where the one cannot join with the other*, ſo that Trial cannot be had, this is void and the Obligation is ſingle. Br. Defeiſance, pl. 13. cites 22 E. 4 2.

9. *Debt upon an Obligation* of 200 l. The Defendant *pleaded, that after the Obligation made, the Plaintiff by Indenture covenanted, that if he paid* 100 *l. ſuch a Day the Obligation ſhould be void*, and alleged that he paid it at the Day; it was the Opinion of the Court it was a good Plea, and the Defendant ſhall not be put to his Action of Covenant by Circuity of Action, but that the Plaintiff ſhall be barred. Cro. E. 623. pl. 16. Mich. 40 and 41 Eliz. B. R. Hodges v. Smith. S. C. cited by Price J. Gilb. 75, as an Authority not to be ſhaken.

10. *B. acknowledged a Statute* to S. *and ſold Lands* in the County of H. *to T.* afterwards *the Land in H. in the Hands of T. were extended by the Statute.* B. brought Audita Querela on a *Defeaſance*, viz. *that if the Land in H. ſhould be extended by the Statute, then the Statute ſhould be void.* Adjudged that the Defeaſance was good and not repugnant; for he might ſue Execution of Land in another County, or of his Goods or Perſon. Mo. 811. pl. 1097. Mich. 8 Jac. in Canc. Trot v. Spurling. S. C. cited per Cur. Carth. 211. Hill. 3 W. & M. in B. R. —— S. C. cited per Holt, Ch. J. Show. 334.

11. Defeaſance *muſt contain proper Words* of Defeaſance, as that the Thing ſhould be void. 2 Salk. 575. pl. 2. Hill. 10 W. 3. B. R. in that of Lacy v. Kinaſton.

12. A *Record of a Judgment* is defeaſible *by Bond or Deed*, per Holt Ch. J. 12. Mod. 229. Mich. 10 W. 3. Anon.

(B) *To whom* it may be made.

1. IF the Obligee afterwards by Indenture between him and a Stranger grants, That if a Stranger performs certain Conditions, **then the Obligation ſhall be void; this is no good Defeaſance, although the Stranger perform the Conditions, becauſe the Obligor is a Stranger to this Indenture, and therefore cannot put it in Trial. Dubitatur**, 3 H. 6. 18. b. 26. b. Br. Eſtranger al fait &c pl. 1. cites S. C. that the beſt Opinion was, that the Obligor ſhall not plead it. —— Fitzh. Debt, pl. 13. cites S. C

(C) *Of what* Things.

For he may rebutt, but not Vouch afterwards Br. Defeaſance, pl. 4. cites 7 H. 6. 43

1. **If a Man makes a** Feoffment with Warranty **againſt all Men, and the** Feoffee by collateral Indenture regrants **for him and his Heirs,** that if the Feoffee be vouched **by force of the Warranty,** then the Warranty ſhould be void, **this is good Defeaſance of the Warranty. 7 H. 6. 34. by all the Juſtices.**

——[In the Year Book it is 43. b. 44 a. pl. 21. and Roll ſeems to be miſprinted.]

* Br. Condition, pl. 1. 103. cites S C.—— Fitzh. Conditions, pl. 14 cites S C.

2. **If a Man** releaſes all his Right **to another, and the** Releaſee after grants, **that** if the Releaſor does ſuch a Thing, the Releaſe ſhall be void; **this is not a good Defeaſance to avoid the Releaſe. Contra, * 17 Aſſ. 2 || 7 H. 6. 34.**

|| Br. Defeaſance, pl. 4. cites 7 H. 6. 43. and See the Notes to pl. 1. ſupra.

Br. Conditions, pl 103. cites S. C Brooke ſays, and therefore it ſeems that the Releaſe and Defeaſance were deliver'd Uno inſtanti. But

3. In Aſſiſe the *Tenant pleaded Releaſe* in barr, and in Defeaſance of it *the other pleaded Payment and Tender of the Money by force of the Condition which he ſhew'd in Specialty.* And note that the Common Opinion there was, that *ſimple Releaſe may as well be avoided by Deed*, &c. *as Charter of the Feoffment, Obligation, Recognizances, Statutes*, &c. But Shard Contra, and there the *Plaintiff recovered*, and therefore the Releaſe is defeaſible by the Deed of Defeaſance; Quod Nota. Br. Defeaſance, pl. 6. cites 17. Aſſ. 2.

Cave if the Releaſe be firſt Deliver'd as appears libro Perkins Fol. 138. 139. For by him if the Indenture and Releaſe be deliver'd ſimul et ſemel, then good ——And ſo if the Condition be compriſed in the Releaſe, if the Releaſe be by Deed indented, quod vide Ibidem. Br. Conditions pl. 103.

4. A Man made *ſimple Feoffment*, and after *by Deed rehearſing it*, the *Feoffee granted to the Feoffor, that if the Feoffee pay* 10 *l. by ſuch a Day, that the Deed and Feoffment ſhall be void.* Tank ſaid Defeaſance can be of no Effect of Lands which paſs by Livery, if the *Livery* be not *made as well upon the Defeaſance as upon the Charter* of Feoffment, and the Opinion of the Court was with him. Br. Conditions, pl. 113. cites 30. Aſſ. 11.

See tit. Conditions (S) per totum.

(D) At what *Time* it may be made.

Cro. E. 837. pl. 11. Gage v. Shirland. S. C. adjudged accordingly, and cites 19 H. 6. 22.

1. **If a Defeaſance be made** to avoid a Judgment before the Judgment given; **this is not good to be pleaded in a Scire Facias to have Execution, though ſuch Judgment be confeſſed upon an Agreement when the Defeaſance was made. Trin. 43. El. B. R. between Cage and Shurland, per Curiam.**

And they ſaid, his Remedy is only by way of Covenant upon his Indenture. The Covenant was, if he obtained Judgment, and the Defendant on ſuch a Day paid him 100 l. that he would not ſue Execution, and that the Judgment ſhould be void; and pleaded, that he paid the 100 l. accordingly.

2. If

2. If a Defeaſance of a Statute be made, and after another Defeaſance is made, the firſt Defeaſance is made void thereby, and the Second only in Force, as in a Will. Paſch. 8 Jac. B. agreed.

3. In Aſſiſe the Tenant ſhew'd how he was *bound to the Plaintiff in a Statute Merchant, and* that the Plaintiff had ſued Execution and *had Execution* delivered to him of this Land by the Sheriff, and *after Execution the Plaintiff by Deed granted to the Defendant to enter*, by which he enter'd, and after *Covenaut was had between them, that if the Defendant ſhall pay* 20*l. to the Plaintiff that the Recognizance ſhall be nul, and ſhew'd an Acquittance of Payment of* 8*l. in part of Payment of the Debt of* 20*l* and the other demurr'd becauſe it cannot be intended in Part of Payment thereof; for now by the Execution it is no Debt, and then it ſhall be intended for another Debt, for the Debt of the Statute is extinct by the Execution, and the Opinion of the Court was Contra, and that it is a good Bar. And ſo ſee a good *Defeaſance of the Statute after that Execution was ſued and executed*, Quod quære without *Words that Execution ſhall be void.* And Brooke ſays, it ſeems to him that by the *firſt Entry it is in Law a Surrender.* And after the Plaintiff ſaid, that this 8 l. was for another Debt, and not for the Debt of the Statute, and becauſe he did not ſhew any Cauſe of other Debt, this Bar was good, and the Plaintiff was barr'd by Judgment. Br. Defeiſance, pl. 7 cites 20. Aſſ. 7. Br. Aſſiſe, pl. 227. cites S C. — Br. Debt, pl. 133. cites S. C. —S. C. cited 6 Rep. 13. b.

4. If I *Grant* to you *that if you be Obliged to me in* 20*l.* by Obligation *that the Obligation ſhall be void*, and *after you are Obliged to me in* 20*l.* yet the Defeaſance is void; for there was no ſuch Obligation at the time of the making of the Defeaſance, quod Forteſcue conceſſit. Br. Defeiſance, pl. 5 cites 19. H. 6. 62.

5. An Eſtate once made ſhan't be defeated by a Defeaſance *made after the Eſtate.* Arg. Pl. C. 133. 6 E. 6. in Caſe of Browning v. Beſton, and cites 5 E. 3. where it is held that if a *Feoffment* is made and the *Feoffee afterwards* at another Time *makes a Defeaſance*, viz. that if the Feoffor does ſuch an Act, that then the Livery and Seiſin and his Eſtate ſhall be void; this ſhall not defeat the Eſtate firſt veſted. ——And *ſo* where *W. borrow'd of R.* 40*l. and in ſurety of Payment infeoff'd R.* of his Land *in Fee on Condition, that if he paid the ſaid Sum at the Day aſſeſs'd, then the Feoffment ſhould loſe its Force. W. did not pay* all the Day, *but* afterwards *died* and *his Wife took to Baron one B. who by Agreement between him and R. paid the Money to R.* whereby B. had the Land, and afterwards *R. died and his Feme brought Writ of Dower*; and it was adjudged that ſhe ſhall have Dower, becauſe the Eſtate of R. was not avoided or defeated by the Agreement made after the Condition broken. Pl. C. 133. a. b. cites it is ſo held 42 E. 3. 1.

6. A *new Defeaſance* may be made *to an Obligation with Condition*, but then it muſt be *by Writing*; Agreed per Cur. Mo. 573. pl. 789. Hill. 41 Eliz. in Caſe of Holford v. Andrews. Mod. 811. in pl. 1097. S. P.

7. A. covenants with B. that *if he obtains Judgment againſt B.* and B. on ſuch a Day pay unto him 100l. that he would not ſue Execution, and the Judgment ſhould be void, in Sci. Fa. on the Judgment Payment of the 100l. is no Plea; for a Defeaſance *can't be made* of a Judgment before the Judgment is given, and cites 19 H. 6. 62. and B. has no Remedy but by Writ of Covenant on his Deed. Cro. E. 837. pl. 11. Trin. 43 Eliz. B. R. Gage v. Shurſland als' Thurſland.

8. There is a *Diverſity* between *Inheritances executed*, and Inheritances *Executory*; as Lands executed by Livery, &c. cannot by Indenture of Defeaſance be defeated afterwards. Co. Litt. 236. b. ad finem.

9. And *ſo* if a *Diſſeiſee releaſes to a Diſſeiſor*, it cannot be defeated by Indenture of Defeaſance made afterwards; but at the Time of the Releaſe of Feoffment, &c. The ſame may be defeated by Indenture of Defeaſance;

Defeaſance; for it is a Maxim in Law, *Quæ incontinenti fiunt in eſſe videntur.* Co. Litt. 236. b.

10. But *Rents*, *Annuities*, *Conditions*, *Warranties*, and ſuch like that be Inheritances *Executory* may be defeated by Defeaſance made, either at that Time, or at any Time after; and ſo the Law is of *Statutes*, *Recognizances*, *Obligations*, and other things Executory. Co. Litt. 237. a.

But Saunders ſays, the Law is clear to the contrary, (viz.) That a Bond, Judgment, or Statute, may be defeated by a Defeaſance, made afterwards, as is the common Practice, and cites Co. Litt 237. and Cro E. 755 For a *Defeaſance is but a Conditional Releaſe*, and a *Releaſe is an abſolute Defeaſance*; and the Difference is between a Thing veſted, and a Thing Executory; As in a Feoffment of Land, the Condition ought to be contained in the ſame Deed, or in another ſealed at the ſame Time, otherwiſe it is Void; becauſe *by the Feoffment, the Eſtate of the Land is Executed* in the Feoffee; *But a Bond or Judgment, are but Executory*, and may be releaſed or defeated at any Time by a Deed ſealed, though not dated at the ſame Time with the Bond or Judgment, and ſays, this is clear Law without any Doubt or Ambiguity, though on a ſudden the Court erroneouſly miſtook it, and gave Judgment as before. 2 Saund. 47. Hill. 21 & 22 Car. 2. B R. Fowell v. Forreſt.

11. Debt upon *Bond*, the Defendant pleaded, that after making the Bond, viz. *on the ſame Day* the *Plaintiff made a Defeaſance, by which he promiſed, that if before ſuch a Day he did not produce Witneſſes, to prove that the Money mentioned in the Condition was a true Debt*, and that the Defendant, before the making the Bond, had promiſed to pay it, then the Bond ſhould be void &c. And averred, that the Plaintiff did not produce any Witneſſes &c. And upon Demurrer to this Plea, Judgment was given by Twiſden (Rainsford and Morton, J. Saying Nothing, and Keeling being abſent) for the Plaintiff, becauſe the Defendant had pleaded a *Defeaſance made after the making the Bond*, and ſuch Defeaſance cannot make the Bond void; for it ought to be made at the ſame Time, or eodem Inſtante the Bond was made. 2 Saund. 47. Hill 21 and 22 Car. 2. Fowell v. Forreſt.

Defeaſance of a Bond may be *after the Money is due*, as well as before, and ſuch Suſpenſion of the Action will not deſtroy the Bond. Per Holt Ch. J. Cumb. 123, 124. Trin. 1 W. & M. in B. R. Anon.——Carth. 63, 64. Ayloffe v. Scrimpſhire. S. C. & S. P. and cited 3 H. 6. 18. b. Co. Litt. 207. 291. Cro. E. 755. and 2 Saund. 47, 48.

(E) To one. In what Caſe it ſhall be to others.

Ld. Raym. Rep. 690 S. C. &. S. P. by Holt Ch. J. in delivering the Opinion of the Court.

1. IF a Defeaſance be to one of the Parties, it is to all, for if ſeveral *Covenant jointly and ſeverally*, a Defeaſance to one of them is a Defeaſance to all; and it is impoſſible to defeat as to one, without defeating as to all; and if a Defeaſance *works a Releaſe and Diſcharge*, a Defeaſance to one is a Defeaſance to all, as a Releaſe to one is a Releaſe to all. 12 Mod. 550, 551. Trin. 13 W. 3. Lacy v. Kynaſton.

(F) What amounts to it.

1. IF a Man *grants a Rent to J. S. in Fee*, and the *Grantee by another Deed grants to the Grantor, that if the ſame Grantee brings ſuch an Action againſt the Grantor, that the Rent ſhall ceaſe*; this is no Condition, but it is a good Defeaſance, and ſhall ſerve as well as a Condition. Quod Nota. Br. Condition. pl. 235. cites 32 Aſſ. 1.

2. If A. *releaſes to B. all his Right in the Land which B. has by Diſſeiſin made to A.* and *after B. grants to A. that if he pays* 10*l.* *at ſuch a Day*

Day, that the Releaſe ſhall be void, and he may re-enter; this ſhall not void the Releaſe, becauſe the Right goes ſimply before, but it ſeems clear, that if the Condition had been in the Releaſe, that then the Condition had been good. Br. Releaſes, pl. 39. cites 43. Aſſ. 12. per Cur And the ſame Year, pl. 44. accordingly.

3. Where *Releaſe is ſimple, and Indenture of Defeaſance comprehends a Coadition in fact* alſo upon it, there if the Releaſe and Indenture of Defeaſance are *delivered uno Inſtanti*, this is ſufficient upon the Performance of the Defeaſance to defeat the Releaſe, per Treſilian and Wich. quod Curia non negavit. Br. Releaſes, pl. 39 cites 43. Aſſ. 12.

4. If a Man be bound in *an Obligation of* 100 *l.* and the *Obligee grants to him by his Deed, that he will not ſue him*, he ſhall plead this in Barr, in Lieu of the Releaſe, Per Martin; And Per Babington he ſhall have thereof Action of *Covenant if it be by another Deed*, and *if it be contained in the ſame Obligation*, then *it is void*; and Brooke ſays, it ſeems to be Law that it is void in Fact in the ſame Deed, *for* it is *Repugnant*, and ſhall void all the Force of the Obligation; but by another Deed, a Man may diſcharge it as well by Grant as above, as by Releaſe, as it ſeems clearly. Br. Defeaſance, pl. 4. cites 7 H. 6. 43.

5. Debt upon Obligation, the Defendant pleaded a *Grant* of the Plaintiff, made to him after by Deed, *that he ſhould not be ſued, vexed, nor troubled* upon the Obligation * *before Mich. and* that, *if he be impleaded, that he ſhould plead the Grant as an Acquittance, and that the Obligation ſhould be Void*, and per Coningsby and Eliot, it is a good Bar, and it is a Releaſe in the Law; and a Releaſe of Actions, or of Right for an Hour, is ſo for ever. But per Moore and Tremayle to the Contrary, and that it was a Sparing for the Time, but no Releaſe. And Fineux Ch. J. to the ſame Intent at firſt, and that it ſounds only in Covenant, and that if the Party breaks the Covenant, he ſhall have only an Action of Covenant. But after Fineux changed his Opinion. Br. Barre, pl. 52. cites 21 H. 7. 23.

* Br. Defeiſance, pl. 15. cites S. C. and Brooke ſays, that the beſt Opinion was, that it is a good Defeaſance in Bar of the Action, by reaſon that a Perſonal Action once ſuſpended, is gone for ever; but that it is ſaid, that it cannot enure as a Releaſe or Acquittance, but as a Defeaſance [by thoſe Words, viz. that he ſhould not be ſued &c. before Mich]

But where the Obligee granted by Deed, that the Obligor *ſhould be acquitted and diſcharged of the Debt, or if he be vexed or ſued, that the Obligation ſhould be Void, and be as an Acquittance*, the beſt Opinion was, that the Debt was gone, and that this was a good Acquittance, and that the Words (If he be vexed or ſued, it ſhall be Void,) do not make a Condition; For the Debt is diſcharged by the firſt Words, and the ſaid laſt Words came too late. Br. Defeiſance, pl. 16. cites 21 H. 7. 32.

6. *And* per Fineux, there is a *Difference between a Defeaſance* of an *Obligation, and a Condition* of an Obligation; For if a Condition be *repugnant* to the Obligation, it is void, and the Obligation good. *As* if the Condition be, that he ſhall not ſue the Obligation, this is a void Condition; *So* of a Feoffment, upon Condition that he ſhall not take the Profits, the Condition is void, but here is *a Grant to defeat the Obligation*, and it is good by way of Defeaſance, though it be repugnant to the Obligation, and therefore by him this Grant made the Obligation void, and ſo Fineux, Coningsby and Eliott, contra Tremayle and Moore. Br. Barre, pl. 52. cites 21 H. 7. 23.

7. There is a great Difference between a *Promiſe not to ſue*, and a Promiſe *to forbear to ſue*; for the firſt excludes him from ſuing at all, but the laſt is only for a Time. Per Periam and Fleming. Ow. 110. Paſch. 36 Eliz. in Cam. Scacc. in Caſe of Sackford v. Philips.

8. And per Walmſley, There is a Difference where the Words are *ſpoke by Plaintiff*, and where *by Defendant*. For if Plaintiff ſays, I will forbear to ſue you, if you will promiſe to pay me, and upon this the Defendant makes a Promiſe accordingly; the Plaintiff ought never to ſue. But if Defendant only ſpeaks the Words, If you will forber to ſue, I will promiſe to pay you, and the Plaintiff agrees, and forbears

bears for a Time certain, yet he may have his Action afterwards. Ow. 110. in S. C.

9. A. was in *Execution* on a Statute Merchant, at the Suit of B. A. ſhews certain *Articles* between him and B. *to diſcharge* him of the Statute, and prays to be bailed, but deny'd; And per Cur. one in Execution ought not to be *bail'd* on a Surmiſe, and the Articles are not ſufficient to diſcharge him of the Execution. But his Remedy is to have an Action of *Covenant* upon them. Cro J. 218. pl. 7. Hill, 6 Jac. B. R. Beeſton v. Robinſon.

10. *B.* [the Plaintiff] *and M. were bound to K.* and *K. makes a Bond to M.* in the Sum of 100l. *that if M. be not ſued upon the firſt Bond, then the Bond of K. to M ſhall be void*; The Plaintiff alleged, that K. did both ſue him and M. and that he had no Notice of the ſecond Bond, that he might have pleaded it, and ſo pretends, that the ſecond Bond ſhould be a Defeaſance of the firſt, and Judgment was given for the Defendant. Brownl. 29. Trin. 13 Jac. Bird v. Kirton.

11. If I grant to one againſt whom I have Cauſe of Action, that I *will not ſue him within a Year*, this is no Suſpenſion of the Action. Bridgm. 117. Trin. 15 Jac. in Caſe of Lee v. Wood, cites it as ſaid per Brudenell, 21 H. 7. 30 in John de Puſeto's Caſe, upon which it is inferr'd, that it is to be obſerved, that I may ſue, and the other is *put to his Action of Covenant.*

Show. 330. Carivil v. Edwards. S. C. argued; and by Holt Ch. J. this is no Releaſe, but a Defeaſance; and ſaid, the Quære is, if here be an Acknowledgment of Satisfaction; Adjornatur. 2 Salk 573. S. C. & S. P.

12. A *Letter of Licence* recited, that A. had Right in an Houſe, and thereby agreed to impower B. to ſell it, and divide the Money among the Creditors proportionably, *and upon Receipt of ſuch Proportions, every of theſe Creditors ſhould give A. a Releaſe of all Matters &c. And* it was further agreed, *that in the mean Time, and until the Houſe ſhould be ſold, and from thenceforth after, the ſaid A. ſhall not be proſecuted or ſued* at Law, or his Perſon or Goods moleſted by any of the ſaid Creditors nam'd in the ſaid Articles, for any Thing paſt, *Sub pœna Relictionis, & Exonerationis Debiti vel Debitorum talium Perſonarum* as ſhall ſo ſue or proſecute &c. Per tot. Cur. this is a Defeaſance and no Releaſe, and is pleadable *in Bar.* Carth. 210. Hill. 3 W. & M. in B. R. Carvil v. Edwards.

13. Where *two Deeds* are *made at the ſame Time*, and they have *no Reference the one to the other*, they ſhall not be conſtrued as Defeaſances. 12 Mod. 221. Mich. 10 W. 3. Cleyton v. Kinaſton.

If *two be bound jointly and ſeverally* in a Bond, and a *Releaſe* is made *to one* of them, it releaſes the ſeveral as well as the joint Lien.

14. Obligee reciting the Bond, *covenants to ſave Obligor harmleſs*, it is an abſolute Defeaſance, and if it be to ſave him harmleſs on a Contingency, it is a conditional Defeafance, becauſe it has an *expreſs Relation to the Deed*, but otherwiſe, where the Deed is only to indemnify againſt all Covenants heretofore made, or hereafter to be made, this does not deſtroy a Deed made at the ſame Time. 2 Salk. 574. Paſch. 13 W. 3. B. R. Cleyton v. Kynaſton.

Per Holt Ch. J. 12 Mod. 415. Lacy v. Kynaſton.——Ibid. 551. S. C.

Ld. Raym. Rep. 690. S. C. & S. P. Per. Holt Ch. J. in delivering the Opinion of the Court.

15. A. and B. are jointly and ſeverally *bound* to H; H. *covenants with A. not to ſue A.* this is no Defeaſance as to B. but if A. only had been bound, ſuch Covenant had been a Defeaſance. 2 Salk. 575. in Caſe of Lacy v. Kinaſton.

A. is bound by *Bond to B.* and *B. covenants not to put it in Suit till ſuch a Time*, it *is a Defeaſance*; but if he grants *not to ſue* upon it *at all*, it *is a Releaſe.* Per Holt Ch. J. 12 Mod. 415. Lacy v. Kynaſton.

But a Defeaſance *to a Stranger* is not good. As if A. be bound to B. in a certain Sum, and B. covenants and grants with C. a Stranger to the Bond, *that if A. did ſuch a Thing, the Obligation ſhould be void*, and held, that it could not be a good Defeaſance. 12 Mod. 551. In Caſe of Lacy v. Kynaſton, cites 34 H. 8. Br. Eſtranger al fait, 31.

16. *Indenture*

16. *Indenture* made *by A. and B. to ſave C. harmleſs*, is not a Defeaſance of a *Covenant*, wherein A. is bound *to pay C. a Sum of Money*. 12 Mod. 548. Trin. 13 W. 3. Lacy v. Kynaſton. Ld. Raym. Rep. 688. S C. reſolv'd accordingly.

17. Where a *Deed intends mutual Remedies*, it is not to be conſtrued a Defeaſance. 12 Mod. 550. In Caſe of Lacy v. Kynaſton.

18. The *Nature of* Defeaſance *is, that* upon Condition performed, or *upon ſuch* and ſuch *Terms, the Thing to be defeaſanced is to ceaſe*. 12 Mod. 550. In Caſe of Lacy v. Kynaſton.

19. A Man made a *Feoffment* in Fee *with Warranty againſt all Perſons*, *Feoffee* by his Covenant, grants and *agrees not to take Advantage* of this Warranty, and then he is impleaded and vouches the Feoffor, he may plead his Covenant in Bar of the Warranty; *but* if the Covenant had been *not to bring a Warrantia Chartæ, or not to vouch*, then it had been a Covenant only, and the Covenantor hath other Remedy and Uſe left him of his Warranty; and the Covenant would not be a Releaſe in that Caſe, becauſe it does *not exclude all his Remedy* upon the Warranty. 12 Mod. 552. Trin. 13 W. 3. In Caſe of Lacy v. Kynaſton. S. P. Br. Defeiſance, pl. 4. and that, notwithſtanding this Covenant, the Feoffee may well rebutt. cites 7 H. 6. 43.

20. *A. covenants with B. to pay* him 300 *l.* for the Uſe of *A. only for her Life*; and covenant was brought upon this and Breach aſſigned, that there was ſo much of the 300 l. Arrear; *Defendant pleads*, that there was *another Indenture* between him and the Plaintiff *ſince* the Date, or Delivery of the Covenant-Deed declared on *reciting the ſaid Covenant* and Agreement for the Payment of the 300 l. *wherein it was covenanted* and agreed, *that ſo long as A. and his Wife did co-habit, the Payment of* the 300 l. *ſhould ceaſe* and *avers that they did co-habit* for the Time the ſaid Arrear became due and pleads this in Bar of the firſt Agreement; and there are *expreſs Words that the Payment ſhould ceaſe during the Co-habition* and there had been no great Harm to conſtrue this as a Releaſe of the Arrearages during the Co-habition; *but yet it being* a Sum *in Groſs, and the Covenant Temporary*, and not perpetual, they held it no good Bar. Per Holt Ch. J. 12 Mod. 552. Trin. 13 W. 3. cites 2 Vent. 217. Gawden v. Draper. S. C. cited by Holt Ch J. Ld. Raym. Rep. 691. and ſaid that it was a found Judgment.—— *But* he ſaid, if it had been a *Rent for Years, and a Covenant* or Agreement by the Leſſor to Leſſee, *that it ſhould not be paid*, or that ſhould *ceaſe for ſuch a Time*, that would amount to a Grant of the Rent for ſo long, and it would in that Caſe ceaſe and revive again, *but they was a Sum in groſs*; and though it was defeaſible, yet becauſe it was *not intirely defeaſanced*, they would not allow a ſubſequent temporary Agreement to be a Releaſe of it. Per Holt Ch. J. 12 Mod 553. In Caſe of Lacy v. Kynaſton.

21. In Debt on an Obligation, the Defendant pleaded in Bar, that it was given for compounding Felony; on a Demurrer it was inſiſted, that this was contrary to the Import and Condition of the Bond, and after ſome Doubts it was adjudged per tot Cur. for the Plaintiff; and by Forteſcue a *Parol* Agreement can no more be ſet up againſt a *Bond*, than a Parol Defeaſance can againſt a *ſingle Bill*. Gibb. 75. Trin. 2 & 3 Geo. 2. C. B. Andrews v. Eaton.

(G) Pleading.

1. WHERE *Debt* is brought *upon an Obligation* of 100 l. the *Plaintiff ſhews the Indenture of Defeaſance* proving it, and not *the Obligation*, the Action lies not, Per Belke. Br. Monſtrans, pl. 38. citer 42 E. 3. 18.

2. In Debt the Defendant pleaded Defeaſance *to diſcharge* the Plaintiff of 100 l. againſt A. B. that then &c. He ought to *ſhew how he has diſcharged him* by Releaſe, Acquittance, Payment, or otherwiſe, Per Judicium. Br. Dette, pl. 204 cites 35 H. 6. 10.

3 Where

S. C. cited by Holt Ch. J. Carth. 64.— S. P. held per Cur. accordingly. Comyns's Rep. 568. Trin. 11 Geo. 2 C. B. Trevet v. Angus.

3. Where a Bond is made, and after a Defeaſance is made thereof, if he pays a leſſer Sum &c. there if he pleads the Defeaſance and the *Tender of the leſſer Sum*, he needs not ſay *Tout Temps Priſt*; for by the Tender he was diſcharged of all. But otherwiſe of an Obligation with Condition to pay a leſs Sum. Cro. E. 755. pl. 16. Paſch. 42 Eliz. C. B. Cotton v. Clifton.

4. Debt upon *Bond* conditioned *to pay ſeveral Sums on ſeveral Days*, the Defendant *pleaded Payment of all* the Sums *due before ſuch a Day, at which Day the Plaintiff per Scriptum ſuum* ſigned *under his Hand*, which the Defendant Profert hic in Curia, *agreed to defer the Payment of the Reſidue till a farther Day* not yet come; and upon a Demurrer to this Plea, it was adjudged ill, becauſe this Action being founded on a Deed, there cannot be a Defeaſance made thereof without a Deed, and Scriptum ſub Manu doth not imply a Deed. 3 Lev. 234. Trin. 1 Jac. 2 C. B. Blemerhaſſet v. Pierſon.

Ld. Raym. Rep. 421. S. C. and the whole Court held that where the Proviſo is by Way of Defeaſance it ought to be pleaded by him that takes Advantage of it.

5. Where a *Proviſo* goes by Way of Defeaſance of a *Covenant*, it muſt be *pleaded* on the other ſide, otherwiſe, where by Way of Explanation, or Reſtriction of the Covenant; Per Holt Ch. J. 2 Salk. 574. pl. 2. Hill. 10 W. 3. B. R. Cleyton v. Kinaſton.

6. A. entered into a *Bond* to B. conditioned *for Payment of* 40 *l.* afterwards *B.* agreed and *entered into a Covenant, that if A. (the Defendant) pay* 5 *s. in the Pound for every* 20 *s. due to the Plaintiff* from the Defendant, and ſo at the ſame Rate, for every greater or leſſer Sum than 20 s. *on or before the* 25th of December, *the Plaintiff ſhould and would accept the ſame in Diſcharge of all Sums*, as *then were, or on the* 25*th of December ſhould be, due* from the Defendant to the Plaintiff. The Ch. Juſtice delivered the Opinion of the whole Court for the Defendant; that this is a Defeaſance to this Bond and ſufficiently relates to it; for it is *not neceſſary to recite the Bond*, no more than where a Power of Revocation is inſerted in a Deed; a Revocation by a ſubſequent Deed is good, though it does not recite or mention the Power, or in direct Words refer to it. Comyns's Rep. 569, 570. Trin. 11 Geo. 2. C. B. Trevet v. Angus.

For more of Defeaſance, See **Conditions, Covenants, Eſtates, Extinguiſhment, Releaſe, Uſes,** And other proper Titles.

* Defence.

*Defence cometh of the Word (Defendo) *ſo called from the Manner of the Pleading* viz. Prædict A. B. *defendit Vim & Injuriam* &c. for Example in a Perſonal Action brought by

(A) In Pleadings. Neceſſary in What Caſes.

1. ASSISE *of Nuſance Vicontiel before the Juſtices in Bank*, the Defendant made Defence and pleaded. Br. Defence, pl. 2. cites 46 E. 3. 23.

A. B. againſt C. D. defendit Vim & Injuriam *quando &c. Et Damna & quicquid quod ipſe defendere debet &c.* Co Litt. 127 b

In *Aſſiſe of Nuſance*, the Defendant *venit & defendit &c.* but does *not ſhew what*, but it ſeems that this ſhall be *intended Vim & Injuriam &c.* and ſo note the Diverſity between Defence in Aſſiſe of Nuſance and in Aſſiſe of Land, Rent, and the like. Br. Defence, pl. 19. cites 46 Aſſ. 9.

2. *Contra* it ſeems before *Juſtices of Aſſiſe*; for the Pleading in Aſſiſe of Nuſance before Juſtices of Aſſiſe, and before the Juſtices of Bank much varies. Br. Defence, pl. 2. cites 46 E. 3. 23.

3. *Præcipe quod* reddat; *At the Grand Cape the Demandant releaſed the Default, and counted* againſt the Tenant. Rolf *defended Tort and Force and demanded Judgment, if the Court would take Conuſance*, and *pleaded Ancient Demeſne* &c. Br. Defence, pl. 5. cites 8 H. 6. 1. Br. Auncient Demeſne pl. 21. cites S. C.

4. Note per Forteſcue, Arguendo in Attaint, that in *Aſſiſe, Dower, Per quæ Servitia and Attaint*, a Man ſhall not make Defence, and ſo ſeems by the Entries no more in Aſſiſe of *Mortdanceſtor, than* in Aſſiſe of *Novel Diſſeiſin*, as it ſeems by the Entries; and ſee elſewhere, that in *Scire Facias* the Defendant ſhall not make Defence, *but the aforeſaid J. B. venit & dicit* &c. *and ſo pleads in Bar.* Br. Defence, pl. 1. cites 34 H. 6. 33. Br. Defence pl. 23.

5. Note, that in *Aſſiſe* and *Scire Facias* there is not any Defence. Br. Defence, pl. 10. S. P. nor in *Attachment upon Prohibition.* Br. Defence, pl. 22.

6. In *Aſſiſe of Darrein Preſentment*, and in Aſſiſe of *Mortdanceſtor*, there is no Defence; contra in Aſſiſe of *Nuſance.* Br. Defence, pl. 48.

7. In this Defence there be *Three Parts* to be conſidered. Firſt, *when he defends the Wrong and the Force*, this has a *double Effect*, viz. *to make himſelf Party* to the Matter; and this is the Reaſon that the Defendant in this and the like Actions can plead no Plea at all before he makes himſelf Party by this Part of the Defence, as it appears here by Littleton, that if the Defendant will plead *in Diſability of the* Perſon *of the Plaintiff*, he muſt firſt make himſelf Party by this firſt Part of the Defence, neither can he *plead to this Juriſdiction of the Court* without this Part of the Defence. Co. Litt. 127. b. Coke ſays that a Man cannot plead to the Juriſdiction without making Defence but this Rule is not Law generally underſtood; for a Man may come and ſay venit & dicit, that the Lands are ancient Demeſme, and it is good without more ſaying. Per Powell J. Ld. Raym. Rep. 117. Mich. 8 W. 3. in Caſe of Britton v. Gradon.

In *Treſpaſs of Corn taken*, the Defendant defends Tort and Force, and demands *Judgment ſi Curia cognoſcere vult*; *For* he ſays, *that he is Parſon of B. where* &c. *and took as Tithes*. And Sic Vide, that he who pleads to the Juriſdiction, ſhall defend the Tort and Force, but not the Damages; For this will affirm the Juriſdiction. Br. Defence, pl. 8. cites 39 E. 3. 23.

8. 2dly, By the *Defence of the Damages*, he affirms that the Plaintiff is able to ſue, and (upon juſt Cauſe) to recover Damages. Co. Litt. 127. b.

9. 3dly, And by the laſt Part viz. *and all that which he ought to defend, when and where he ought*, he *affirms the Juriſdiction* of the Court. Et ſic de ſimilibus. And of ſuch neceſſity is it for the Tenant, or Defendant to make a lawful Defence as albeit he appears, and pleads a ſufficient Bar without making Defence, yet Judgment ſhall be given againſt him. Co Litt. 127. b.

10. In *Pleading Excommunication* in the Plaintiff, Hale Ch. J. doubted, if Defendant ought not to have made ſome kind of Defence though no full Defence is to be made. Vent. 222 Trin. 24 Car. 2. B. R. Jay v. Bond.

11. In *Aſſumpſit* on a Bill of Exchange, the Defendant *pleaded in Bar without Defence*, and upon a General Demurrer this was objected, and the Queſtion was, if this was Matter of Form, and ſo aided by the *General Demurrer*. And prima facie the Court was of Opinion, that this was Matter of Subſtance; becauſe the Defendant is not Party to the Action without Defence; but after having conſulted the Judges of B. R. where it has been a long Time held Matter of Form, they agreed that it was *aided* by the general Demurrer, though at the ſame Time they ſeemed to comply with that Opinion, rather than to approve it with their own Judgments, to the End that there might be a Conformity between the two Courts. Ld. Raym. Rep. 282. Mich. 9 W. 3. Bellaſis v. Heſter.

S. P. 3 Lev. 182. Trin. 36 Car. 2. C. B. in Caſe of North v. Hoyle. Per Cur. and the Precedents, where ancient Demeſne was pleaded, ſometimes with Defence, and ſometimes without it, prove only, that it may be well pleaded with Defence, but does not prove that it may not be pleaded without Defence; and thereupon the Plea without Defence was ruled good.

12. In Ejectment the Defendant *venit & dicit, that the Land is Ancient Demeſne, without making any Defence*; to this there was a ſpecial Demurrer. Et per Holt Ch. J. The *Plaintiff* might have refuſed the Plea for want of a Defence; but if he *receives the Plea he admits a Defence*. If one plead Outlawry, he ought to plead it ſub pede ſigilli, and if he does not ſo plead it, the Plaintiff may refuſe it; but if he accepts the Plea he ſhall not demur for that Cauſe; for it is well enough if he allows it. 1 Salk. 217. Paſch. 4 W. and M. in B. R. Ferrer v. Miller.

Show. 386. Farrers v. Miller. S. C. adjudg'd accordingly.——S. C. cited Arg. as the Caſe of Fenner v. Miller. Ld. Raym. Rep. 117. That Defendant Venit & defendit Vim & Injuriam, (but Quando was not in) &c. and he pleaded Ancient Demeſne, and held good.

(B) The Manner. And in what Actions.

Brown's Anal. 6.

1. IN *Appeal of Mayhem*, the Defendant *defendit vim & Injuriam, and all Felonies and Appeals of Mayhem, and whatever is Contra Pacem Domini Regis, Coronam & Dignitatem ſuam*. Br. Defence, pl. 18. cites 40 Aſſ. 9.

In Treſpaſs, he who *pleaded to the Perſon de-*

1. In *Treſpaſs* the Defendant *defended Tort and Force, and demanded Judgment if he ſhall be anſwered*; *for he was his Villein, and ſhewed how* &c. And ſo ſee that he did not make full Defence when he *pleaded to the*

the Perſon, and did not ſay hæc verba *quando* &c. for this *goes to the Damages, and is full Defence.* Br. Defence, pl. 21. cites 40 E. 3. 36.

fended Tort and Force, but *not the Damages*, viz. *Vim & Injuriam*, but did *not* ſay *Quando* &c. And ſo ſee, that he who pleads to the Perſon ſhall not make full Defence. Br. Defence, pl. 12. cites 35 H. 6.——Br. Nonabilitie, pl. 47 (bis) cites 14 H. 6. 18. S. P. accordingly.

Defence upon *Villenage pleaded* is, quod Defendens, *ven. & defend' Vim & Injuriam* &c. *and demanded Judgment.* Br. Defence, pl. 29.

3. In *Treſpaſs*, the *Defendant defended Tort and Force* and *Proteſtando, that the Plaintiff is his Villein, pro placito that the Defendant is a Counteſs not named Counteſs; Judgment of the Writ*; per Fulthorp, firſt you ought to have made full Defence, and then to take the Villenage by Proteſtation; Per Newton, no, for *full Defence would affirm the Plaintiff a Perſon able, and then the Proteſtation void, and before Defence a Man can't take Proteſtation; for before Defence a Man is a Stranger to the Action.* But per Howſter Prothonotary the Uſe has been in ſuch Caſe to make *Proteſtation before the Defence, and then to make full Defence*; and June thought this Form good; quod nota of Proteſtation before Defence. Br. Defence, 9. cites 14 H. 6. 18.

Heath's Max. 25. cites S. C. —Ibid. 26. ſays, that by Plowden, in Caſe of Grayſtock v. Fox, in his Commentaries, it is ſaid, that a Proteſtation is a ſaving or excluding of a Concluſion, and (by that Book) ought to be after the Defence, which is (in that Point) left doubtful by the Book of 21 H 6 26. and may not be contrary in itſelf, or double. As Proteſtando that he made no Teſtament, pro Placito, that he made not the Plaintiff his Executor; becauſe if he made no Teſtament, he could make no Executor.

4. In *Writ of Right, the Form* in Writ *is after the Count rehearſed to make Defence de novo, and then to vouch over or plead in Bar*; And the *ſame* Form is *where the Demandant replies to the Bar, the Defendant ought to make Defence, and then to anſwer to the Title* &c. Br. Defence, pl. 7. cites 21 H. 6. 26. per Newton.

Heath's Max 25. cites S. C.

5. He who *pleads Villenage to the Perſon of the Plaintiff or Defendant cannot* make full Defence, but *ſhall defend Tort and Force only, and demand Judgment if he ſhall be anſwered.* Br. Defence, pl. 11. cites Litt. Tenures tit. Villenage.

Br. Defence pl. 28. S. P.

6. In *Maintenance* the *Defence is ven' & defend' vim & injur'* &c. & *quicquid* &c. and *the ſame* in Action *upon the Statute of Labourers*; for *theſe are Actions upon Statute.* Br. Defence, pl. 23.

Brown's Anal. 6.

7. *Vouchee defends thus*, viz. *Et præd' A. B. ut tenens per warr' ſuam defend' Jus ſuum quando* &c. Br. Defence, pl. 24.

Heath's Max. 25. cites S. C.

Brown's Anal. 67.

8. In *Recto de rationabili parte ven' et defend' vim* &c. Br. Defence, pl. 25

9. And in Writ of *Participatione facienda, ven' et defend' vim et injuriam quando* &c. and not *Jus ſuum*; for no Land is in Demand. Br. Defence, pl. 25. (bis.)

10. In *Bill of Debt, ven' et defend' vim & injuriam* and does not ſay *quando* &c. Br. Defence, pl 26.

11. *Rationabilibus Eſtoveriis*, Defendant *ven' & defend' Vim & Injuriam quando* &c. Br. Defence, pl. 27.

12. In *Action upon Statute, ven' & defend' Vim & Injuriam* &c. & *quicquid &c. premunire fac'*. Br. Defence, pl. 30.

13. In *Recaption' averiorum ven' & defend' Vim & Injuriam quando* &c. & *quicquid*, &c. *ſo* in *Forger de Faits*, and in *Conſpiracy*. Br. Defence, pl. 31.

14. In

14. In *Rationabili Parte Bonorum venit & defendit Vim & Injuriam quando* &c. Br. Defence, pl. 32.

S. P. Br. Defence pl. 38.

15. In Writ of *Intruſion, and every Præcipe quod* reddat, *venit & defendit Jus ſuum quando* &c. and *the ſame in Ad Terminum qui præteriit.* Br. Defence, pl. 33.

16. *So in Writ of Avowry.* Br. Defence, pl. 34.

17 In *Eſcheat, venit & defendit Jus ſuum quando* &c. Br. Defence, pl. 35.

18. In *Quare Impedit venit & defendit Vim & Injuriam quando* &c. And the *ſame in Warrantia Chartæ.* Br. Defence, pl. 36.

19. And in all *Actions of Contempt Venit & defendit Vim & Injuriam & omnem Contemptum & quicquid* &c. and *the ſame* in *Præmunire.* Br. Defence, pl. 37.

In Detinue of Charters the *Defendant defended*

20. In *Detinue of Charters, venit & defendit Vim & Injuriam quando* &c. Br. Defence, pl. 38.

Tort and Force and no more, and pleaded to the Juridiction, becauſe the *Land in the Charter is within the Cinque Ports*, and it was admitted a good Defence, and therefore it ſeems, that he *ſhall not make full Defence* if he will plead to the Juriſdiction, but it was not adjudged if the Plea be good to the Juriſdiction in this Caſe. Br. Juriſdiction, pl. 36. cites 8 H. 6. 22. Br. Defence, pl. 4. cites 7 H. 6. 22. S. P. and ſeems to be S. C.

21. And in *Formedon, venit & defendit Jus ſuum quando* &c. Br. Defence, pl. 38.

22. In *Quo Jure, venit & defendit Vim & Injuriam quando* &c. Br. Defence, pl. 39.

In Nativo habendo, the *Defendant defended*

23. In *Nativo habendo, ven' & defend' Jus ſuum & omnem Nativitatem quando*, Br. Defence, pl. 40.

Tort and Force and all Manner of Nieftie &c. Br. Defence, pl. 6. cites 19 H. 6. 32. S. P.—Br. Defence, pl. 16. cites S. C.

24. In *Ne Injuſte vexes, ven' & defend' Vim & Injuriam quando* &c. Br. Defence, pl. 41.

25. In *Ejectione Cuſtodiæ, ven' & defend' Vim & Injuriam quando* &c. Br. Defence, pl. 42.

26. In *Rationabilibus diviſis, ven' & defend' Jus per Nomen* &c. *quando* &c. Br. Defence, pl. 43.

27. Action upon the *Caſe, ven' & defend' Vim & Injuriam quando* &c Br. Defence, pl. 44.

28. *Recto quando Dominus remiſit Curiam ſuam, ven' & defend' Jus præd' petentis & Seiſinam ejus quando* &c. viz. quando petens narr' de Seiſina propria *& totum* &c. *& quicquid* &c. and eſpecially *de ten' præd' cum Pertin' ut de Feodo & Jure* &c. Br. Defence, pl. 45.

29. Vouchee in a Count upon a Writ of Right of Advowſon makes his Defence in this Form, viz. *Et prædictus* Thomas *tenens per Warantiam ſuam defendit Jus prædicti Simonis & Seiſinam ſuam quando &c. Et totum &c. Et quicquid &c. Et maxime de Advocatione prædict' ut de Feodo & Jure &c.* Brown's Anal. 7.

(C) What

(C) What may be pleaded after Defence made.

1. THE Tenant after Defence made may ſay *that the Grand Cape was not ſerved* &c. but not after any other Plea pleaded. Thel. Dig. 202. Lib. 14. cap. 1. S. 1. cites Mich. 22 E. 3. 18.

2. After Defence of Damages done, and after hearing of the Writ, the Defendant may ſay, *that the Plaintiff is a Monk profeſſed, and Feme Defendant may ſay, that ſhe is Covert of Baron.* Thel. Dig. 203. Lib. 14. cap. 1. S. 2. cites Hill. 44 E. 3. 4. & 32 H. 6. 27.

3. In *Quare Impedit*, the Defendant defended the Tort, and Force, and Damages, and demanded Oyer of the Writ, and *pleaded that the Plaintiff is a Chanon profeſſed*, Judgment, if he ſhall be anſwered, and the *Plaintiff replied, becauſe he has made a full Defence and has had Oyer of the Writ*, Judgment, if he *ſhall ſay Nonability to the Perſon after*; for after ſuch Matter in Action againſt a Feme ſhe ſhall not ſay that ſhe is Covert Baron, which Caund expreſsly denied, and ſaid, that ſhe ſhall have the Plea. And per Cur. this Plea is to the *Action*, and alſo Nonability of the Perſon, therefore anſwer, by which he ſaid, *that ſuch a Prior is Patron of the Vicaridge of B. where the Plaintiff is Vicar, and have uſed Time out of Mind to preſent one of their Chanons, and ſuch Chanon ſo preſented Vicar has been perpetual and not removable, and have impleaded and been impleaded Time out of Mind* Judgment, and the beſt Opinion was, that he his not by this diſcharged of his Profeſſion but only of his Obedience, and that in this Caſe he is a Perſon able to have all Actions touching this Vicaridge, but this Quare Impedit was uſed upon a Grant made to the Plaintiff of another Advowſon, therefore Quære as here; for it was agreed, that he may be elected Prior of the firſt Houſe at an Avoidance. And per Finch if a Man recovers the Patronage, where he is Vicar, againſt the Prior, he ſhall return to his Houſe, and ſhall be Obedient again. Br. Nonabilitie, pl. cites 44 E. 3. 4.

4. It is ſaid, that the Defendant after Defence made ſhall plead *Miſnoſmer*. Thel. Dig. 203. Lib. 14. cap. 1. S. 5. cites Trin. 2 H. 6. 13.

After General Defence made the Defendant cannot make Special

plead *Miſnoſmer, or that he is abiding at another Vill* &c. But in ſuch Caſe he ought to Defence in ſuch Form, viz. you have here W. who is ſued by Name &c. Per Cur. Thel. 203. Lib. 14. cap. 1. S. 3. cites Mich. 19 H. 6. 1. 2.

5. In Præcipe quod reddat, the Defendant made Defence, and *demanded the View*, he ſhall *not plead to the Juriſdiction upon the View, but* ſhall have it *to the Writ, if the Land lies in Wales*, but *otherwiſe* it ſeems *of ancient Demeſne*. Br. Defence, pl. 13. cites 7 H. 6. 36.

6. In *Præmunire*, the Tenant defendit Vim & Injuriam and demanded *Judgment, if the Court would take Conuſance*, and *alleged the Matter to be in Cheſter*, which is a County Palatine. Br. Defence, pl. 14. cites 8 H. 6. 3.

7. *Superſedeas of Privilege in Chancery* was allowed by Award after Defence made; For it ſeems that there is great Difference between pleading to the Juriſdiction and Superſedeas of Privilege. Br. Defence, pl. 17. cites 19 H. 6. 32. & 3 H. 6. 30.

The Difference is, where the Plea is *in disability of the Person*, as Alien, Enemy, Outlawry &c. it cannot be pleaded after full Defence, because it is repugnant for by the full Defence, the Defendant has admitted the Plaintiff able to recover Damages, but other Pleas in Abatement may be pleaded after full Defence; for a full Defence never admits an Ill Writ Per Powell J. Ld. Raym Rep. 117. Mich. 8 W. 3. in Case of Britton v. Gradon.

8. After full Defence made, the Defendant cannot say, *that the Plaintiff is his Villein*, or is *outlawed*, in Disability of his Person, but he may plead such Plea to the Action. Thel. Dig. 203. Lib. 14. cap. 1. S. 4. cites Hill 32 H. 6. 27. Quære.

S. P. said accordingly, 12 Mod. 235. Mich. 10 W. 3. in Case of Clerk v. Butler; but Curia advisare vult.

9. *Trespass of Sheafs*, the other *justified as Parson and pleaded to to the Jurisdiction*, and it appears by Littleton there, that if a Man makes *full Defence*, he *cannot plead to the Jurisdiction after*. Br. Defence, pl. 20. cites 1 E. 4. 15.

S. C. cited Heath's Max. 25.— Brown's Anal. 7.

10. *Misnosmer* shall be alleged *before Defence, and then shall make Defence, and shall shew the Certainty* of the Misnosmer. Br. Defence, pl. 46.

S. P. but, whether one shall take his Protestation before or after Defence, dubitatur.——*General Defence is a Conclusion to plead Misnomer after Licence to imparle de Persona & de Villa*; For it is contrary to the Name affirmed by the general Defence and Imparlance; And therefore he *ought to say that J. S. of S. who is impleaded by the Name of J. S. of C defendit Injuriam &c. & petit Licentiam interloquendi usque Oct. Hilarii* &c. and then it is well, quod Curia concessit. Br. Defence, pl. 15. cites 19 H. 6. 1.

11. Trespass, *Assault, Battery*, the Defendit *venit & defendit Vim & Injuriam quando* &c. *and pleads Outlawry in Abatement after Imparlance*; the Plaintiff demurs; and adjudged that the Defendant answer over; because he cannot plead such a Plea after a full Defence, by which he has admitted the Plaintiff able to recover Damages. Ld. Raym. Rep. 117. Arg. cites Trin. 35 Car. 2. B. R. Rot. 1528. Gawen v. Surby.

12. In Trespass, *Assault and Mayhem*, the Defendant *venit et* defendit Vim et Injuriam quando, and *pleaded another Action depending for the same Cause* undetermined in Abatement, and Judgment, quod respondeat ulterius, for the same Reason as before. Ld. Raym. Rep. 117. Arg. cites Trin. 4 W. and M. in C. B. Meacock v. Farmer.

13. After the Defendant has made a full Defence in *Trespass* by adding the Words *quando &c.* to the Words (Venit & defendit Vim & Injuriam) he *cannot plead in Disability that the Plaintiff is in Alien born* &c. but he *ought to omit the* (*Quando*) because by that Word, the Defendant hath admitted that the Plaintiff hath Capacity to sue. Carth. 230. Pasch. 4 W. and M. in B. R. Jentreer v. Jenkins.

14. *Assumpsit* was brought *against R. G. Esq*; the Defendant *Venit & defendit Vim & Injuriam quando* &c. *and pleads that he is a Gentleman, Absque hoc that he is an Esq*; &c. upon Demurrer it was argued for the Plaintiff, that the Defendant by saying Vim & Injuriam quando &c. has made a full Defence, and after that he cannot plead in abatement; but it was answer'd on the other Side that it is good either way; for this is not a full Defence, but the Moiety of a Defence; for that a full Defence is when the Defendant proceeds and says, & Damna et quicquid quod ipse defendere debet, and cited Pasch. 3. and 4 W. and M. in B. R. Rot. 449. that the Defendant after Vim & Injuriam quando pleaded that the Defendant was an Alien Enemy, and the Court held that it was good the one way or the other. But per Powell J. *Quando* &c. *amounts to a full Defence*, and Damna & quicquid quod ipse defendere debet' is never put in. No Judgment was given as to this Point,

Point, but all agreed, that the Miſnoſmer being pleaded in abatement by Attorney is ill; and a Reſpondeas Ouſted awarded. Ld. Raym. Rep. 117. Mich. 8 W. 3. Britton v. Gradon.

15. Defendant came and *defendit Vim & Injuriam quando*, and then would plead *Miſnoſmer*; and ſaid he could not plead that after pleading defendit Vim & Injuriam; for that he had admitted himſelf by that Name. Curia adviſare vult. 12 Mod. 235 Mich. 10 W. 3. Clerk v. Butler.

For more of Defence in General, See other proper Titles.

De Injuria ſua propria.

(A) In what Caſes it is a good Plea.

1. IN Treſpaſs the Defendant *juſtify'd for taking of the Villein of his Maſter*, and the Plaintiff ſaid that De ſon tort &c. pl. 35. cites 4 E. 3. 2.

2. In Replevin of taking of Cattle the Defendant *juſtify'd for Execution of a Recovery of* 38 *s. in a Court Baron*, the Plaintiff ſaid, that De ſon tort demeſne abſque tali Cauſa, and it was held that he ſhall not have ſuch general Averment *contrary to the ſpecial Matter*, by which he ſaid, that the Cattle were not deliver'd in Execution. Br. De ſon tort &c. pl. 36. cites 38 E. 3. 3.

3. In Treſpaſs of taking a Horſe, the Defendant *juſtify'd*, becauſe T. held of him *by Heriot Service* to render his beſt Beaſt tempore Mortis, and the Plaintiff as Executor got the Horſe which was the beſt Beaſt, and the Defendant took it for Heriot, and the Deſendant ſaid, that De ſon tort demeſne, Priſt &c. and the others e contra. Br. De ſon tort &c. pl. 10. cites 38 E. 3. 7.

4. In Treſpaſs the Defendant juſtify'd, becauſe *the Plaintiff was in Ward of the Prince, by which he ſeis'd and granted to the Defendant*, whereupon he enter'd and Occupy'd &c. and the Plaintiff ſaid, that De ſon tort demeſne without ſuch Cauſe, and no Plea per Cur but *ought to anſwer to the ſeveral Matter*, by which Iſſue was taken that he held in Socage, and not in Chivalry. Br. De ſon tort &c. pl. 6. cites 44. E. 3. 18.

5. In *Reſcous* the *Defendant juſtify'd to make Replevin by Warrant of the Sheriff*, the Plaintiff ſaid, that De ſon tort demeſne without ſuch Cauſe et non allocatur contra to this ſpecial Matter by which he *ſaid, De ſon tort demeſne Abſque hoc, that he had Warrant from the Sheriff at the time of the Delivery*. Br. De ſon tort &c. pl. 28. cites 13 R. 2. and Fitzh. tit Iſſue 163.

6. In *Replevin* the Defendant *made Conuſance as Bailiff* of R. B. and the Plaintiff ſaid, that De ſon tort demeſne without ſuch Cauſe, and no Plea but *ſhall anſwer to the Conuſance*. Br. De ſon tort &c. pl. 27. cites 2 H. 5. 1. and Fitzh. tit Iſſue 132.

7. Treſ-

Where the Defendant juſtifies the *taking of Beaſts by ſpecial Matter, by Agreement of the Plaintiff himſelf*, there De ſon tort Demeſne &c. is a good Plea; For *the Juſtification is only Matter in Fact.*

7. Treſpaſs of taking *two Beaſts* at B. the Defendant *ſaid, that the Plaintiff held the Place where &c. of J. by Rent and for the Rent arrear, J. diſtrain'd the Beaſts, and the Defendant at the deſire of the Plaintiff intreated J. for the Beaſts, and J. delivered them to him upon Condition, that if the Plaintiff paid the Rent within a Month that he ſhould deliver them, and if not, that he ſhould deliver them to J. which Matter the Defendant ſhewed to the Plaintiff upon which he agreed that the Defendant ſhould put them in the Place, where* &c. *and that if he did not pay as above*, that he ſhould retake them and deliver them to the Plaintiff, and becauſe he did not pay &c. he took them and re-deliver'd them to J. Judgment &c. There De ſon tort demeſne without ſuch Cauſe is adjudged a good Replication without anſwering to the ſpecial Matter becauſe it *is only a Surmiſe* Quod Nota. Br. De ſon tort &c. pl. 30 cites 10 H. 6. 3.

Br. De ſon tort &c pl. 25. cites 10 H. 6. 3, and Fitzh Iſſue 58.

In Treſpaſs, per Littleton, where the Defendant *juſtifies by Act of the Plaintiff, as by Gift or Licence* &c. there the Plaintiff ſhall not ſay that De ſon tort demeſne, abſque tali Cauſa, but ſhall anſwer to the Matter, Quod Nota. Br. De ſon tort &c. pl. 41. cites 9 E. 4. 41.

8. But where *Leaſe or Licence* is pleaded, the Plaintiff ſhall not ſay De ſon tort demeſne abſque tali Cauſa, but ſhall anſwer to the ſpecial Matter. Br. Ibid. cites 10 H. 6. 9.

9. Nota *where Patentee of the King comes to juſtify the Matter*, De ſon tort demeſne abſque tali Cauſa is no Plea; for the Juſtification is by Matter of Record. Br. De ſon tort &c. pl. 32. cites 33 H. 6. 29.

10 Treſpaſs of *cutting Trees* the Defendant *pleaded Gift of the Plaintiff* to which the Plaintiff ſaid, that De ſon tort demeſne, contrary to 9 E. 4. Br. De ſon tort &c. pl. 34.

Le. 124. pl. 169. S. C. The Court held accordingly, that though the Form of Pleading is not good, yet, for the Reaſon here given, the Pleadings ſhall be maintain'd, But the Report ſays, that Judgment was afterwards given againſt the Plaintiff, [which ſeems to be a Miſtake in the Printing.]

11. Treſpaſs of Aſſault and *Battery againſt three* Defendants, *two* of them *pleaded that they were Leſſees of certain Lands, and there were certain Poſts on the Land, and the Plaintiff would have taken them away, and they gently took them from him*; and the *third pleaded, that he found the Plaintiff and the other contending about the Poſts, and he parted them by laying his Hands Molliter on the Plaintiff &c. quæ eſt eadem* &c. the Plaintiff *replied de Injuria ſua Propria abſque tali Cauſa, &c.* and it was found for the Plaintiff; it was moved, that here was no Iſſue, becauſe the Plaintiff ought to have made ſeveral Replications, and abſque tali Cauſa can be no Iſſue to all. But per Cur. though it is no good Form of Pleading, yet by reaſonable Conſtruction theſe Words (Abſque tali Cauſa) being Nomen æquivocum ſhall be referr'd to every Cauſe; and ſo Judgment for the Plaintiff. Cro. E. 139. pl. 15. Trin. 31 Eliz. B. R. Engliſh v. Pellitary.

12. De Injuria Sua Propria is *no Plea*, where the Defendant juſtifies by *claiming an Intereſt* in the Freehold to himſelf; But where one claims not any Intereſt, but juſtifies *by Command*, or Authority derived from another, it is otherwiſe. Cro. E. 539. pl. 2. Hill. 39 Eliz. B. R. Archbiſhop of Canterbury v. Kemp.

13. In *Replevin* the *Defendant as Bailiff to one* Pyne, who was *ſeiſed of the Third Part of the Place, where &c. juſtifies for Damage feaſant.* The *Plaintiff ſays, that a Stranger was ſeiſed of the other Two Parts, and by his Licence he put in his Cattle* The *Defendant ſays De Injuria ſua propria abſque tali Cauſa* &c. And the Plaintiff demurs, and it was adjudged to be no Plea; but he ought to anſwer to the ſpecial Matter in the Bar. Cro. E. 812. pl. 19. Hill. 43 Eliz. C. B. Whitnel v. Cook.

14. When the *Defendant in his own Right, or as Servant* to another, *claims any Intereſt in the Land*, or *Common or Rent out* of it, or *Way or Paſſage*

Paſſage upon it, there De Injuria ſua propria generally is no Plea. 8 Rep. 61 a. the ſecond Reſolution, Mich. 6 Jac. Crograte's Caſe.

15. *But if* the Defendant *juſtifies as Servant*, there *De Injuria* ſua propria in the ſaid Caſes *with a traverſe of the Commandment is good, where the Commandment is material*, and this will reconcile the Books. For the General Plea *De Injuria* ſua propria &c. *is properly when the Defendant's Plea conſiſts merely upon Matter of Excuſe, without any Matter of Intereſt* whatſoever. And it is ſaid, De Injuria ſua propria, becauſe *the Injuria properly in this Senſe is to the Perſon or his Reputation*, as Battery or Impriſonment to the Perſon, or Scandal to his Feme, there if the Defendant excuſes himſelf, as upon Son Aſſault Demeſne, or upon the levying Hue and Cry, there properly De Injuria ſua propria Generally is a good Plea; for there the Plea conſiſts only of Matter of Excuſe. Reſolved. 8 Rep. 67. Mich. 6 Jac. in the Second Reſolution in Crogate's Caſe.

16. *When by the Plea of the Defendant*, any *Authority*, or Power, *is* mediately, or immediately, *derived from the Plaintiff*, there, *though no Intereſt be claimed*, the Plaintiff ought to anſwer thereto, and ſhall not reply generally De Injuria ſua propria. And the Law is the ſame of an *Authority given by the Law*, as *to ſee Waſt* &c. Reſolved. 8 Rep. 67. a. b. Mich. 6 Jac. Crogate's Caſe.

17. De Injuria ſua propria is a good *Replication to a Juſtification by the Common Law, or by a General Act of Parliament*. 2 Salk. 628. pl. 3. Mich. 13 W. 3 B. R. Chance v. Weedon. 12 Mod. 580 S. C. by Name of Chancey v. Wynn & al'. & S. P.

18 If one come into my *Houſe by my Conſent*, and he *will not go away* when I would have him go, I may by Authority in Law turn him out; if he brings Treſpaſs for this, and I *ſet out all the Matter ſpecially* in my Juſtification, De Injuria ſua propria generally will be a good Plea. Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Caſe of Chancey v. Win & al'.

19. If in *Treſpaſs againſt a Conſtable* he *juſtifies*, for that he was a Conſtable, and the *Plaintiff was breaking the Peace*, for which he committed him; may not the Plaintiff reply, De Injuria ſua propria abſque tali Cauſa? Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Caſe of Chancey v. Win & al'.

19 Treſpaſs *for taking and impounding* a Gelding at Scarborough. Defendants *plead, that the Place where* the Gelding was taken *is called Heapneſs, containing* 1000 *Acres in Scarborough, of which the Bailiff and Burgeſſes of Scarborough were ſeiſed in Fee, and the Defendants as their Servants, and by their Command, took the Cattle Damage Feaſant.* To which the Plaintiff replies, *De Injuria ſua propria generally.* To which the *Defendants demur*, and ſhew *for Cauſe, that the Plaintiff did not traverſe.* And Judgment was given for the Defendants. Firſt, becauſe *ſeveral Things are put in Iſſue*, which is a Reaſon in Crogates's Caſe. 8 Co. 67. a. Secondly, Becauſe *where Intereſt is in Land, or claimed out of Land*, the Plaintiff cannot reply De Injuria ſua propria. Comyns Rep. 582, 583. pl. 254. Trin. 11 Geo. 2. Cockerel v. Armſtrong & al'. See 2 Lutw. 1347. 1350. Hill. 2 & 3. Jac. 2 Kilbourne v. Vallence. S. P.

For more of De Injuria ſua propria in General, See other Proper Titles.

Demand.

(A) Sufficient. What is.

S. C. cited Cro. E. 721. in pl. 49. — S. P. Per Cur. Cro. E. 74. pl. 32. 74. pl 32 Mich. 29 & 30 Eliz. B. R.

1. IN Debt upon a *Bill of 70l. to be paid upon Demand*, it was inſiſted, that a Demand was requiſite, ſo that a Demand in Law by bringing the Action will not ſerve the Turn; But adjudged well enough; For it is a Duty preſently and ſo needs no Demand. Cro E. 548. pl. 22. Hill. 39 Eliz. C. B. Capp v. Lancaſter.

Bringing an *Action* is a ſufficient Demand. Cro. J. 242. pl 8. Paſch. 8 Jac. B R.

2. Where one is *indebted* to me *ſeverally in ſeveral Sums of* Money to be paid upon Requeſt, or Demand made, and I go and ſay to him *pay me what you owe me*, this is not a ſufficient Demand or Requeſt. 3 Le. 206. pl. 166. Paſch. 30 Eliz. B. R. ſaid to have been adjudged. Dockray v. Tanning.

3. If a *Will appoints Payment of Money*, and mentions no Place, there muſt be a Requeſt. Brownl. 46. Mich. 14 Jac. Anon.

But in *Debt or Detinue* were the very bringing the Action is a Requeſt, if the *Defendant appears at the firſt Summons*, then he excuſes himſelf, otherwiſe he ſhall be ſubject to Damages, but the Requeſt needs not be ſo preciſely alleged. Godb. 403. Paſch. 3 Car. B. R. by Jones J. in pl. 483.

4. Where a Contract is made, and no Time *expreſſed for the Payment* of the Money, if the Party bring his Action before he makes a Requeſt, he ſhall not *have Damages*, but if he makes an Actual Requeſt and the Defendant does not pay the Money there, he ſhall recover Damages, beſides the Duty. Godb. 362. pl. 454. Trin. 21 Jac. B. R. Gleede v. Wallis alias Harris.

5. A. in Debt to B. in 12 l. for Goods, B. refuſed to truſt him further, on which C. comes to B. and prays him to Truſt A. and if he would, he would pay him the Old Debt, and whatſoever A. ſhould be in Arrear more, if it did not exceed 100 l. C. would pay, B. ſold after to A. ſeveral Goods amounting to 19 l. and lent A. 3 l. *One Demand is* ſufficient for the *three ſeveral Sums*. Hetl. 84. Paſch. 4 Car. C. B. Gammon v. Malbarn.

6. If a Man *promiſes to pay* Money *at any Time within a Month upon Requeſt*, the Creditor *may Requeſt after the Month, and the Debtor ſhall have a Month's Time after* the Requeſt to pay the Money. Freem. Rep. 346. pl. 429. Mich. 1673. B. R. Anon.

7. Note, to pay 50 l. to B. at any Time during their Joint Lives, within three Months after A. ſhould demand the ſame, the Demand *ought to be Perſonal*. 2 Show. 235. pl. 232. Mich. 34 Car. 2. B. R. Duke of Norfolk v. Howard.

8. Demand

8. Demand *Ore Tenus* in ſome Caſes is good, as in Caſe of Stock to be transferred, it is the Uſage amongſt Merchants to make all their Demands Ore Tenus upon ſuch Bargains, as well as ſometimes by Writing at the Eaſt-India Houſe, and not to ſeek after the Perſon of the Vendor, and Judgment accordingly. Carth. 269. Paſch. 5 W & M. in B. R. Hall v. Cupper.

Skinn. 391. pl. 27 S. C. and Judgment accordingly, the conſtant Practice being an Expoſition of theſe Words.

9. *Diſtreſs for Rent* is a Demand in itſelf. See Rent (I) pl. 2. and 9.

(B) Neceſſary, or not. In what Caſes, and where.

1. A *Leaſe* was made for Years, *rendering Rent payable at a Place off the Land*; and the Court was moved, whether a Demand of the Rent may not be made upon the Land, but denied by the whole Court; for they ſaid, that the Demand muſt be made at the Place of Payment, although it be off the Land. Brownl. 96. Trin. 5 Jac. Ventris v. Farmer.

2. An *Executor brings Trover of Goods taken from his Teſtator* by a Treſpaſſor. It was held the *Executor muſt firſt make a Demand* of the Treſpaſſor *before he can bring this Action.* Clayt. 122. pl. 215. March 1647. before Germine one of the Judges of B. R. Coldwell's Caſe.

3. In Action of *Debt upon a Bond* with Condition *to pay* 300*l. to the Plaintiff, and to add* 3*l. to every* 100 *if it were demanded*; The Defendant pleaded Payment of the 300 l. and that he added 3 l. to every 100 l. ſecundum formam Conditionis prædict'. The Plaintiff traverſed the Addition o 3 l. to every 100 ſecundum formam Conditionis præd'; after Verdict, it was moved in Arreſt of Judgment, that the Plaintiff ought to have alleged a Demand; and for this Cauſe, Judgment was given againſt the Plaintiff, for this being Matter of Subſtance, without which the Plaintiff had no Cauſe of Action, was not helped by the Iſſue nor Verdict, notwithſtanding the Words ſecundum formam Conditionis, which was pretended to imply a Demand. Allen 55. 56. Paſch. 24 Car. B. R. Hill v. Armſtrong.

4 A *Difference* was taken by Serjeant Jones, between a *Limitation which depends on the doing of ſome Collateral Act*, which is *to be done but once, and the Payment of a Rent* iſſuing out of the Land, *which hath ſucceſſive Acts*; that in the laſt Caſe there ought to be a Demand, but not in the firſt. Freem. Rep. 24. Hill 1671. pl. 32.

5. Debt upon a Bill obligatory, ſeil', *borrowed of* J. S. 10*l. which I Promiſe to pay upon Demand*; the Plaintiff ſays, Quod licet ſæpius requiſitus he had not paid it, but does not lay any actual Demand; and Verdict being for the Plaintiff, Baldwin moved in Arreſt of Judgment, becauſe no particular Requeſt in Time and Place is averred; and cited the Caſe of Brown v. Dunnery, Hob. 208. But per Curiam a Requeſt is not here neceſſary, it being for the payment of a Debt, and between the Parties; but if it had been upon a *Penalty*, or a *Promiſe by a Stranger, or for ſome collateral Matter*, there a Requeſt muſt be laid; but here appears that a Debt was due, and it being for the Payment of Money by the Debtor, although it be ſaid upon Demand, yet the bringing of the Action is a ſufficient Demand. Freem. Rep. 113. pl. 135. Trin. 1673. Aſhenden v. Clapham.

6. *A. was indebted to B. and A. dies*, and after *B. comes to C. and demands the Money, and C. in Conſideration that B. would forbear his Debt,* (or

(or to ſue) *did Promiſe to pay him*. Objection was made that this being a collateral Promiſe, and no Debt due from the Defendant, here ought to have been a Requeſt. But to that the Court anſwered, that a Requeſt was not neceſſary, the *Promiſe* being *generally to pay*, and not upon Requeſt. Freem. Rep. 439. pl 595. Mich. 1676. Anon.

7. *Debt for a Rent reſerved* upon a Leaſe for Years, in which there was a *Proviſo, that if the Rent be behind, and unpaid by the ſpace of a Month* next after any, or either of the Days of Payment, then *the Leaſe to be void*. The Plea was, that the Rent was behind a Month after a Day, on which it was reſerved to be paid, and ſo the Leaſe is void; to which Plea the Plaintiff demurred, becauſe the Defendant did *not ſay that the Plaintiff demanded the Rent*; for though the Rent be due without the Demand, yet the Intereſt ſhall not be determined without it, which muſt be expreſsly laid in the Pleading; and of that Opinion was the Court, except Juſtice Atkyns who doubted. 2 Mod. 264. Trin. 29 Car. 2. C. B. Steward v. Allen.

8. Ejectment at Chelmsford Aſſizes held by Ld Ch. J. Pemberton, that if *Legacies* be given by Will, *and that in Caſe of Non-payment, the Legatees may enter and enjoy the Profits of ſuch and ſuch Land till ſatisfied*, no Demand is neceſſary; for it is no Forfeiture, but an Executory Deviſe, although there be a Place and Time appointed for Payment &c. So was the Caſe of Tyrrel v. Glaſſack here. 2 Show. 185. pl. 190. Hill. 33 and 34 Car. 2. B. R. Peirſon v. Sorrel.

9. Where the Condition of a *Bond* given *by a Member of a Society is to pay ſuch Sums as ſhall be due*, an Action may be brought for Non-payment without any Demand; for it is a Sum in groſs. Ld. Raym. Rep. 596. Trin. 12 W. 3. Levins v. Randolph.

(C) In Actions Real. Of what Things. Pleadings.

1. SELION ſhall not be demanded *by Præcipe* quod reddat per Judicium; becauſe it does not contain certainty; for it may be an Acre or Half an Acre. Thel. Dig. 69. Lib. 8. cap. 17. S. 1. cites Tempore E. 1. Brief. 866. And ſays, that 9 E. 3. 479. it was ſaid two Selions do not contain but one Acre of Land.

S P. Thel. Dig. 66. Lib. 8. cap. 4. S 6. cites Hill. 8 E 3. 381. Per Sharde.

2. Thel. Dig. 66. Lib. 8. cap. 4. S. 5. ſays, it ſeems by the Opinion of Trin. 4 E. 2. Brief 793. that a Man ſhall have *Præcipe* quod reddat *de Paſſagio ultra aquam* &c. but *not againſt him to whom the Courſe of the Water is, nor Aſſiſe de Paſſagio*, cites 31 E. 3. Aſſiſe 440. but againſt other Occupier or Diſturber; for the *quod permittat lies againſt the Tenant* &c.

3. *Præcipe* quod reddat does not lie *of Eſtovers*, nor *Dower*. Thel. Dig. 68. Lib. 8. cap. 6. S. 1. cites Mich. 2 E. 3. Dower 123. but ſays the contrary is ſaid Mich. 7 E. 3. Aſſiſe 138. per Herle and Shard of Præcipe quod reddat.

4. *Bovata terræ*, which is an Oxgange, lies in Demand. Thel. Dig. 69. Lib. 8. cap. 13. S. 1. And ſays, it was held Mich. 2 E. 3. 57. that Meadow, Paſture and Wood, may be appurtenant to an Oxgange of Land, and compriſed in the Words, Cum Pertinentiis. And that it is ſaid in Plowden, 168, That an Oxgange of Land may contain in it Land, Meadow, Paſture and Wood, and other Things. And yet it is adjudg'd Mich. 13 E. 3. Brief 241. That Oxgange of Marſh does not lie in Præcipe; And it was ſaid, that Bovata is always of Things which fall in Tillage. Theloal ſays, that an Oxgange of Land in his Country contains 10 Acres of Land.

5. *Carucata*

5. *Carucata terræ* is another Quantity of a Thing which lies in Demand. Thel. Dig. 69. Lib. 8. cap. 12. S. 1. cites Mich. 4 E. 3. 161. and 6 E. 3. 283. where it was held, that a Houſe, Mill, and Toft, may be compriſed within a Carve of Land. And ſays, See 35 H. 6. 29. where Priſot ſaid, that a Carve of Land is greater in one Country than it is in another Country. And ſo it is of an Oxgange; Moor, Wood, and Meadow, may be within a Carve of Land, cites Tempore E. 1. Brief 811.

6. *Præcipe* quod reddat was maintained *of three Rood of Land.* Thel. Dig. 69. Lib. 8. cap. 16. S. 1. cites Mich. 6 E. 3. 291.

7. A Man ſhall not have *Præcipe* quod reddat *de Foſſato, ſive Stagno.* Thel. Dig. 66. Lib. 8. cap. 4. S. 6. cites Hill. 8 E. 3. 381.

8. A Man ſhall not have Præcipe quod reddat *of a Piſchary.* Thel. Dig. 66. Lib. 8. cap. 4. S. 7. cites 8 E. 3. 381. But ſays, that ſuch Præcipe was brought in the Time of E. 1. Brief, 861, where it was ſaid, that Præcipe quod reddat lies *de Stagno*, and ſays, See *Aſſiſe of Piſchary*, 12 H. 3 Aſſiſe 427. And of *Common of Pichary*, 34 Aſſ. 11. And that Fine was levied of a Piſchary. Hill. 1 E. 3. 4. And ſays, See Mich. 13 E. 3. Entry 57, where it was ſaid, That where a Man is to demand *Piſchary from ſuch a Place to ſuch a Place* in a Water, *he ſhall make his Demand of the Soil.* And ſays, See Writ of Aiel brought of a Piſchary. Trin. 20 E. 3. Brief 685.

9. In *Aſſiſe* Plaint was made *of a Place containing* 40 *Feet in Length, and* 10 *Feet in Breadth.* Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites 12 Aſſ. 1. and 14 Aſſ. 13.

10. But in *Mortdanceſter*, Si *obiit ſeiſitus de octo pedibus terræ in Longitudine, & ſex in Latitudine*, was held good, *without ſaying, a Place containing ſo many* &c. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites 16 Aſſ. 2. Hill. 16 E. 3. 650.

11. But a Man cannot demand *the Moiety of ſuch a Piece of Land, containing* &c. but he ſhall do it well of a Piece entire. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites Mich. 9. H. 4. 3.

12 *Formedon* was maintain'd *of an Office of the Serjeanty in a Church Cathedral.* Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Trin. 18 E. 3. 27.

13. Writ of *Entry ad terminum qui præteriit* was maintain'd *de una Bedellaria.* Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Paſch. 19 E. 3. View 77.

14. Præcipe quod reddatt was maintained *de una Balliva.* Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Mich. 34 E. 3. Brief 855.

15. And ſo it was *de balliva Cuſtodiendi talem parcum.* Thel. Dig. 67. Lib. 8. cap. 5. S. 1. cites Mich. 7 E. 3. 361, and Mich. 8 E. 3. 423, and ſays, See Paſch. 10 E. 3. 508.

16 In *Aſſiſe* Plaint was made *of two Furlongs* of Land. Thel. Dig. 69. Lib. 8. cap. 18. S. 1. cites 40 Aſſ. 38. And ſays, that Hill. 4 H. 6. 14. a *Formedon* was brought *of ſix Furlongs.*

17. It was granted, That a Man ſhall have *Præcipe* quod reddat *quandam Portionem terræ* &c. Thel. Dig. 69. Lib. 8. cap. 19. S. 1. cites Hill. 11 H. 4. 43, and that ſo agrees Mich. 5 H. 7. 9.

18. Where a *Feoffment* is made *of two Rood of Land, and afterwards a Houſe is built therenpon, and Parcel made Meadow, Parcel Paſture, and Parcel made Wood* &c. the Demand ſhall be by Name of a Houſe, Land, Meadow, Paſture and Wood, and not by Roods. Thel. Dig. 69. Lib. 8. cap. 14. S. 1. cites Mich. 39 H. 6. 8. And ſays, See, Foreprise of a Rood 4 E. 3. 159, and 8 E. 3. 377. And it is ſaid in Plowden, fol. 168, that a Rood of Land may contain in it the ſaid Things.

19. A Man ſhall have *Præcipe quod reddat de una Acra terræ cum aqua cooperta*, or de una Acra terræ *generally* at his Election. Thel. Dig. 66. Lib. 8. cap. 4. S. 3. cites Mich. 12 H. 7. 4. Per Vaviſor.

20. Theloal ſays, he has not ſeen any *Præcipe* quod reddat *de Fodina*, nor de *Minera*, but there is a Form of *Writ of Covenant* in the Regiſter, fol. 165. *De Minera plumbi et cujuſcunq; Generalis mètalli cum pertin' in* &c. Thel. Dig. 68. Lib. 8. cap. 8. S. 1.

21. Thel. Dig. 69. Lib. 8. cap. 9. S. 1. ſays, That in Glanvile, fol. it appears, That at the ancient Law, a Man ſhould have *Præcipe* quod reddat *de una terræ*, but Theloall makes a Quære of what it contains, and ſays, See the Regiſter, fol. 2, and Bracton, fol. 434.

(D) Count or Declaration. In what Order the ſeveral Things ſhall be Demanded.

1. ALWAYS the *Thing of greater Dignity, ſhall be put before* the *Thing of leſs Dignity*, and the *Thing General, before the Thing Special, and* the *Entire, before its Parts.* Thel. Dig. 70. Lib. 8. cap. 20. S. 1.

Pl. C. 169. a. Hill. 3 P. & M. Arg. in Caſe of Hill v. Grange. S. P. and cites the Regiſter of Writs, that every Thing is ſo placed there, and ſays, that this Dignity is taken from the Neceſſity; For to have a Meſſuage for a Man to inhabit, and to defend his Body againſt Tempeſts and Violence of the Air, is more neceſſary than to have Land to plough for Bread, and to have Land for Bread, is more neceſſary than to have for Hay for Cattle, and to have Meadow for Hay, which will ſerve throuhout the Year, is more neceſſary than Paſture; & Sic de Similibus, and ſo a Meſſuage is more worthy than Land.

2. And becauſe Land upon which a Houſe is built, is of more Dignity than Land without an Edifice, *Houſe* ſhall be demanded before *Land*; And of Edifices, *a Caſtle* ſhall be demanded *before a Meſſuage*; becauſe it is of a greater Dignity, and a *Place of Force and Defence againſt the Enemy in Time if War, and againſt the Rebels in Time of Rebellion*, and in Time of Peace for Coercion of great Miſdoers by Impriſonment, and a magnificent Habitation for the Nobles, and ſo it ſhall be put in Demand *before a Manor, notwithſtanding that it may be Parcel of a Manor*, as appears 1 E. 3. 4. and 7 H. 6. 39. And this Order is to be obſerv'd, of Things of greater Dignity. See Plowden, 168, 169. Thel. Dig. 70. Lib. 8. cap. 20. S. 2.

3. And ſo it ſhall be of *Things General, as Land is to Meadow, Paſture, Wood* &c. and ſhall be put in Plaint or Demand before them; For Meadow is a Species of Land upon which the Hay grows, and is mow'd, and Paſture, Wood, Ruſhy Ground and Marſh, &c. are Species or Kinds of Land. And ſo Wood is a Genus to Land, where all Manner of Trees grow, and therefore ſhall be put in Demand before Alder Beds, and Willow Beds, which are only Species of Wood. Thel. Dig. 70. Lib. 8. cap. 20. S. 3.

4. So the *entire Thing* ſhall be demanded *before the Moiety or other Part* or Parts of the ſame Entire, as appears in the Regiſter, and in the Natura brevium. Thel. Dig. 70. Lib. 8. cap. 20. S. 4.

5. Yet, notwithſtanding the ſaid Rules, a Writ was adjudg'd good, by which *Land* was put in Demand *before a Mill.* Thel. Dig. 70. Lib. 8. cap. 20. S. 5. cites Hill. 9 E. 3. 444.

6. There is a Note in the Regiſter, fol. 81. in Replevin, That if live Beaſts, and dead Chattles are to be Replevy'd, the *live Thing* ſhall be put in the Writ *before the dead Thing* &c. Thel. Dig. 70. Lib. 8. cap. 20. S. 6.

(E) Demand;

(E) Demand; In the Disjunctive.

1. IN *Aſſiſe* the Plaint was *of a Robe, Price* 10 *s. or* 10 *s. for the Robe*, at the Feaſt of Chriſtmas, and held good. Thel. Dig. 74. Lib. 8. cap. 24. S. 1. cites 3 E. 3. It. North. Aſſiſe 175. And that ſo it is agreed. 11 Aſſ. 8. and 29. Aſſ. 7. Trin. 11 E. 3. Variance, 69.

2. And in *Annuity*, notwithſtanding that *the Specialty* be *of a Robe, price* 10 *s. or of* 10 *s.* yet the *Writ may be of a Robe only.* Thel. Dig. 74. Lib. 8. cap. 24. S. 2. cites Paſch. 11 E. 3. Annuity, 27.

3. *And* it was adjudg'd in ſuch Caſe, that the *Writ* of Annuity *may be Quod reddat unam Robam, or* 10 *s.* &c. Thel. Dig. 74. Lib. 8. cap. 24. S. 3. cites Paſch. 5 E. 4. 6. And ſays, See Mich. 13 E. 4. 4. That a Writ of Debt was brought of 20 l. &c. where the Specialty was of 20 l. of 20 Packs of Wool, and ſays, See the ſame Caſe 9 E. 4. 29.

4. A Writ of Error was brought upon a Judgment given in a Writ of Entry in the Poſt, upon which a Recovery was had in the Common Pleas; And the Error aſſigned was, becauſe the Writ of Entry was, *De uno annuali reditu ſive Penſione* 4. *Marcarum exeunt. de Eccleſia ſive Rectoria.* It was Reſolv'd, That the Writ was good, for there is not any Uncertainty in it, for one of two Things is not ſeverally demanded, but one Thing only, for the Demand is of Rent, or a Perſon of four Marks, ſo as there is not but one four Marks. And *Reditus & Penſio* are all one; And the Words *exeunt. de Rectoria* prove it to be a Rent, for if it ſhould be an Annuity, the Rectory ſhould not be changed, but the Perſon of the Parſon, in reſpect of the Rectory. 5 Rep. 40. a. 41. a. Paſch. 35 Eliz. B. R. in Dormer's Caſe.

(F) Of divers ſeveral Things, or of Things of different Natures, in one Plaint or Demand.

1. A Man ſhall make his *Plaint of Office, and of Corody* in an *Aſſiſe*. Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites Mich. 18 E. 2. Aſſiſe 377.

2. So of a *Carve of Land, and of Corody.* Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites 7 Aſſ. 18. 11 Aſſ. 13. 23. and 7 E. 3. Aſſiſe, 138. in which Books it was ſaid, that a Man in the ſame Plaint, may put *Franktenement at the Common Law, and* Franktenement *by Statute.*

3. So of *two Rent Services, and Rent Service, and Rent Charge.* Thel. Dig. 75. Lib. 8. cap. 26. S. 1. cites 15 E. 3. Charge 9. And ſo agrees 15 Aſſ. 11. but ſays, See Mich. 17 E. 3. 52. 75. that it was doubted if a Man ſhould have a Plea of two Rents, and at laſt adjudg'd that the Plaintiff ſhould recover.

4. An *Aſſiſe* was maintained *of four ſeveral Rent Charges.* Thel. Dig. 75. Lib. 8. cap. 26. S. 2. cites 22 Aſſ. 52. 66. And ſays, it ſeems by 5 E. 4. 80. that a Man ſhall have *Writ of Entry of diverſe Rents.* And ſays, ſee 12 E. 3. Aſſiſe 112. that the Plaint in Aſſiſe was of 40 s. Rent, 52 s. Rent, 7 * darec' and the Rent of a Robe ſeverally upon ſeveral Titles &c, and adjudg'd good.

* Quære the Meaning of the Word.

5. A

5. A Writ of *Annuity* was maintained *of* 4*l. Annuity* where the *Deed was that four Marks were granted for one Cauſe, and* 2 *Marks for another Cauſe.* Thel. Dig. 75. Lib. 8. cap. 26. S. 3. cites 29 E. 3. Grant 101.

(G) Pleadings.

1. A *Leaſe* was made *of a Houſe except certain Chambers, rendring Rent with Clauſe of Re-entry.* The Leſſor entred for Default of Payment and in an Action brought by the Leſſee, the Leſſor juſtified for this Cauſe, and averr'd, that he demanded the Rent Ad Damnum prædictum [Domum prædictam.] It was moved in Arreſt of Judgment, becauſe he did *not ſhew in what Part of the Houſe he made his Demand*; for perhaps it was demanded in the Chambers excepted; ſed non Allocatur; for Domus prædict' is intended to be Domus præmiſs' [prædimiſs'] 2 Roll. Rep. 42. Trin. 16 Jac. B. R. Dorrell v. Truſſell.

For more of Demand in General, See **Actions. Condition. Rent. Requeſt.** and other Proper Titles.

Demurrer.

(A) Demurrer. How.

1. *THE Form* of Demurrer *upon Matter apparent in the Writ*, and in its return *is firſt to Demand Oyer of the Writ and of the Return, and after to ſay that they are inſufficient* &c. as appears in the Aſſiſe of Wymbiſhe &c. Plowden fol. 73. Thel. Dig. 217. Lib. 15. cap. 9. S. 1.

2. And the *Ancient Form* of Demurrer *upon the Count* is to ſay, that *non debet eidem petenti ad hanc Narrationem, & ad hoc breve reſpondere* &c. Dicit enim quod &c. And ſo *ſhew the Cauſe* of the Demurrer &c. *Unde petit Judicium* &c. Thel. Dig. 217. Lib. 15. cap. 9. S. 2. cites Mich. 7 E. 3. 349.

3. There is another Form, to ſay, *ex quo Narratio prædict' ad breve præd' manutenendum non eſt ſufficiens, in Lege petit Judicium de breve.* Thel. Dig. 217. Lib. 15. cap. 9. S. 3. cites Paſch. 11 H. 6. 36.

4. Demurrer is an Allegation of the Defendant, which, admitting the matters of Fact, or ſome of them, alleged by the Defendant to be true, ſhews that, as they are ſet forth by the Complainant himſelf, they are inſufficient for him to proceed upon, or to oblige the Defendant to Anſwer; and therefore demands the Judgment of the Court, whether

ther the Defendant ſhall be compelled to make Anſwer to the Plaintiff's Bill, or to ſome certain Part thereof. P. R. C. 131.

(B) What may be done upon, or after Demurrer.

1. THERE can be no Striking out, Amendment, or *Alteration after* a Demurrer. Per tot. Cur. 1 Bulſt. 204. Paſch. 10 Jac. Anon.

2. A Demurrer *cannot be waived* without the Plaintiff's Conſent. Cro. C. 513. pl. 10. Mich. 14 Car. B. R. in Caſe of Talory v. Jackſon.

3. After a Demurrer by the Defendant, the Court ordered that the Plaintiff *reply* to the Anſwer *notwithſtanding the Demurrer*, and proceed to Examination of Witneſſes, and Hearing the Cauſe, but no Coſts allowed. 3 Ch. R. 57, 58. Trin. 22 Car. 2. Gaſcoigne v. Stutt.

Nelſ. Chan. Rep. 143. Gaſcoign v. Sturt. S. C. in totidem Verbis.

4. When a Defendant has demurred, he may Sign another Cauſe of Demurrer *at the Bar* Paying Coſts, and if ſuch Demurrer is over ruled, he ought to pay double Coſts; but when a Defendant has pleaded, and there is no Demurrer in Court, he can't demurr at the Barr, though he would pay Coſts. Vern. R. 78. pl. 72. Mich. 1682. Durdant v. Redman.

One may demur a new Ore tenus at the Bar, but then on its being allow'd he cannot have Coſts. 3 Wms's Rep. 371. Per Ld. Chancellor. Trin. 1735. ——Ibid. The Reporter adds a Note, that what is ſaid in Vern. 78. Durdant v. Redman, that Coſts ought to be paid for a new Demurrer inſiſted on at the Bar, Ore tenus is not now the Practice.

5. Where a Demurrer to a Bill of *Review* is allowed, it may be *Inrolled*, but if over ruled it can't be inrolled ſo as to prevent the Demurrer being re-argued. 2 Vern. R. 120. pl. 119. Hill. 1690. Woots v. Tucker.

6. When a Demurrer is join'd, the Court ought firſt to determine the Matter of Law, whether, *Sufficiens* or *minus Sufficiens* before they pronounce Judgment, and the Judgment muſt be enter'd with Et quia videtur Curiæ hic quod placitum Prædict' &c. 1 Salk. 402. pl. 10 Mich. 1 Ann B. R. in Caſe of Atwood v. Burr.

7. Defendant demurs to a Bill, and the Demurrer is *allowed* Ld. Lechmere Chancellor of the Dutchy gave the Plaintiff *leave to amend*, though Defendant ſtrenuouſly inſiſted on it to be Irregular, becauſe by allowing the Demurrer the Cauſe was out of Court, though before arguing it he might have amended. 2 William's Rep. 300. Trin. 1725. In the Dutchy Chamber. Ld. Coningsby v. Sir Joſeph Jekyl Maſter of the Rolls.

Agreeable to what was ſaid by the Maſter of the Rolls, it was ſaid by Ld. Ch. Talbot, that after a Demurrer to the whole Bill allowed the Bill is regularly out of Court, and no Inſtance of Leave to amend it. Ibid. in a Note at the End, cites 9 December, 1736. —— v. Baines.

8. A Defendant *cannot demur and plead, or demur and Anſwer to the ſame Part of a Bill*; for the Plea &c. over rules the Demurrer. 3 Wm's. Rep. 80. Mich. 1730. in Caſe of Jones v. Strafford.

(C) Set aside.

1. THE Plaintiff exhibited his *Bill to be relieved for a Promiſe* ſuppoſed to be made by the Lady Lutterell *for a Leaſe of certain Lands and for ſtopping certain Ways*; the Defendant had a *Commiſſion to take her Anſwer*, and demurred; for that the Plaintiff may have his *Remedy by Law*, which Cauſe ſeems Inſufficient, and not to be allowed of, and the rather for that the Defendant having a Commiſſion to take Anſwers in the Country did demur, therefore a Subpœna is awarded againſt them to make a better Anſwer. Cary's Rep. 75. cites 18 & 19 Eliz. Stuckly v. Lady Lutterell & al'.

2. The Defendant puts in Demurrer to the Plaintiff's Bill *without ſhewing any Cauſe of this Demurrer*. Therefore ordered a Subpœna be awarded againſt him to make a better Anſwer. Cary's Rep. 153. cites 21 Eliz. Offely v. Morgan.

3. Becauſe the Defendant did *not put in* his Demurrer, *according to the Rule of the Court*, it was moved to have it entred, but denied. Toth. 140. cites 14 Car. Osborne v. Paget.

4. The Defendant *pleaded* that there was *a former Bill depending*, and brought *by the ſame Plaintiff*, *for the ſame Matter* as in this Bill. And *demurred*, *for that there was no Equity in the Bill*, *and that the ſame being 200 Sheets of Paper*, *was ſtuffed with Repetitions*, Tautologies, and Impertinences. It was inſiſted by the Counſel for the Plaintiff, that by Reaſon of the Demurrer, he could not procure a Reference to the Maſter, to examine whether there was a former Suit depending or not. Thereupon the *Court over-ruled the Demurrer* with Coſts, *and referred it to the Maſter to examine into the former and this Bill*, if he found it for the ſame Matter, then to tax Coſts for the Defendant. Fin. R. 179. Mich. 26 Car. 2. Dumford v. Dumford.

5. Demurrer though *not formally joined* may *be ſufficient to bring the Matter before the Court*. Per Cur. Reſolved. 3 Lev. 222. Trin. 1 Jac. 2 C. B. in Caſe of The King v. Butler.

6. Defendants had *leave to plead Anſwer and Demur*, but *not to demur alone*. They demurred and *anſwered only by denying Combination*, *or ſome ſuch trifling Matter*, no ways material. The Court diſcharged the Demurrer as not complying with the Order, it being in Effect a Demurrer only. 2 Wms's Rep. 286. Trin. 1725. Stephenſon v. Gardiner.

(D) What is Good Cauſe of Demurrer.

1. THE Defendant put in a *Demurrer* to the Plaintiff's Bill, becauſe the Plaintiff was *outlawed at the Suit of Strangers*, yet ordered to anſwer. Toth. 137. cites Mich. 9 Jac. Skies v. Rawſon.—— Ibid. 139 cites 10 Jac. Morris Owen.

Ibid 138. cites 5 Car. Brooks v. ---

2. Demurrer, becauſe *excommunicated*, over-ruled about. 4 Car. Toth. 137. 4 C. Plumton v. Headlam.

3. Scire

3. Scire Facias upon a Judgment againſt ſeveral *Terretenants*, who came in and pleaded *ſeveral Pleas*; the Plaintiff replied and ſaid, *quoad ſeparalia placita* &c. Upon Demurrer the Point was, whether the Plaintiff ſhould ſay, Quoad Placita of the one &c. and ſo to anſwer to each Plea particularly; or if the Words Separalia Placita ought to be referred to the ſeveral Pleas, Reddendo ſingula ſingulis; and the Court *held*, that the Saying Separalia Placita is *good*, and ſhall be conſtrued *Reddendo ſingula ſingulis*. Sid. 39. pl. 2. Paſch. 13 Car. 2. B. R. Curtis v. Bateman.

4. It is allowed a good Cauſe of Demurrer in this Court, that a Bill is brought for *Part of a Matter only*, which is proper for one intire Account, becauſe the Plaintiff ſhall not *ſplit Cauſes* and make a Multiplicity of Suits. Vern. 29. pl. 24. Hill 1681. in Caſe of Pureſoy v. Pureſoy.

5. *Demurrer to ſcandalous Matter* ſuggeſted *in a Bill*; Per Sir J. Churchill, as Amicus Curiæ, the Courſe of the Court in ſuch a Caſe is not to put the Defendant to anſwer the ſcandalous Matter, but to ſtrike out the Word Demurrer, and leave the Plaintiff at Liberty to prove it. Vern. R. 137. pl. 96. Mich. 1682. Page v. Neale.

6. A *Plea amonting to the General Iſſue* is not always good *Cauſe* of Demurrer, as if it confeſſeth and avoideth. In Debt for Rent a Releaſe is a good Plea, yet it might be given Evidenee upon the General Iſſue, Et ſic de ſimil. Per Holt. Cumb. 332. Trin. 7 W. 3 Anon.

7. *Not concluding to the Country upon Iſſue compleatly joined* is good Cauſe of Special Demurrer. Per Cur. 7 Mod. 105. Mich. 1 Annæ B. R. Crogate v. Martin.

8. Where a Bill was exhibited to have an *Excution of an Award*, which was *performed by neither Party*; and the Defendant *demurred becauſe there was no Precedent* that a Court of Equity had ever carried ſuch Awards into Execution; and the Demurrer was allowed. Abr. Equ. Caſes 51. Mich. 1704. at the Rolls. Biſhop v. Webſter.

9. Where a *Tort* is *laid to be done after the Action* brought, the Defendant may take Advantage of it on a Special Demurrer. Gilb. Hiſt. of C. B. 106.

(E) To What. To Bills in General.

1. A Demurrer *to a Second Bill of Revivor* over-ruled. Toth. 138. cites Hill. 7 Car. St. John v. Lady Thornburgh.

3. An *Original Bill* was brought *to explain a Decree*. The Defendant demurred. The Plaintiff inſiſted, that the Demurrer confeſſed the Matter of the Bill, but the Court allowed the Demurrer good. 2 Freem. Rep. 179. pl. 242. 15 Car. 2. in Canc. Read v. Hanby.

Chan. Caſes 44, 45. Read v. Hambey, S. C. the the Demurrer was,

for that it was to alter or change the Decree; and it was inſiſted for the Defendant, that no Original Bill ought to explain a Decree upon any Matter precedent to the Decree, and that it would be dangerous, for it would be introductive of a Means to blemiſh and hinder the Execution of Decrees; and the Demurrer was allowed.

4. Bill for Performance of Agreement. Demurrer, becauſe there there was but 20 s. paid as Earneſt to bind the Bargain, which is but an *Inconſiderable Execution of the Agreement*, and it being not under Hand and

S. P. as to 5 s. alleged to be paid by the Plaintiff

to the Defendant in Earneſt and Seal, the Court allowed of the Demurrer. Chan. Rep. 241. 15 Car. 2. Simmons v. Cornelius.

for a Bargain of Hops, which was alleged not to be a ſufficient Conſideration to ground a Decree upon; the Court allowed the Demurrer. Fin. Rep. 253. Trin. 28 Car. 2 Fox v. Froſt.

4. The Plaintiff having only the *Poſſibility of the Remainder of a Perſonal Eſtate*, which is void in Law, exhibited a Bill for Security of ſuch Eſtate, which the Defendant demurred to, and the Demurrer allowed. Chan. Rep. 260. 17 Car. 2. & 18 Car. 2. Hart v. Hart.

5. *A. and M.* his Wife (the Plaintiff's Father and Mother) were *ſeiſed in Fee of Lands in which P. had Eſtate for Life.* In 1643. *A. and M. covenanted to levy a Fine to* the Uſe *of themſelves for Life*, Remainder *to the Plaintiff in Tail male*, Remainder over. *A. ſurvived and* then (as the Bill ſuggeſts) *forged another Deed declaring the Uſes of the Fine to be to the Father and Mother, and to the Survivor of them, and to his or her Heirs*, under which Deed the Defendant purchaſed the the Lands of the Father who is ſince dead; and P. the Tenant for Life being ſtill Living, the *Plaintiff exhibited his Bill, to perpetuate the Teſtimony of his Witneſſes to prove the true, and to diſprove the forged Deed.* The *Defendant demurred* to the Bill *for that he was a real Purchaſor under the pretended Deed, believing it was true and real Deed*; and therefore inaſmuch as it was to draw under Examination a Matter of Forgery againſt a dead Perſon, who could not anſwer for himſelf, and to get Aid to impeach a real Purchaſor, the Defendant did inſiſt upon it, that he ought not to anſwer, nor the Plaintiff be permitted to proceed any farther. And upon Debate, it *appearing that the Tenant for Life was ſtill living, ſo that the Plaintiff could not try his Title at Law*; and that this Court is obliged in Juſtice to preſerve a Title at Law, which by ſuch Impediment could not at preſent be tried, the *Demurrer was over-ruled.* Nelſ. Chan. Rep. 125, 126. Anno 20 Car. 2. Seabourn v. Chilſton.

6. A Bill for 20 l. promiſed to the Wife, if ſhe would paocure *a Releaſe* from her Husband for Purchaſe Money, which was Part paid and the Rents ſecured, Defendant demurred for that it was *no Conſideration*, becauſe the Defendant was releaſed by Law, by *Payment and Security*, and allowed. Per Ld. Keeper Bridgman, 3 Ch. B. 70. 24 July, 1671. Stuckly v. Cook.

3 Chan. Rep. 26. S. C. 7. The Plaintiff brought a Bill againſt the Defendant, as Executor of the Obligor, *to diſcover Aſſets, and to compel the Payment of* the Debt. The *Defendant demurred, for that the Plaintiff had brought an Action* againſt him *at Law; to which the Defendant had pleaded Plene Adminiſtravit.* But the Demurrer was over-ruled, and the Defendant ordered to anſwer without Payment of Coſts. Nelſ. Chan. Rep. 127, 128. Anno 21 Car. 2. Pitt v. Scarlet.

8. Plaintiff having obtained a *Decree* againſt the Defendant for Money out of Aſſets in their Hands, they being Executors, and they having denied Aſſets, Plaintiff brought a Bill to *diſcover* Aſſets. Defendants demurred, for that it *did not appear that the Decree was ſigned and inrolled*, or the Defendant ſerved with any Decree under Seal. Demurrer allowed and Bill diſmiſſed. Fin. R. 33. 34 Mich. 25 Car. 2. Braithwait v. Davis.

9. A Bill was brought *to baſtardize the Iſſue*, and ſet aſide and overthrow the Marriage of his late Father with the other Defendant his Mother. The *Defendant demurred, for that the Validity of the Marriage and Legitimacy of the Defendant is properly triable at Law, and that the Defendant the Mother, is not bound to diſcover upon Oath that ſhe is Guilty of ſuch a Crime, as will ſubject her to the Penalty of the Statutes*, and

and Laws of the Realm, and that the Bill was ſcandalous and impertinent. The Demurrer was allowed, and the Bill to be taken off the File and burnt. Fin. Rep. 72. 73. Hill 25 Car. 2. Trevor v. Leſquire.

10. *Joint Executors*, one died, the Executor of the Executor brought a Bill for Relief againſt an Action of Trover brought by the ſurviving Executor for Goods of the firſt Teſtator; the ſurviving Executor demurred, for that the Perſonal Eſtate belongs to him, as *ſurviving Executor*, and he is the Perſon that is in Law accountable to the Legatees for the ſame, and for that the Plaintiffs Bill contains *no Equity*. The Court allowed the Demurrer. Fin. R. 171. Mich. 26 Car. 2. Burgh v. Davis.

11. The Plaintiff exhibited a *Bill to diſcover* ſeveral Matters, *and to examine Witneſſes*, in Order *to prove a Codicil*, which he *pretended was made by the Defendants Teſtator, whereby he deviſed to the Plaintiff all the Goods of him*, the ſaid Teſtator, *then in the Poſſeſſion of the Plaintiff*. But it appearing, that this Matter was depending upon an Appeal to the Archives, the Defendants *demurred; for that this a mere Teſtamentary Cauſe*, and properly *within the Conuſance of the Spiritual Court, where the ſame is now litigated*, and where the Plaintiff has a proper Remedy for the Recovery and Relief. The Court allowed the Demurrer. Fin. Rep. 218. Trin. 27 Car. 2. Cawſton v. Helwyes.

12. Bill to *diſcover ſeveral fraudulent Conveyances ſet up againſt a Mortgage*, one of the Defendants demurred, for that the Bill is *for different Matters, againſt different Defendants* and the Plaintiff *did not diſtinguiſh for* what particular Conveyances or Incumbrances made by the ſeveral Defendants he would have a Diſcovery made; Plaintiff's Counſel argued, that the Bill was for a Diſcovery of Incumbrances made by the other Defendants, wherein this Defendant was not concerned, and this appearing to the Court, the Demurrer was over-ruled, and this Defendant was ordered to anſwer, but not to any Incumbrances made by the other Defendants. Fin. R. 240. Mich. 27 Car. 2. Draper v. Jaſon, Pargiter & al'.

13. Bill againſt *an Executor to enjoin him to exhibit an Inventory and to give Security to account before he goes beyond Sea.* Demurrer, for that this Bill is to make an Injunction in the Nature of the Writ of Ne exeat Regnum &c. The Court allowed the Demurrer. Fin. R. 257. Trin 28 Car 2. Bridge v. Hindall.

14. Bill to be relieved concerning an *Agreement for Tythes* and Verdicts for Tythes, and to diſcover *what the Agreement was*, and *what due for* 4 or 5 *Years laſt paſt*, Defendant demurs, for that Plaintiff *ought to have ſet forth the Subſtance of the Agreement*, or what Sum was [to be] paid in Lieu of Tythe, or what was actually paid, and for what Tythes, all which was within Plaintiff's own Knowledge, and though Bill does not charge that the *Witneſſes* to prove this pretended Agreement were *either Dead, o, beyond the Seas, when Plaintiff was ſued at Law and a Verdict againſt him*, ſo that he might have pleaded the Compoſition at Law, or given the ſame in Evidence at the Trial, the Defendant need not ſet forth the Quantities, Qualities, and Value of the reſpective Tythes, due for Four or Five Years paſt, the ſame *being properly in the Cognizance of the Plaintiff*, who was Owner and Proprietor of the Lands out of which they were to be paid. Demurrer allowed. Fin. R. 389. Trin 30 Car. 3. Tregonnel v. Forbes.

15. One Thouſand Pounds was left by Will to *purchaſe a Dukedom* within a Year for the Head of a Family, a Bill was exhibited to have the Money applied accordingly, but upon Demurrer it was adjudged againſt the Plaintiff, as well becauſe it is illegal to acquire Honour for Money, as alſo, becauſe the *Bill was exhibited in Time*, ſo as to attach

the Money in Equity within the Year. Vern. 5. pl. 3. Paſch. 1681. Earl of Kingſton v. Lady Pierpoint.

16. In a Bill by *Obligee againſt the Heir of the Obligor* for Payment of the Debt out of Aſſets alleged to be deſcended; if the Bill does *not allege that the Heir was bound by the Bond*, Defendant may Demur. Per North K. Vern. R. 180. pl 173 Trin. 1683. Croſſing v. Honor.

17. The Bill was, that the *Plaintiff had obtained Judgment againſt J. S. for* 100*l.* and that the *Defendant upon Pretence of a Debt due to himſelf, and to prevent the Plaintiff's having the Benefit of his Judgment, had got goods of J. S.* of great Value into his Hands, *ſufficient to ſatisfy his Debt with a great Overplus*, and pray'd an *Account and Diſcovery* of theſe Goods. The Defendant *demurred becauſe the Plaintiff had not alleged that he ſued out Execution*, and *had actually taken out a Fieri Facias*; for untill he had ſo done, the Goods were not bound by the Judgment nor the Plaintiff intitled to a Diſcovery or Account thereof. The Court allow'd the Demurrer; the Plaintiff ought actually to have ſued out Execution before he had brought his Bill. Vern. 399. pl. 371. Paſch. 1686. Angeli v. Draper.

18. Defendant demurred, becauſe the Bill was *againſt ſeveral Defendants, for ſeveral Diſtinct Matters* but was over ruled, becauſe the Plaintiff by his Bill had charged the Defendant with *Combination* which Defendant had *not denyed* in his Anſwer. Vern. R. 416. pl. 395. Mich. 1686. Powell v. Ardern and Chevall.

19. The Bill was *to examine Witneſſes to preſerve their Teſtimony touching the Title of certain* Lands in the Bill mentioned. The Defendant *demurred, becauſe there was no Impediment that hindred the Plaintiff from trying his Right at Law*; *and* that he had *not obtained any Verdict* in Affirmation of his pretented Title. Demurred allowed. Vern. 441. pl. 415. Hill. 1686. Parry v. Rogers.

20. Bill to *inforce the Lord of a Manner*, to receive a Petition in Nature of a Writ of Falſe Judgment *to Reverſe a common Recovery* demurred to, and allowed. 2. Chan. Rep. 387. 1 Jac. 2. Aſh v. Rogle and the Dean and Chapter of St. Paul's.

20. If an *Original Bill* be brought *for matters, part of which are in a former Bill and Decree, and Part new or by way of Supplemental Bill.* The Court will on a Demurrer, to ſo much as was continued in the former Decree, ſend it to a Maſter to ſee what was, and what was not in the firſt Bill, and allow the Demurrer accordingly. G. Equ. R. 184. Hill. 12 Geo. 1. in Canc.

(F) To Bills. Want of Parties.

3 Ch. R. 92. S. C. — Nels. Chan. Rep. 92. S. C. & S. P. accordingly.

1. DEmurrer for that an *Infant ſued not by his Guardian*, and the Father not being thought proper to be Guardian, he being Defendant, the Eldeſt ſix Clark was appointed for that Purpoſe. N. Ch. R. 45. 17 Car. 1. Offley v. Jenny.

2. A. made J. S. and J. N. Executors durante Minoritate of B. his Son, and gave a 100*l.* Legacy to C. his other Son. B. attained his full Age and dy'd. C. brought his Bill for the 100*l.* againſt J. S. and *for an Account of the Surplus of A's Eſtate* J. S. Demurred for that he and J. N. where made Executors durante Minoritate of B. who attained his full Age, ſo that the *Executorſhip being determined* ſome other *Executors or Adminiſtrators* ought to be called to Anſwer, who might poſſibly make out

out ſome ſufficient Releaſe or Diſcharge He Demurred alſo as to the Account of the Surplus, becauſe *there are others to whom Defendants are liable to account, as well as to the Plaintiff, and they not Parties.* The Demurrer was over ruled as to the Legacy, but allowed as to the Demand of the Account. Fin. Rep. 113. Hill. 25 Car. 2. Atwood v. Hawkins.

3. Bill to be relieved againſt an *Award made by ſome Members of the E. I Company* touching the Quantum of Freight due from the Company to the Plaintiff. The *Arbitrators and ſome particular Members being made Defendants*, they Demurred *to the whole Bill*, becauſe the *Plaintiff can have no Decree againſt them, nor will their Anſwers be Evidence* againſt the Company, and the Plaintiff might examine them as Witneſſes. Demurrer allowed without putting them to Anſwer as to Matters of Fraud and Contrivance. 2 Vern. 380. pl. 347. Trin. 1700 Dr. Steward v. E. I. Company.

4. Demurrer to a Bill for Want of proper Parties, was *allowed as to Part*, and diſallowed as to Part. Fin. R. 113. Hill. 25 Car. 2. Atwood and Davis v. Hawkins.

(G) To Bills. Matter at Law, and want of Equity.

1. SUbpœna in Chancery by W. againſt B. *to render certain Goods and Chattles to the Value &c. which T. B. Forfeited to the King by Reaſon that he was attainted of Treaſon, and which came to the Hands of the Defendant, and which the King gave to the Plaintiff by his Letters Patents* &c. And the *Defendant demanded Judgment* of the Subpœna, *for the Plaintiff may* upon this Matter *have Detinue at the Common Law*, and then he ſhall not ſue in Equity by the Subpœna; for Subpœna does not lie but where he has no Remedy at the Common Law, and then when the Common Law fails, he ſhall have Subpœna in Chancery, and per Cur the Subpæna lies well, by which *the Defendant was commanded to make Inventory of all the Goods* which he had of the ſaid T. B. againſt the next Day, or he ſhould be committed to the Fleet. B. Conſcience, pl. 6. cites 39 H. 6 26.

2. A Bill laying a *Promiſe to aſſure Lands for* 10 *s in Hand*, and 2100 l. at Days, Demurred and Allowed, becauſe it was but a *Preparation for Action upon the Caſe.* Toth. 135. Trin. 38 Eliz. William v. Nevil.

3. A Demurrer pleaded becauſe Remedy at Law, over-ruled. Toth. 139. cites Paſch. 7 Car. Bland v. County of Cambridge.

4. A Bill was brought *after a Verdict* on an Action ſur Caſe, Suggeſting Matters in Defendants Cognizance, which the Plaintiff could not prove at the Trial. Defendant pleaded the Verdict, and that the Effect of the Matter (which was a Letter) was given in Evidence on the Trial, and Demurred for *want of Equity*, and Plea and Demurrer allowed. Chan. Caſes 65. Hill. 16 and 17 Car. 2. Sewell v. Freeſtone.

Chan. Rep. 48. S. C. The Court on peruſal of Precedents, conceiv'd the Matter of the bill to be of ill Conſequence, and allow'd the Demurror to the Bill.

5. Plaintiff in a Bill *of Revivor*, Demurred to ſo much of *the Anſwer to it*, as did ſet forth a pretended Irregularity in the Examination of the Witneſſes in the Original Cauſe, and alſo as to a variation of the Evidences,

dences Viva Voce at the Trial, and what been Depoſed here. Demurrer allowed. N. Ch. R. 138. 22 Car. 2. Weſthall v. Carter.

6. A Bill was brought at the Relation of ſeveral *Freemen of the Weavers Company, againſt the Defendants, Wardens &c.* of the ſaid Company, ſetting forth their *Charters* of Incorporation and Rules. But the Defendants had been Guilty of many Breaches thereof, and had oppreſſed the Freemen &c. and mentioned ſome particularly, and for a Diſcovery of the reſt, and *that they might be decreed* for the future, *to obſerve the Charters, and to have an Account of the Revenue* of the Corporation, *which the Defendants had miſpent* &c. was the End of the Bill to which the Defendants demurred, becauſe as to Part of the Bill, it was to ſubject them to Proſecutions at Law, and to a Quo Warranto, and as to the other Parts, the Plaintiffs have Remedy by *Mandamus, Information*, or otherwiſe, and not here, and of the ſame Opinion was my Lord Keeper, who ſaid, it *would uſurp too much on the King's Bench, and* that he *never heard of any Precedent* for ſuch a Caſe as this, and ſo allowed the Demurrer. Abr. Equ. Caſes. 131. Mich. 1705. Attorney General v. Reynolds, & al'.

7. The Plaintiff brought her Bill to have an *Account of the Real and Perſonal Eſtate* of her late Husband, *and* to have *Satisfaction thereout for Defect of Value of her Jointure Lands*, which he Covenanted to be, and to continue of ſuch Value. The Defendants inſiſted, it was a Matter properly triable at Law, and ſhe ought to be ſent there to try it, for if ſhe were damnified, this Court could *not aſſeſs Damages*; but my Lord Chancellor ſaid, The Maſter might enquire into it well enough; and therefore ſent it to him to examine and report, and ſaid, if he found there was any Difficulties in it, he could ſend it to be tried afterwards. Abr. Equ. Caſes, 131, 132. Mich. 1729. Hedges v. Everard.

(H) To Bills after Suits elſewhere.

1. DEmurrer, becauſe the Matter was *diſmiſſed in the Court of Requeſts*, over-ruled. Toth. 136. cites 30 Eliz. Haddon v. Salter.

2. Demurrer, becauſe the Matter *was depending in the Exchequer* before the Bill, over-ruled. Toth. 137. cites 35 Eliz. Biller v. Elliot.

3. A Demurrer, becauſe a *Decree in the Exchequer*, over-ruled, and decreed here in preſence of the Barons of the Exchequer. Toth. 140. cites Mich. 14 Car. Salter v. Bennet.

4. After an *Examination and Diſmiſſion* of a Cauſe, whether a Will or no Will *in the Exchequer, without Prejudice in Law or Equity*, an original Bill was brought in Chancery for Relief as to the ſame Matter, the Court ordered, that the Plaintiff might examine any Witneſſes that were not examined in the Exchequer, and that as to the Matters examined unto there, the Plaintiff might examine the ſame Witneſſes De bene eſſe, and how far thoſe De bene eſſe ſhould be uſed, the Court would farther conſider. Chan. Caſes, 156. Hill. 21 & 22 Car. 2. Anon.

(I) To Bill. Length of Time.

1. A Bill was brought to redeem an ancient Mortgage, the *Mortgagee* demurred, in which Caſe there was Infancy and Coverture for 60 Years, the Demurrer was ſaved to the Hearing. 3 Chan. Rep. 55, 56. 22 Car. 2. Pratt v. Allen.

(K) To Bills. Where it is to Subject to a Penalty, Forfeiture &c.

1. A. *purchaſed the Office* of Deputy of a Biſhop's Regiſter, for a Term of Years of the Defendant, but was turn'd out before the Years expired, and the Defendant having got the Deed in his own Hands, refuſed to deliver it to the Plaintiff. A. brought his Bill for Relief. Defendant demurred upon the 5 and 6 *Ed.* 6. againſt Sale of Offices of Juſtice, or the Deputation thereof; and averr'd, that the Office of Regiſter concerned the Adminiſtration of Juſtice, and for that the Plaintiff by his Bill had confeſſed, that he had given Money, or contracted for it contrary to the Meaning of the Statute, therefore he was diſabled to execute the ſame, and the Demurrer was held good. N. Ch. R. 27. 9 Car. 1. Lake v. Pridgeon.

2. A. preſented a Parſon to a Living, and took *a Boud to reſign on Requeſt* at any Time within ſeven Years; A's. Houſekeeper being the Parſon's Siſter, *got away the Bond*, and deliver'd it over to the Parſon. A. brought a Bill to diſcover, and to be relieved; Defendants demurred, and Demurrer allowed. 2 Vern. R. 242. Mich. 1691, in the Caſe of Brainham v. Mannings, cited per Com'r. Hutchins, as Forteſcue's Caſe.

3. Pickering ſeiſed of Land, and Sir J. Werden of a *Fee Farm* iſſuing out of it, *paid* Taxes *only after the Rate of* 1 *s. and* 3 *d. per Pound*, and retained for the Fee Farm at the Rate of 4s. at which the Land-Tax was, on which Sir J. Werden, Owner of the Fee Farm Rent, brought his *Bill in the Exchequer*, and *prayed* that Pickering ſhould *ſet forth the Value of the Land*, and what Rent he receiv'd, and what he had paid for Taxes, to which Bill Pickering *demurred*, and the *Demurrer allowed*, notwithſtanding the **Caſe of Sherington** was cited; the whole Matter there appearing, and this being on a Demurrer, which was made the Difference. 12 Mod. 171. Hill. 9 W. 3. Pickering's Caſe.

(L) To Bills by Purchaſors.

1. BILLS to *diſcover a Truſt of a Mortgage, and to redeem*, was brought by the Heir; Defendant demurs, for that it was to ſecure the Payment of *Money borrow'd of them* by the Anceſtor, *without any Truſt*, and for that the Defendants were *willing to re-convey*, free from Incum-

brances done by them, on Payment of Principal and Intereſt, by which Means the Plaintiff may have the Eſtate again, in as good Condition as when it was made over to them by the Anceſtor, ſo that it was not material to the Plaintiff, if there was any Truſt repos'd in the Defendants in the ſaid Mortgage or not; Demurrer allow'd with Coſts. Fin. R. 214. Trin. 27 Car. 2. Harvey v. Morris and Clayton.

(M) To Bills. For not ſetting forth any Title.

1. DEmurrer becauſe *Ceſty que vie was not ſhewn to be alive*, and over-ruled the Demurrer not to be good. Toth. 136. cites 37 Eliz. Victor v. Read.

2. Plaintiffs *claim a Title under a Fine and Recovery on a Deed to lead the Uſes.* Defendant demurrs, for that Plaintiff made out no Title, becauſe ſuch Fine and Recovery *was never levied* or ſuffered, or if they were, yet it is not alledged that the Parties to the Fine or Deed of Uſes were then, or afterwards, *ſeiſed or Poſſeſſed of the Lands in the Bill*, whereby to enable them to make ſuch Aſſurance as in the Bill; ſo that the ſaid Bill is very *uncertain* and inſufficient in thoſe Particulars thereof whereby any Relief or Diſcovery is ſought; Demurrer allowed with Coſts, and Plaintiff to amend his Bill as he ſhall be adviſed. Fin. R. 268. Mich. 28 Car. 2. Lawrence and Hetley v. Doughty.

3. Bill by an *Occupant* againſt Defendant who had got the original Leaſe and threatned to cancel it and take a new Leaſe from the Biſhop. Defendant demurred for that the Plaintiff did *not aver the Life or Lives* of any of the Nominees in the Leaſe *were then in being at the Death of the Leſſee*, and that this Court doth *not countenance the Title of an Occupant againſt a Purchaſor* for a valuable Conſideration. Demurrer allowed, but without Coſts, and diſmiſſed the Bill. Fin. R. 270. Mich. 28 Car. 2. Roſſer v. Evans.

4. *Executor* brought a Bill *for Recovery of ſome of Teſtator's Aſſets*, but the *Bill did not ſhew that he had proved the Will* in any Court, whereupon the Defendant demurred. And upon the Court's asking the Regiſter what the Courſe of the Court was in this Point, he ſaid, that the Plaintiff's Bill ought to allege that he had duely proved the Will; but though he did *not mention in what Court* it would be well enough; whereupon Ld. C. Macclesfield allowed the Demurrer. Wms's. Rep. 753. Mich. 1721. Humphreys v. Ingledon.

In a Note added to this Caſe, it is ſaid that Ld. K. North, when he firſt came into Chancery, was of Opinion, that a *Plaintiff Adminiſtrator ought to ſhew* by his Bill, where he had taken out Adminiſtration, to the Intent the Defendant might know in what Court to look for it, which might be void, if taken out under a wrong Juriſdiction; but that of late, the general Allegation of having duly taken out Adminiſtration, has been held good, eſpecially where (as on Demurrer) the Cauſe is not then to be determined, but he muſt ſhew *his Letters of Adminiſtration at the Hearing.* And the Note ſays, that this was ſo ſaid, and determined by Ld. King, 13 Dec. 1732, in the Caſe of Stone v. Baker.

5. A *Sci. Fa.* was brought *by an Executor to revive a Decree.* The Teſtator died ſeiſed of Bona Notabilia in 2 Dioceſes within the Province of Canterbury, and the Executor proved the Will only in the Arch Deaconry of S. Ld. C. Macclesfield, upon this being pleaded, ordered, that the Plaintiff ſhould not proceed any further in his Suit unleſs he *ſhew the Defendant a ſufficient Probate of the Will.* Wms's. Rep. 766. Mich. 1721. Comber's Caſe.

(N) To

(N) To Bills of Revivor or Review.

1. A Bill of Revivor was brought, which was *to revive* all former Proceedings, and *particularly an Order by Conſent*. The Defendant demurred to the Bill, for that it ſought to Revive that Order, whereas *the Feme, who was Party to it, was Executrix, and only during her Widowhood* and her Executorſhip *to ceaſe on her Marriage*, and She being *married ſince*, her Executorſhip, and conſequently *her Conſent, was determined*. And upon Debate (which was the only Work of the Day) the Demurrer was allow'd. Chan. Caſes. 77. Mich. 18 Car. 2. Hampden v Brewer.

2. A Demurrer was *to a Bill of Review* exhibited on *New Matters* for that it ought not to be admitted where the Matter was *of the Knowledge* of Defendant at the Time of the Anſwer and Hearing, though then there was no Proof, but *afterwards the Proof came to light*, and herein was cited a Caſe where the Defendant ſet forth *Deeds* that made a Title by Anſwer, but were *loſt afterwards*, and a Decree againſt them; but coming to Light afterwards, the Bill of Review was admitted. But Per Ld. Keeper, this Caſe is not like the other, and ſo in Effect diſmiſſed the Bill, but then gave Time to produce Precedents. 3 Ch. R. 76. July 1672. Chambers v. Greenhill.

2 Chan. Rep. 66. S. C. ſays, that Precedents being produced by the Plaintiff, his Lordſhip declared, that the ſame ſeemed of no Weight to the Plaintiff's Purpoſe, and diſmiſs'd the Bill of Review.

3. Bill of *Review* was brought, and *Errors aſſigned in the Decree*. Three Errors were aſſign'd; Defendant pleads Money ſtill due to him, which Plaintiff ought to have paid before he be admitted to a Bill of Review, and demurred as follows, viz. For that there doth not appear ſuch Error in the body of the Decree, for which the ſame ought to be review'd or alter'd and that the ſuppoſed Errors ariſe from Matters of Fact not therein mentioned. The Court over-ruled the Demurrer as to the firſt Error, but allowed the Demurrer to the ſecond and third Errors. Fin. R. 36. Mich. 25 Car. 2. Tredcroft and Rigg v. White.

(O) To Anſwers and Replications.

1. DEmurrrer *to an Anſwer to a Bill of Revivor*, which tendeth to draw into Examination de Novo an Agreement contained in the Decree; though the Court thought it unreaſonable, yet doubted what to do as to the Demurrer; ſome at the Bar ſaid, that the Court ſhould have been moved in this ſpecial Caſe for an Order to reſtrain an Examination of Matters formerly examined, and it was now order'd that no Matter examined to before ſhould be re-examined. The Reporter ſays, he takes it that this was the Rule that was given Sed Quære. Ch. Caſes 56. Trin. 16 Car. 2. Williams v. Owen and Arthur.

2 Freem. Rep. 181. pl. 249. S. C ſtates it as a Demurrer to an Anſwer to a Bill of Review; and that the Demurrer was, becauſe it would tend to Perjury, and Infiniteneſs, to examine Things examined and decreed, and that the Court was of that Opinion, but that as well the Defendant's Councel as the Court ſaid, that there could be no Demurrer upon an Anſwer in Equity, but Serjeant Glyn for the Plaintiff ſaid, he had known it. The Court made an Order that there ſhould be no Examination of that which had been examined before, and that was the Rule.

2. The

2. The Plaintiff putting Matter in the Replication, which was not contained in the Bill, and which Matter the Plaintiff knew of at the exhibiting the Bill, the Defendant pleaded and demurred to the Replication, which this Court allowed of. Chan. Rep. 259. 17 Car. 2. Goodfellow v. Marſhall.

3. A Decree being made, and a Bill brought to *execute the Decree*, the Defendant *ſet forth a Parol Agreement in Bar.* The Plaintiff demurs, and Ld. Chancellor allow'd the Demurrer, though the Agreement was *ſubſequent to the Decree.* The Decree ſhall proceed, and if the Defendant will have Advantage of the Agreement, let him bring an Original Bill; for if he have Advantage by it in way of Defence, one Witneſs may ſerve his turn, but to an Original Bill here if he in his Anſwer denies the Agreement one Witneſs will not convict him, ſo as by this way of Anſwer the Plaintiff ſhould loſe the Benefit of his Anſwer. 2 Ch. Caſes 8. Mich. 31 Car. 2. Walklin v. Walthall.

(P) To Subpœna &c.

1. THE Demurrer was to a *Subpœna in the nature of a Scire Facias*, and it was becauſe he that brought the Subpœna did not thereby alledge himſelf to be the Heir or Executor to him that had the Decree; Reſolved, that there never was any Demurrer of this nature before, and the Subpœna was no Record nor any where filed, and ſo not to be demurred to; but the Cauſe was to be ſhewn upon the Return of the Writ on the Order, and the Order did mention him that brought the Writ to be both Heir and Executor, ſo this Demurrer was conceiv'd very ridiculous and over-ruled. Ch. Caſes. 50. Paſch. 16 Car. 2. Wan v. Lake.

5 Chan. Rep. 15. Ward v. Lake, S. C. in toridem Verbis.— 2 Freem. Rep. 180. pl. 246. S. C. accordingly.— Gilb. Equ. Rep. 234. S. C. cited by Ld. Ch. Baron Gilbert.

(Q) What ſhall be over-ruling a Man's own Demurrer.

1. DEfendants having Demurred, for that the Plaintiff had *made no Title* to himſelf in the Bill. (as in truth he had not) Hutchins inſiſted that the Defendant had *over-ruled his own Demurrer by having anſwer'd over* to ſeveral Parts of the Bill. But the matter of Fact being denied, and there being no Books in Court the Matter was adjourned. Vern. R. 90. pl. 79. Mich. 1682. Savage v. Smallbrook.

2. Where a Man demurs, for that the Bill contains *ſeveral Matters not relating one to the other*, and *in ſome whereof the Defendant is not concern'd*, if by Anſwer the Defendant doth more then barely deny Combination and Confederacy, he *over-rules* his Demurrer. Per Jefferies C. Vern. Rep. 463. pl. 442. Trin. 1687. Heſter v. Weſton.

(R) At Law. In what Caſes; and how conſidered.

1. INquiſition found that *J. S. held certain Lands of the King, as of his Honour of Glouceſter which is not in Capite*, upon which *Proceſs iſſued againſt W. S. who had intruded* &c. *and to ſue Livery*, and becauſe this Tenure is not in Capite, and therefore Livery is not due, the Party demurred in Law upon the Record; for there is no Cauſe of Livery. Br. Demurrer, pl. 25. cites 32. H. 8.

2. *And* where a Man *declares upon a Statute, and recites it otherwiſe than it is, or pleads a Statute otherwiſe than it is*, the other may demur upon it; for there is no ſuch Law, if it be miſrecited. Ibid.

3. A Demurrer *is* properly called *a Plea*; for the Placitum is Nomen Collectivum. See Ld. Raym. Rep. 22 and Carth. 334, 335. Mich. 6 W. and M. in B. R. in Caſe of Wilſon v Law.

4. Where a Demurrer is proper, the *other Party is bound to join*; and though it be on a Plea in abatement if the Demurrer is proper, and appoint the other muſt join. Comb. 306. Mich. 6 W. and M. in B. R. Campbell v. St. John.

5. There can be no ſuch Thing as a Demurrer *in abatement*. Per. Holt. Ch. J. 6 Mod. 195. Trin. 3 Ann. B R. Anon. The Defendant demurred in Abatement, and Plaintiff joined in Bar, and Judgment final for the Plaintiff; For the Court ſaid, they knew not what a Demurrer in Abatement was, for if the Cauſe be apparent to the Court, they would abate the Writ &c. themſelves, or elſe it ought to be pleaded, and they ſaid they would turn all ſuch Demurrers into Bars, though Eyre quoted Wimbiſh v. Willoughby, in Plowd. for a Precedent of a Demurrer in Abatement 6 Mod. 198. Trin. 3 Ann. B. R. Docmannee v. Davenant. —— 1 Salk. 220. Docminique v. Davenant. S. C. held accordingly.

(S) Where it is a Confeſſion of Matters of Fact.

1. IN *Treſpaſs* the *Defendant juſtified to retain Goods in Pledge for 10 l. due by the Plaintiff*, and the *Plaintiff demurred generally*; by this he confeſſed the Debt, by the Opinion there, therefore *ought to have taken Proteſtation of the Debt, and then to have demurred upon the Plea* &c. Br. Demurrer, pl. 24. cites 5 H. 7. 1.

2. A Demurrer is a *Confeſſion* of all *Matters in Fact*, but *not of Matters in Law*; for by it they are put in Judgment of the Court. Pl C. 85. a Hill. 6 & 7. E. 6. by Mountague Ch. J. in Caſe of Partridge v. Strange and Croker. A Demurrer *admits nothing but what is well pleaded*; Per Cur.

Rep. 39. Freem. Rep, 39 Trin. 1672. C. B. King v. Rotham —— Freem. Rep. 199. pl 202. Trin. 1675. Skedwin v Lampen. S P. per Cur ——A Demurrrer confeſſes only Matter of Fact, and that only when it is well pleaaed, but it never confeſſes Matter in Law; Per Holt Ch. J. Ld. Raym. Rep. 18. Trin. 6 W. & M. in B. R. cites S. C. & 5 Rep. 96.

3. A Demurrer in Law, *is* never a *Confeſſion of a Thing againſt the Record, but only of that which may ſtand with the Record*, for otherwiſe, his If a Thing be *ſufficiently alleged*

his Confeſſion would be vain and ſhould not bind the Court; Per Cur. Cro. J. 12. Paſch. 1 Jac. B. R. in Caſe of Arundel v. Arundel.

It is confeſſed by the Demurrer but not otherwiſe; Per Anderſon Ch. J. Goldsb. 52. pl. 1. Trin. 29 Eliz. in Specot's Caſe.

4. As a Demurrer *at Common Law did confeſs all Matters formally pleaded*; ſo now by *the Statute a General Demurrer does confeſs all Matters pleaded though unformally*, according the Forms meant by the Statute 27 Eliz. 5. For ſuch Forms are now not material, not being expreſſed in Demurrer. Hob. 233. at the End of pl. 295. Mich. 12 Jac. in the Caſe of Heard v. Baskerville.

5. A *General Demurrer confeſſes not the Matter*; As if in Debt upon a Bill, Defendant pleads Payment, and the Plaintiff demurs, that Demurrer does not confeſs the Payment; Per Warburton J. Arg. Hutt. 15 Trin. 13 Jac.

6. *If the Count, Plea, Replication*, &c. upon which the Demurrer *was, is good*; then all the Matter which is contained in the Count or Plea is confeſſed, but if the Count or Plea be vitious, then it is otherwiſe. 2 Roll R. 22. Paſch. 16 Jac. B. R. in Caſe of Holford v. Plat, cited Per Cur. as a Difference taken 17 Aſſ. pl. 2. 31 H. 6. & 22 H. 6.

Mountague Ch. J. ſaid, that it was lately ſo agreed in the Exche- in the Caſe of the Common-dams and ſo adjudged, that where Title for the King was contained in that Plea, on which the Plaintiff demurred that there this Queſtion was no Queſtion of the King's Title, becauſe the Plea was not good.

7. On a *Scire Facias to repeal a Patent to B. for a Market* to be held at C. reciting that there was an Ancient Market long before kept at R. within half a Mile of C. and that there was an Ad quod damnum taken out before the new Patent, and the Inqueſt thereupon taken, found it not to be to the Damage of any, and that it was executed by Surprize and without Notice; and that notwithſtanding it was to the great Damage of the former Market &c. to this Scire Facias B. *demurred*. But the Ld. Chancellor Finch (aſſiſted by North Ch. J. of C. B. and Jones J. gave Judgment for repealing of the Patent; for the Return of the Writ of Ad quod Damnum, was not concluſive, and here *by the Demurrer it is confeſſed to be to the Damage of the former Market*. 2 Vent 344. Hill 31 & 32 Car. 2. in Canc. Sir Oliver Butler's Caſe.

8. *Indebitatus Aſſumpſit* for a Horſe ſold for 20 l. The *Defendant pleaded within Age*. The Plaintiff *replied, that he ſold him his Horſe for his Conveniency to carry him about his neceſſary Affairs*; to which the *Defendant demurred*. And the ſole Queſtion was, whether an Action would lie againſt an Infant for Money for a Horſe ſold? It was urged on the Defendants Part, that an Infant was chargeable only for Neceſſaries, as Meat, Drink, Cloaths, Lodging, and Education, and cited 3 Cro. 175. 1 Cro. Ayliff v. Archbold. Latch. 169. But the Court were of a contrary Opinion, for the Plaintiff having averred, that he ſold him the Horſe to ride about upon his neceſſary Occaſions, and the Defendant having *confeſſed* it by his Demurrer, it muſt now be taken to be ſo; If the Defendant had traverſed, then the Jury muſt have judged of it, whether it were neceſſary or convenient, or not, and ſo likewiſe of the Price of the Horſe, whether it was exceſſive or no. Jud. pro Quer. Niſi Freem. Rep. 531, pl. 715. Mich. 1680. Barber v. Vincent.

1 Salk. 125. pl. 2. S. C. held accordingly ——Skin. 346. S C. held accordingly—— Comb. 204. S. C. but

9. An Action on the *Caſe brought* upon an Inland Bill of Exchange, in which the Plaintiff declared *upon a ſpecial Cuſtom in London*, for the Bearer to bring the Action &c. and upon a Demurrer to the Declaration it was held, that the Defendant having demurred, *without traverſing the Cuſtom*, he had thereby confeſſed there was ſuch a Cuſtom, though in Truth there was not, and for that Reaſon the Plaintiff had Judgment; for though the Court takes Notice of the Law of Merchants, as

as Part of the Law of England, yet they cannot take Notice of the Cuſtoms of particular Places; and this Cuſtom as ſet forth in the Declaration, being ſufficient to maintain the Action, and the Defendant confeſſing it by his Demurrer, he has given Judgment againſt himſelf. 3 Salk. 68, 69. pl. 5. Paſch. 5 W. 3. B. R. Hodges v. Steward.

S. P. does not appear —12 Mod. 36 S. C. adjudged accordingly.

8. If a Thing be *laid by Way of Preſcription*, which *does not lie in Preſcription*, and it be demurred unto, that does not confeſs it; for if this be a Courſe of the Court it is Law, and if it be Law we are to take Notice of it. Per Holt Ch. J. Obiter. 12 Mod. 573. Mich. 13 W. 3.

9. Demurrer confeſſes nothing but *what is materially alleged*. Arg. and ſeems admitted. 12 Mod. 578. Mich. 13 W. 3.

10. A Demurrer is admitting the Matter of Fact, ſince it *refers the Law ariſing on the Fact to the Judgment of the Court*; and therefore the Fact is taken to be true on ſuch Demurrer, or otherwiſe the Court has no Foundation on which to make any Judgment. Gilb. Hiſt. of C. B. 55.

(T) General Demurrer; What is aided by it. Duplicity.

1. HE who demurs *for double Plea* cannot demur by the Common Demurrer that the Plea is Inſufficient, but ought *expreſly to demur for the Doubleneſs*; For a double Plea may be found a ſufficient Plea, unleſs for the Inconvenience, that the one may be found for him and the other againſt him; Per Forteſcue. Br. Demurrer, pl. 7. cites 37 H. 6. 6.

S. P. For double Plea *is no Cauſe for Demurrer generally* Br. Double Plea pl. 73. cites 37 H. 6. 6.

2. In Caſe of a *General* Demurrer, he ſhall have *Benefit of* every Thing mentioned in the Record, or of every Point given him by the Law, but otherwiſe in a *Special* Demurrer. Per Montague Ch. J. Pl. C. 66. Mich. 4 E. 6. in Caſe of Dive v. Manningham.

3. Upon a General Demurrer, he that demurs ſhall have Advantage of a *Double Plea*. Palm. 232. cites it as reſolved, 4 Eliz. Ayer v. Joyner.

4. If one demurs generally *to a Double Plea*, it is not good at this Day; Per Anderſon Ch. J. Gouldsb. 52. in pl. 1. Trin. 29 Eliz.

Upon a general Demurrer Duplicity is not fatal. Comyns's Rep. 115. Paſch. 13 W. 3. B. R. in Caſe of Lamplugh v. Shortridge.

5. At this Day by the *Statute of Eliz.* where there is a *Plea without a Colour*, a Plea *amounting to a general Iſſue*, or a *double Plea*; the Demurrer to ſuch Pleas ought to be Special; So if there be only *want of Form*, a *general Demurrer is not ſufficient*, as it was at the Common Law. The Law rejects double Pleas, and Pleas amounting to the general Iſſue; becauſe they are ſuperfluous, and incumber the Roll. Lex rejicit Superflua. Jenk. 133. pl. 72.

6. In *Treſpaſs* &c. *the Defendant as to the Force and Arms, pleaded Not Guilty, without ſaying, & de hoc ponit ſe ſuper patriam, and pleaded over to the Treſpaſs*; The *Plaintiff demurred* to this Plea, *for that it was double, inſufficient, and wanted Form*; Per Cur. the want (Et de hoc ponit ſe ſuper Patriam) *is Matter of Form*, and therefore the Plaintiff ſhall not have Advantage thereof upon this Demurrer, without ſhewing it for Cauſe, and for that Reaſon Judgment was given for the Defendant. Sid. 216. pl. 20. Trin. 16 Car. 2. B. R. Thacker v. How.

7. In

Comyn's Rep. 115 pl. 78. S. C. held per Cur accordingly

See tit. Amendment, and Jeofails (Q)

7. In Demurrer for Duplicity, it is not ſufficient to demur *quia duplex eſt or duplicem habet materiam*; but the Party *muſt ſhew wherein*; For the Statute, by requiring to ſhew Cauſe, intended to oblige the Party to lay his Finger upon the very Point; Per Holt Ch J. 1 Salk. 219. pl. 5. Paſch. 13 W. 3. B. R. Lamplugh v. Shortridge.

8. By the 4 & 5 *Annæ* 16. no Advantage can be taken upon a generol Demurrer, of ſuch *Faults in Form as would be cur'd by Verdict*, but ſuch Defects in pleading are aided upon a general Demurrer by that Statute. 10 Mod. 251. 348. Trin. 13 Ann. and Hill. 3 Geo. 1. B. R. Cole v. Hawkins.

9. *Debt* was brought *upon a Judgment* in C. B. and the *Declaration was Eſſex Scil'*. though the Judgment was at Weſtminſter, and therefore the *Action ought to have been brought in Middleſex*; the *Defendant demurr'd generally*. It was urged, that this was aided by 4 & 5 Ann. cap. 16 that the laying the Action in a wrong County goes only to the Form and Courſe of Proceeding, and not to the Right of Action; that if a Trial had been in this Caſe by an Eſſex Jury, it would have been good after a Verdict; yet the Statute 16 and 17 Car. 2. aids only ſuch Defects as do not hinder the Court from giving Judgment according to the Right of the Action, ſed non allocatur; for the 4 *and* 5 *Ann. does not give any Remedy upon Demurrer, but in matters of the ſame Nature with thoſe which are there ſpecified.* Judgment for the Defendant. But Plaintiff was afterwards allow'd to diſcontinue on Payment of Coſts. Comyn's Rep. 305 Mich. 5 Geo. 1. C. B. Hedgethorn v. Thurlock.

(U) Peremptory. In what Caſes.

1. WHEN the Demandant or *Plaintiff demurrs upon Plea to the Writ pleaded by the Tenant* or Defendant, the Judgment is not Peremptory to the Tenant, but a *Reſpondeas Ouſter*. Thel. Dig. 238. Lib. 16. cap. 11. S. 1. cites Mich. 31 E. 3. Brief 343. *Notwithſtanding that Day be given till another Term* cites 34 H. 6. 9. Aſſ. 1. 6 E. 3. 241. 5 E. 3. 20. and 22 H. 6. 63.

2. Where the Demurrer is upon the Cauſe of removing the Plea, the Judgment is peremptory to the Defendant. Thel. Dig. 239. Lib. 16. cap. 11. S. 9. cites Mich. 27 H. 6 4.

3. In Entry ſur Diſſeiſin Demurrer *upon Plea to the Writ, or to the Action of the Writ*, is not peremptory. Br. Peremptory, pl. 68. cites 34. H. 6. 8.

4. *Contra if Iſſue be* thereof *joined and tried per pais*, this is peremptory to the Tenant, and only to the Writ as to the Demandant. Ibid.

5. Cui in Vita of four Acres of Land in D. the *Tenant pleaded to the Writ, that the Demandant himſelf had recover'd one Acre parcel* of the Demand againſt the Tenant, *and enter'd* upon Plea pleaded in the Aſſiſe to the Writ, and the *Demandant pleaded an Eſtoppel that the Tenant ſhall not ſay, that P. in which the Recovery by the Aſſiſe was had, was a Hamlet of D.* upon which they *demurr'd*. Per Littleton, this is only a Reſpondeas Ouſter. But Moyle ſaid yes, [that it was more] for you were at Iſſue in the Cui in Vita, and this Plea was pleaded to the Writ, viz. the Recovery of the Parcel, by the Aſſiſe in P. which is a Hamlet of D. and upon

upon the Demurrer to ſay this you are Eſtopp'd, and therefore *the Iſſue is wav'd*, and ſo the Demurrer is peremptory; for it is not like to a Plea pleaded in Abatement of the Writ before Iſſue join'd and Demurrer had upon it, which all the Juſtices granted, quod nota, and ſo ſee that *Demurrer upon a Dilatory Plea after Iſſue join'd is peremptory*; for it is pleaded to avoid the Iſſue, and an Iſſue tried is always peremptory. Br. Peremptory, pl. 45 cites 2 E. 4. 10.

6. Demurrer *upon Plea to the Writ pleaded after Iſſue join'd* is peremptory to the Tenant. Thel. Dig. 239. Lib. 16. cap. 11. S. 11. cites Trin. 2 E. 4. 11.

7. In *Appeal* it was ſaid, that *if the Defendant demurs upon a Plea which is adjudg'd againſt him, he ſhall be Hang'd*, quod fuit conceſſum; *but* this does *not* ſeem to be *of Pleas to the Writ which are not in Bar*. Br. Demurrer, pl. 17. cites 14 E. 4. 7.

8. Iſſue being joined upon not Guilty in *Battery, at the Aſſiſes at Huntingdon*, the *Defendant pleaded an Accord without alleging Satisfaction*; to which the *Plaintiff demurred*; and the Plea being certified upon the Back of the Poſtea, the Plaintiff gave the Defendant a Rule to join in Demurrer; but the Defendant refuſing, the Plaintiff entred Judgment, and took the Defendant in Execution. The Court held that the Defendant refuſing to join in Demurrer, the Plaintiff might lawfully enter upon his Judgment. Freem. Rep. 252, 253. pl. 267. Paſch. 1678. Abbot v. Rugeſley.

(W) To the Writ or Declaration. Good.

1. IN *Debt* the *Defendant pleaded Accquittance, which had no Print of any Seal, nor it could not be perceiv'd that ever there was a Seal*, by which the Plaintiff ſaid, that becauſe no Print appear'd, no Law ſhall put him to anſwer, and the Defendant ſaid, Sir, becauſe you do not deny that it is your Deed, Judgment &c. and ſo ſee Special Demurrer. Br. Demurrer, pl. 5. cites 14 H. 4. 30.

2 *In Diſceit*, if the *Defendant pleads Not his Deed in Debt upon an Obligation, and demurrs in Law upon the Declaration*, the Demurrer is void, and the Plea ſhall be taken, Per Priſot. Br. Demurrer, pl. 1. cites 33 H. 6. 10.

3. So *in* the *Writ of Diſceit* the *Defendant ſaid, that the Summoners and Veyors were other Perſons than thoſe who appear'd, and gave Addition*, and the *Plaintiff ſaid, that thoſe who appear'd were the ſame Perſons who were return'd upon the Præcipe quod reddat*, and to the Plea pleaded by the manner &c. and therefore per Priſot, the Replication ſhall ſtand, and the Demurrer is void; and they are at Iſſue which ſhall proceed, viz. by Examination of the Juſtices of thoſe who appear'd; For where the Sheriff has return'd, that thoſe are they, who were return'd in the firſt Action, the Parties ſhall not have Averment to the Contrary. Ibid.

4. *Treſpaſs of a Horſe, and Bridle carried away*, by H. S. againſt B. who *ſaid, that he himſelf was thereof poſſeſs'd as of his proper Goods, till H. S. of B. took them and gave them to the Plaintiff, and the Defendant retook them at the Time of the Treſpaſs.* The *Plaintiff ſaid, that this H. S. named in the Bar, and H. S. now Plaintiff, are one and the ſame Perſon, and not divers, and to the Plea pleaded by the Manner, no Law* &c. and *ſo the Parties demurr'd in Law*, and the Opinion of all the Juſtices was, that the Plea was good, and well pleaded, by which the Plaintiff had Writ to inquire of the Damages; For *by the Nient Dedire of the Defendant*,

dant, it is confeſs'd, that the one and the other, are one and the ſame Perſon; For if otherwiſe, then the Defendant might have taken Iſſue upon it, and by the Nient Dedire, the Plea of the Defendant is not good, but amounts to Not Guilty. Br. Demurrer, pl. 12 cites 13 E. 4. 7.

5. *Treſpaſs by H B. Guardian of the Chantery of B and the Chaplains thereof*, the *Defendant ſaid, that one H. B was ſeiſed in Fee, and leas'd to the Defendant for Years, which yet continues, and gave Colour to the Plaintiff for the Term of Life of the Leſſor.* And the *Plaintiff ſaid, that the ſaid H. B. and the H B. Guardian &c. are one and the ſame Perſon, and not divers, and that the ſaid H. B never had any Thing in the ſaid Land, unleſs in Right of the Chantery aforeſaid, and to the Plea pleaded by the Manner, and ſo demurr'd* &c. and ſo a good Demurrer by the *diſcloſing of the Special Matter*, and otherwiſe not. Br. Demurrer, pl. 13. cites 21 E. 4. 76.

Br. Barr, pl. 69. cite S. C.

6. The *Defendant demurr'd ſpecially, becauſe he was tranſlated to Abbot of another Houſe after the making of the Obligation, and the Goods did not come to the laſt Houſe*, and ſo demurr'd. Br. Demurrer, pl. 9. cites 3 H. 7. 11.

7. In a Demurrer *to a Declaration*, it is not enough to ſay, Quod caret Forma, but *the particular Want of Form muſt be ſhewn.* 2 Ld. Raym. Rep. 802. Mich. 1 Ann. B. R. Shortridge v. Lamplugh.

8. A *Scire Facias* was brought in C. B. to which the *Defendant demurr'd as to a Declaration.* The Plaintiff join'd in Demurrer, and inſiſts that his Writ is good, and Judgment was given for the Plaintiff. Error was brought in B. R. and there the Judgment was affirmed. 2 Ld. Raym. Rep. 1504. Trin. 13 Geo. 1, and 1 Geo. 2. B. R. Blake v. Dodemead.

(X) To Pleas. Good.

1. IN *Nuſance againſt three*, the *one pleaded in Bar*, and *another made Default*, and the *third ſaid, that the Land extended into two other Vills not named* in the Writ, Judgment of the Writ. The *Plaintiff ſaid, that he, who pleaded to the Writ, had nothing in the Franktenement, and therefore to the Plea pleaded by the Manner* &c. For *he who is not Tenant to the Franktenement ſhall not plead this to the Writ.* Br. Demurrer, pl. 21. cites 5 E. 3. 10.

2. In *Debt upon Arrears of Account*, the *Defendant tender'd his Law, and pray'd that the Plaintiff be examin'd*, and *upon the Examination, it was found that the Matter lay in Account*, and upon this the *Defendant pleaded in Bar*, to which the *Plaintiff ſaid, that inaſmuch as the Defendant pray'd Examination, which* Examination *is found againſt him, therefore to the Plea pleaded by the Manner* &c. and ſo demurr'd; for to his Pretence this is peremptory. Br. Demurrer. pl. 22. cites 10 H. 6. 21.

So if the one takes the entire Tenancy, and pleads in Bar, Abſque hoc, that the other any Thing has, the *Demandant may ſay, that both are Tenants as the Writ ſuppoſes, and demur upon the Voucher*, and this is good Iſſue; for the Tenant tender'd Travers before. Br. Iſſues joines, pl. 61. cites 9 E. 4. 36.

Thing has, the *Demandant may ſay, that both are Tenants as the Writ ſuppoſes, and demur upon the Bar pleaded by the one alone*, per Catesby and Littleton. Ibid.——Br. Demurrer, pl. 16. cites S. C.

4. In

4. In *Formedon againſt Baron and Feme*, the *Baron for his Feme pleaded Nontenure, and* the Baron *took the entire Tenancy and Vouch'd* &c. Catisby ſaid, the *Baron and Feme the Day of the Writ purchas'd, were Tenants of the Franktenements in Jure Uxoris* &c. Et hoc &c. *and to the Voucher demurred.* Per Littleton, In Aſſiſe againſt ſeveral, if the one takes the entire Tenancy and pleads in Bar, the Plaintiff may ſay that he holds jointly with the other, and to the Plea plead by the Manner. Br. Demurrer, pl. 20. cites 9 E. 4. 36. and 22 H. 6. 44. accordingly.

5. In *Debt upon an Obligation with diverſe Condition*, if the *Defendant ſays that it is indorſed upon ſuch Condition, and ſhews one only, which he has performed*, the *Plaintiff may ſay that it is indorſed upon this Condition and others, to which the Defendant has not anſwer'd, and therefore to the Plea pleaded by the Manner* &c. *and demurred*; for otherwiſe he ſhall loſe the Advantage of thoſe Conditions. Br. Demurrer, pl. 18. cites 21 E. 4. 78.

6. *Tr ſpaſs of Goods carry'd away in B.* The *Defendant juſtify'd in S. in the ſame County, abſque hoc that he is Guilty in B.* Vavilor ſaid, *S. is a Hamlet of B. and to the Plea pleaded by the Manner, no Law* &c. and well; for now he *has juſtify'd, and alſo pleaded not Guilty* as appears by the Replication, and therefore a good Demurrer. Br. Demurrer, pl. 14. cites 22 E. 4. 50.

7. *So in Aſſiſe* the *Defendant pleaded Feoffment of J. N. and gave Colour.* The *Plaintiff ſaid, that the ſaid J. N. and the Plaintiff are one and the ſame Perſon and not divers, and to the Plea pleaded by the Manner no Law* ſhall put him to Anſwer &c. And a good Demurrer, by which Suliard pleaded over another Plea. And ſo ſee *ſpecial Demurrer by Declaration of the ſpecial Matter, and upon this concludes with Demurrer.* Br. Demurrer, pl. 14 cites 22 E. 4. 50.

8. In Replevin the *Plaintiff declar'd in a Place called S. in B.* The *Defendant ſaid, that his Father was ſeiſed of* 100 *Acres of Land in B. called M. and died ſeiſed, and the Land deſcended* &c. *and Avowed for Damage feaſant, Abſque hoc that he took them in the Place called S.* and demanded Judgment of the Writ and prayed Return, and the *Plaintiff ſaid, that the* 100 *Acres are ſo well known by the Name of S. as by the Name of M. and that the Place called S. and the* 100 *Acres called M. are one and the ſame Place, and not diverſe* et hoc &c. *And to the Plea pleaded by the Manner* &c. *No Law ſhall put him to Anſwer.* Br. Demurrer, pl. 8. cites 1 H. 7. 11.

9. *Replevin of taking in a Place called B. in N.* the *Defendant juſtify'd in a Place called S. in N. aforeſaid for Damage feaſant Abſque hoc that he is Guilty in B.* the *Plaintiff ſaid, that the Place is known by the one Name and the other, and to the Plea pleaded by the Manner &c. and demurred.* Br. Demurrer, pl. 19. cites 1 H. 7. 21.

10. Replevin; upon Demurrer the Caſe was, That the *Plaintiff in Bar to the Avowry ſhews that the Land was Copyhold* Land *grantable in Poſſeſſion or Reverſion for Life, or in Fee, and that the Lord granted the Reverſion unto him after the Death of W. who was Tenant for Life, and ſhews the Death of W. whereby he entred.* And it was hereupon *demurred; becauſe he did not ſhew the beginning of W's. Eſtate*, nor by whom W. had the Eſtate granted him. And it was held to be no Cauſe of Demurrer, becauſe it is not the Plaintiff's Title, but Matter of Conveyance thereto; wherefore it was adjudged for the Plaintiff. Cro. J. 52. pl. 24. Mich. 2 Jac. C. B. Lodge v. Frye.

11. *Debt for Rent.* The Defendant *pleads Nil debet* and ſo *Iſſue joined*, and at the Day of Niſi Prius the *Defendant pleads quod puis darrein continuance the Plaintiff releaſed to him* and does *not name any Place where* he releaſed, ſo as no Iſſue could be taken; and to this the Plaintiff demurred. And it was adjudged a Fault incurable. Freem. Rep. 112. pl. 132. Trin. 1673. Gardner v. Bloxam.

(Z) In

(Y) In what Caſes a Demurrer makes a Diſcontinuance.

Comb 306. S C —— Ld. Raym. Rep. 20. S. C. and the Court held it a Diſcontinuance.

1. IN Trover for a Box and 290 Peciis Argenti, the Defendant demurred to the Declaration, and the *Plaintiff demurred to the Defendants Demurrer, and concluded & hoc paratus eſt verificare*; The Defendant maintained his Demurrer, and put the Matter upon the Court. The Court held that all is diſcontinued by the Plaintiff's not joining in Demurrer, but demurring upon the Defendants Demurrer; for there is no difference between pleading over when Iſſue is offered, and not joining in Demurrer but pleading over; both are alike and make a Diſcontinuance. 1 Salk. 219. pl. 4. Trin. 6 W. and M. in B. R. Campbell v. St. John.

2 Salk. 599. pl. 5 Lugg v. Goodwin, S C. the Scire Facias was *againſt* the *principal Defendant*, and was (*in hac Parte.*) And per Holt Ch J. on ſearch of Precedents, where it is *againſt the Defendant himſelf*, it ſhould be (*in hac Parte*) but where *againſt the Bail*, it ſhould be (*in ea Parte*) and this will reconcile the Precedents. —— 12 Mod. 214. Luck v. Goodwin, S. C. is, that in Scire Facias Exception was taken, that whereas it was ſaid, "Petit Judicium pro Miſis & Cuſtagiis in hac Parte," that it ſhould have been "in ea Parte." But "in hac Parte," was held good.

2. In *Scire Facias on a Judgment* againſt the Defendant, he *pleaded in Abatement no Specification.* The *Plaintiff demurred in Bar. Reſpondeas Ouſter* was awarded. Afterwards the *Defendant pleaded the ſame Matter in Bar.* The *Plaintiff demurred*; and Carthew took Exception, that there was a diſcontinuance here; becauſe upon the Plea in Abatement the Plaintiff had concluded his Demurrer as if it had been in Bar. Sed non allocatur. For *where the Defendant pleads a good Plea in Abatement, and the Plaintiff replies new Matter, he ought to maintain his Writ; but if the Defendant pleads an ill plea*, though the *Plaintiff replies and concludes in Bar, it is not material.* Ld. Raym. Rep. 393. Mich. 10 W. 3. Lug v. Godwin.

S. C. cited 2 Ld Raym. Arg. 1021. and 1023, and admitted by Holt Ch. J.

3. A Demurrer, as an Iſſue, *muſt compriſe the whole Matter in Plea*, and if any Part be omitted, it is a Diſcontinuance, becauſe the whole Matter is not brought before the Court. Arg. 2 Ld. Raym. Rep. 1021. Hill 2 Ann. B. R. in Caſe of Croſs v. Bilſon, cites Yelv. 5. 6. [Trin. 44 Eliz. B. R.] * Johnſon v. Turner.

* See tit. Continuance &c. [E. 4.] pl. 11. S. C.

If the Demurrer was in Abatement, then it was a Diſcontinuance,

4. A Demurrer *as in Abatement to a Replication to a Plea in Bar* is not a Diſcontinuance, though the Plaintiff might have taken Judgment by Nihil dicit. 2 Ld. Raym. Rep. 1023. Hill. 2 Ann. B. R. Croſs v. Bilſon.

and the Plaintiff might take Judgment; but nevertheleſs he was not bound to do it, and therefore had his Election, and might Join in Demurrer, and the Court upon this Joinder ſhall give him Judgment in Bar. For the Court is not hindred by the Concluſion of the Demurrer in Abatement to to give Judgment, as of Right they ought, upon the whole Record. Per Cur. 1 Salk. 3. pl. 8. the ſecond Reſolution, in the Caſe of Croſs v. Bilſon.

5. In *Treſpaſs* the Defendant demurr'd *after Iſſue join'd upon De Injuria ſua propria abſque tali Cauſa*, it is a Diſcontinuance and ill. 2 Ld. Raym. Rep. 1482, 1483. Paſch 13 Geo. 1. B. R. Aſlett v. Vincent.

(Z) To

(Z.) To Pleas. Where a ſtay of Proceedings.

1. IN Waſt it was agreed, that where a Man *joins Iſſue for Part, and demurrs in Law for part* he ſhall not have *Venire Facias* or *Writ to enquire of the Waſt*, or *Writ to inquire of the Damages* till the Demurrer be adjudg'd. Br. Demurrer, pl. 2. cites 48 E. 3. 15.

2. In Scire Facias Per Huls and Tirwit, where a Man *joins Iſſue for Part, and demurrs for the reſt*, the Iſſue ſhall be try'd before the Demurrer adjudg'd. Br. Demurrer, pl 3. cites 11 H. 4 5.

3. Where they are *at Iſſue for Part, and at Demurrer for the reſt*, the *Iſſue ſhould be try'd firſt to enquire of the Damages*, ſo that Judgment may be given after of all at one and the ſame Time, Per Thirn et non negatur. Br. Demurrer, pl. 4. cites 11. H. 4. 75.

4. In *Treſpaſs of Beaſts taken*, the *Defendant pleaded to parcel not Guilty*, and *to the reſt another Plea*, whereupon the *Plaintiff demurr'd* and the *firſt Iſſue was found againſt him by Niſi Prius*, and he pray'd Judgment upon it, and had it before the Demurrer try'd. And ſo ſee the Iſſue try'd before the Demurrer, and Judgment alſo before that the Demurrer was diſcuſs'd. Br. Demurrer, pl. 23. cites 32 H. 6. 5.

5. *Treſpaſs* upon Anno 5. R. 2. the *Defendant pleaded not Guilty to Part and ſo to Iſſue, and pleaded another Plea of the reſt*, whereupon the Plaintiff demurr'd in Law, and yet Venire Facias Iſſued to try the Iſſue. Br. Demurrer, pl. 10. cites 3 E. 4. 2.

(A. a) Demurrer to Part, and Plea to Part.

1. IF a Man in Action *demurrs for part*, and joins *Iſſue for the reſt*, Venire Facias, or Writ of Inquiry of Damages, or Writ of Waſt, or the like ſhall not Iſſue before the Demurrer be try'd, by Reaſon of the Damages. Br. Trials, pl. 129. cites 48 E. 3. 15.

2. In Scire Facias, if he *joins Iſſue for Part and demurs for Part*, the Iſſue ſhall be tried before that the Demurrer ſhall be adjudged, Per Huls and Tirwit. Br. Trials, pl. 24. cites 11 H. 4. 5.

(B. a) Judgment on Demurrer on Plea to the Writ, or on Plea in Maintenance of the Writ.

1. THE Judgment upon Demurrer, *if the Action lies without ſhewing Specialty or not*, it is peremptory to the Tenant. Thel. Dig. 238. Lib. 16. cap. 11. S. 4. cites Mich. 18 E. 3. 50. 56. and in diverſe other Books; But it is to the Action.

2. Where the *Plaintiff ſhews Matter in his Replication varying from the Matter compriſed in his Writ*, and the *Defendant* for this Variance demands Judgment of the Writ and *demurs* thereupon, the Judgment againſt the Defendant ſhall be peremptory, if the Court awards againſt him.

him. Thel Dig. 239. Lib. 16. cap. 11. S. 5. cites Hill. 32 E. 3 Bar, 261.

3. In *Aſſiſe of Rent Charge in* Warblington, the Deed *of the Grant was to take apud* Warblington, and by the Clauſe of the Diſtreſs *Liberty was given to diſtrain in other Tenements alſo in another County* &c. for which *Judgment* was demanded *of the Writ for the not naming of the other Tenements* &c. upon which was a Demurrer, and the Judgment a Reſpondeas, and not peremptory. Thel. Dig. 238. Lib. 16. cap. 11. S. 3. cites Trin. 41 E 3. 15 Charge 6. 41 Aſſ. 3

4. In *Debt* the *Defendant ſhewed forth Superſedeas of the Chancery, teſtifying that he was a Menial Servant of the Chancellor* &c. and demanded Judgment if the Court &c. and the *Plaintiff tendered to aver, that he was not his Servant* &c. which Averment was refuſed by the Defendant, by which he was awarded to anſwer. Thel. Dig. 239. Lib. 16. cap. 11. S. 14. cites 21 H. 6. 22. But ſays that this Exception goes to the Juriſdiction.

5. In *Præcipe quod reddat of Rent*, the Tenant *pleaded a Darrein Seiſin in the Demandant*, to which the *Demandant ſaid, that he was not ſeiſed* &c. And the Tenant *pleaded* Plea containing *Matter to eſtopp the Demand to ſay, that he was not ſeiſed of the Rent*, upon which Plea the *Demandant demurred* in Law, and adjudged againſt the Tenant that he ſhould anſwer over, for it was not peremptory. Thel. Dig. 239. Lib. 16. cap. 11. S. 16 cites Mich. 34 H. 6. 8.

6. The Judgment upon Demurrer *upon Plea to the Juriſdiction* of the Court is only a Reſpondeas. Thel. Dig. 239. Lib. 16. cap. 11. S. 12. cites Mich. 35 H. 6. 4.

7. The *Demandant and the Prayee to be received were at Iſſue upon the Counteplea of the Reſcript*, and afterwards the *Prayee pleaded that the Demandant had entered after the laſt Continuance* &c. Upon which the *Demandant demurred*, and it was adjudged that he recover Seiſin of the Land. Thel. Dig. 239. Lib. 16. cap. 11. S. 10. cites Mich. 37 H. 6. 2.

8. It is held, that *after Demurrer in Law*, if the *Tenant makes Default*, Petit Cape ſhall be awarded. Thel. Dig. 239. Lib. 16. cap. 11. S. 13. cites Paſch. 8 E. 4. 4.

9. In an Action *of Debt upon a Bond* in C. B. the Plaintiff *declares, quod cum the Defendant at London*, &c. *per quoddam ſuum Obligatorium* &c. *omitting the Word Scriptum.* The Defendant prays Oyer of the Bond, and it is entred in hæc Verba, and *pleads in Bar, that the Plaintiff had not ſpecified the Bond according to the Act of Parliament*, and the *Plaintiff demurred.* It was moved that this was a good Plea in Bar, for it was a Temporary Bar. If this be no Plea in Bar, yet now by the *Demurrer* the Plaintiff *has confeſſed, that he has not ſpecified the Bond*, and therefore the Court cannot give Judgment for him; for by the expreſs Words of the Act of Parliament the Debt is not recoverable. Trevor Ch. J. As to the Demurrer, though it does confeſs the Matter of not ſpecifying, yet that ſhall not hinder the Plaintiff from having his Judgment; for *Want of a Specification* like all other Matters, *muſt be taken Advantage of in a Regular Way and by proper Pleading.* 2 Ld. Raym. Rep. 1055, 1056. Mich. 3 Ann. B. R. Copley v. Delaunoy.

For more of Demurrer in General, See **Amendment and Jeofails, Pleadings, Plea** and **Demurrer**, and other proper Titles.

(A) Deodand.

1. IF a Man be driving a *Cart*, and the *Cart falls and kills* a Man, the Cart and Horſes are a Deodand. Hales's Hiſt. Pl. C. 420. cites 8 E. 2. Corone 388.

2. And *ſo* if a Cart runs over a *Man and kills him*, the Cart and Horſes are forfeited. Ibid. cites 8 E. 2. Corone. 403. 3 E. 3. Corone 326. 342.

3. So if the *Timber that hangs a Bell falls and kills a Man*, the Timber and Bell are both forfeited. Hale's Hiſt. Pl. C. 420.

4. If a *Man be getting up a Cart by a Wheel* to gather Plumbs, and *neither the Cart nor Horſes moving*, the *Man falls and dies*, neither the Cart nor Horſes are forfeited, but only the Wheel. Hale's Hiſt. Pl. C. 422. cites 8 E. 2. Corone. 409. Hawk. Pl. of the Cr. 66. cap 26. S. 6. ſays it is ſaid that if a Ship by a Fall from which a Man is drowned in the Freſh Water, ſhall be forfeited; but not the Merchandize therein becauſe they no Way contribute to his Death; and by the ſame Reaſon it is, that if a Man getting up the Shafts of a Waggon falls to the Ground and breaks his Neck, the Horſes and Waggon only are forfeited and not the Loading; becauſe it no Way contributed to his Death; for which Cauſe, where a Thing not in Motion cauſes a Man's Death, that Part only, which is the immediate Cauſe, is forfeited. But if he had been killed by a Bruiſe from one of the Waggon Wheels, being in Motion, the Loading alſo would be forfeited; becauſe the Weight thereof made the Hurt the greater.—See pl. 17.

5 If a Man *falls from an Hay-rick* whereby he dies it is ſaid (nota, not adjudged) that it ſhall be forfeited. Hale's Hiſt. Pl. C. 422. cites 3 E. 3. Coron. 348.

6. If *a Man be killed*, *the Property of his Goods* are *in his Executors* or Adminiſtrators, and are not Deodand, per Belk. Br. Property, pl. 42. cites 8 R. 2. and Fitzh. Indictment, 27.

7. If a Man *kills another with my Weapon*, the Weapon is forfeited as Deodand, and yet no Default in me, unleſs for not better keeping it from him. Br. Forfeiture de terre, pl. 112. cites Doct. & Stud. Lib. 2. cap. 51. fol. 157.

8. If my *Horſe ſtrikes* a Man, and afterwards I *ſell him*, and afterwards the Man dies, the Horſe ſhall be forfeited. Arg. Pl. C. 260. b. Mich. 4 & 5 Eliz. in Caſe of Hales v. Petit.

9. If a Man riding in a River is drown'd by the *Violence of the Stream*, or *ſudden Flux of Water*, the Horſe ſhall be no Deodand. Per Montague and Haughton, J. 2 Roll R. 23. Paſch. 16 Jac. B. R. The King v. the Lord Cavendiſh. Cro. J. 483. pl. 13. Ld. Chandois's Caſe ſeems to be S. C. & S. P. held accordingly per tot. Cur.——For the Water, and not the Horſe was the Cauſe of his Death. Per Cur. Poph. 136. Anon. ſeems to be S. C.

If the Horſe *carry his Rider further into the River than he wanted*, ſo that by the Depth or Strength of the Stream he is drown'd, There the Horſe ſhall be a Deodand. Per Haughton J. 2 Roll Rep. 23.——But if the Horſe *throw him*, *and the Stream carried him to a Mill*, *and the* || *Wheel of the Mill killed him*, the Horſe and the Wheel are both forfeited Cited by per Pollexfen Ch. J. to have been ſo adjudged. 1 Salk 220.——But then this Throwing muſt not be by the Violence of the Water. 1 Salk. 220. cites Cro. J. 483. Lord Chandois's Caſe.——Hawk Pl. C. 66. cap 26. S. 6. ſays, it ſeems clear, That when a Man riding over a River, is drowned through the Violence of the Stream, the Horſe is not forfeited; becauſe, not that, but the Waters, cauſed his Death.

|| Hale's Hiſt. Pl. Cr. 420. S. P. cites 8 E. 2 Corone, 389.

10. A Man was hang'd by a Bell-Rope in the Church; The Queſtion was, If the *Bell* ſhall be forfeited? The Court was divided. Lev. 136. Trin. Sid. 204. S. C. the Court divi-

ded the Bell being fix'd; Trin. 16 Car. 2. B. R. The King v. the Church-Wardens of Axminſter, but Proceſs was ſtay'd till the Court are further adviſed, and it was not mov'd again, and ſo thoſe of Axminſter enjoy'd their Bells ——— Raym. 97. S P. and ſeems to be S. C. Adjornatur. ——— Per Holt Ch J. a Bell cannot be a Deodand 6 Mod. 187 Trin. 3 Ann. B. R Obiter. ——— Hawk. Pl C. 66 cap. 26. S 5 ſays, that it cannot according to the late Reſolutions, unleſs it was ſevered before the Accident happen'd.

11. A *Door or Gate* which *per Vim Venti &c. kills a Man* by being forced upon him, is not a Deodand. Arg Quod fuit Conceſſum per Cur. Sid. 207. Trin. 16 Car. 2. B. R. in Caſe of the King v. Croſſe and Dabbyn, alias Axminſter Pariſh's Caſe.

12. If a *Jack-Weight falls* and kills a Man, nothing is forfeited but the Weight, and not the Jack which moves it, becauſe Part of the Freehold. Arg. Sid. 207.

In a great *Vein of Lead, Part of the Earth fell upon a Miner* and killed him; only that Parcel, and the Whole, was forfeited for a Deodand. Jenk. 64. pl. 21. cites S. C.

13. *Part of a Load of Tynn* with the Earth kill'd a Man, adjudg'd, that nothing ſhould be forfeited but that Part which fell. Arg. Sid. 207. cites 12 R. 2. Fitzh. Forfeiture, 20.

14. *Sail of a Windmill* kill'd a Man as it was turn'd with the Wind. Arg Sid. 207. cites it as held per Clench and Fenner, J. that the Sail ſhall not be Deodand, becauſe it is Parcel of the Frank-tenement, and ſhall go to the Heir and not to the Executor. Clench ſaid, that the Linnen might be forfeited, but Fenner denied it, becauſe it participates of the Nature of the Sail itſelf.

Prynn's Abr. of Cott. Records, 150. 51 E 8. Numb 73. Same Petition and Anſwer

15. In Aqua Dulci *a Ship may become a Deodand*, but in the Sea, or in Aqua Salſa, being an Arm of the Sea, no Deodand of the Ship or any Part of it, though any Body be drowned out of it, or otherwiſe come by their Death in the Ship, becauſe on ſuch Waters, Ships and other Veſſels are ſubject to ſuch Dangers upon the raging Waves, in reſpect to Wind and Tempeſt; and this Diverſity all our ancient Lawyers do agree in, and it does more eſpecially appear in the Parliament Rolls, where, upon a Petition it was deſired *, That if it ſhould happen, that any Man or Boy ſhould be drowned by a Fall out of any Ship, Boat, or Veſſel, they ſhould be no Deodands; Whereupon the King, by great Advice of his Judges and Counſel learned in the Laws, made anſwer, The Ship, Boat, or Veſſel, being upon the Sea, ſhould be adjudged no Deodand, but being upon a freſh River, it ſhould be a Deodand, but the King will ſhew Favour. There are abundance of other Petitions, upon the like Occaſion, in Parliament. 2 Molloy 225. cap. 1. S. 13.

* Prynn's Abr. of Cott. Rec. 164. 1 R. 2. Numb. 106. the ſame Petition and Anſwer. —— And Ibid. 192. 4 R. 2. Numb. 32. the like Petition and Anſwer. ——— Ibid. 537. 1 H. 5. Numb. 35. the like Petition and Anſwer. ——— Same Points, 3 Inſt. 58. and cites the ſame Petitions in the Parliament Rolls.

Hawk Pl. C. 66. cap 26. S. 6. ſays it is agreed by all, that a Ship in Salt Water, whether in the open Sea, or within the Body of a County, from which a Man falls and is drowned, is not forfeited, becauſe Perſons are continually expoſed to ſo many Perils, that the Law imputes ſuch Misfortunes happening there, rather to them, than to the Ship.

16. A Ship lying at Redriff, in the County of Kent, near the Shore, to be careen'd and made clean, it happened that one of the Shipwrights being at Work under her at low Water, the Veſſel (then leaning aſide,) fortuned to turn over the contrary Side, by means of which, the Shipwright was killed; Upon a Trial at Bar, where the Queſtion was, Whether *this Deodand did belong to the* Earl of Salisbury, who was *Lord of the Manor lying contiguous to the Place where the Man was ſlain, or* to the Almoner, as a Matter not granted out of the Crown? In that Caſe it was reſolv'd, That the Ship was a Deodand, and the Jury thereupon found a Verdict for Lord of Salisbury, that the ſame did belong to his Manor. 2 Molloy 225. cap. 1. S. 13.

17. A

17. A *Cart met a Waggon loaded upon the Road*, and *the Cart endeavouring to paſs by*, the Waggon was driven upon a high Bank, and *overturned*, and threw the Perſon that was in the Cart juſt before the Wheels of the Waggon, and *the Waggon run over the Man and killed him.* In the home Circuit this was referred to Pollexfen Ch. J. and Gregory, and they gave their Opinions, that the Cart, Waggon, and all the Horſes are Deodands, becauſe they all moved ad mortem. 1 Salk. 220. pl. 1. Caſe of the Lord of the Manor of Hampſtead. Hawk. Pl. C. 66, 67. cap. 26. S. 6. ſays, It is a General Rule, that whereever the Thing, which is the Occaſion of wounds him,

a Man's Death, is in Motion at the Time, not only that Part thereof which immediately but all Things, which move together with it, and help to make the Wound more dangerous, are forfeited alſo; For the Rule is, that *Omnia quæque movent ad Mortem ſunt Deodanda.*

18. It is ſaid in the Books, that if a *Tree fall on the Branch of another Tree*, and both fall to the Ground, and the Branch kills a Man, the Tree and the Branch are both forfeited. 1 Salk. 220. in Caſe of the Lord of the Manor of Hampſtead. Hale's Hiſt. Pl. C. 420. S. P. cites 8 E. 2. Corone, 398.

19. Inquiſition before the Coroner ſuper viſum Corporis found, That the *Wheel of a Forge* moved to the Death of the deceaſed. And now it was moved to ſtay Proceſs for ſeizing it as a Deodand, becauſe *Parcel of a Freehold*, as the Wheels of a Mill or Millſtone, which were agreed to be Freehold, and ideo not capable of being a Deodand. And per Holt Ch. J. A Mill is a known Thing in Law, and ſo are the Parts thereof; and therefore if the Owner of a Mill takes out one of the Mill-ſtones to pick or gravel it, and deviſes the Mill, while the Stone is ſevered from it, yet it ſhall paſs as Part of the Mill; and a Bell cannot be a Deodand. Et per omnes; Let Proceſs upon the Inquiſition ſtay. 6 Mod. 187. Trin. 3 Annæ B. R. The Queen v. Wheeler. Hawk. Pl. C. 66. cap. 26. S. 5. ſays, that by the Opinion of our ancient Authors, Things fix'd to the Freehold, as a Wheel of a Mill, a Bell hanging in a Steeple &c.

might be Deodands, but by the later Reſolutions they cannot, unleſs they were ſevered before the Accident happen'd.

20. If the Party wounded *dies not* of this Wound *within a Year and a Day after* he received it, there ſhall be nothing forfeited, for the Law does does not look on ſuch a Wound as the Cauſe of a Man's Death, after which he lives ſo long; But if the Party dies within that Time, the Forfeiture ſhall have Relation to the Wound given, and cannot be ſaved by any Alienation, or other Act whatſoever, in the mean Time. Hawk. Pl. C. 67. S. 7.

21. Nothing can be forfeited as a Deodand, nor *ſeiſed* as ſuch, *till found* by the Coroner's Inqueſt to have cauſed the Death of a Man; But after ſuch Inquiſition the *Sheriff is anſwerable for the Value* of it, and *may levy the ſame on the Town where* it fell, and therefore the *Inqueſt ought to find the Value* of it. Hawk. P. C. 67. cap. 26. S. 8. But where the Officer ſeized it before the Inquiſition and the Inquiſition 11

Months after found the ſame, ſuch after-finding, was a good *Juſtification in Treſpaſs againſt the Officer*; becauſe of the Relation to the Death. Kelw. 68. b. Mich. 21 H. 7. B. R.

For more of Deodand in General, See other Proper Titles.

Departure.

(A) Departure in Pleading. What is.

S. P. per Hide J. Sid. 10. in pl. 5 Mich. 12 Car. 2. C. B.

1. A Departure in pleading *is* ſaid to be *when the ſecond Plea contains Mater not purſuant to his former, and which fortifies not the ſame*, and thereupon it is *called Deceſſus*, becauſe he departs from his former Plea; and therefore whenſoever the *Rejoinder* (taking one Example for all) *contains Matter ſubſequent to the Matter of the Bar, and not fortifying the ſame*, this is regularly a Departure, becauſe it leaves the former and goes to another Matter. Co. Litt. 304. a.

As if *in an Aſſiſe* the *Tenant pleads a Deſcent from his Father*, and gives a Colour, the *Demandant intitles himſelf by a Feoffment from the Tenant himſelf*; The *Plaintiff cannot ſay, that that Feoffment was upon Condition, and to ſhew the Condition broken*, for that ſhould be a clear Departure from his Bar, becauſe it contains Matter ſubſequent. Co. Litt. 304. a.

But in an Aſſiſe, if the *Tenant pleads in Bar that one J. S. was ſeiſed and infeoffed him* &c. and the *Plaintiff ſhewed that he himſelf was ſeiſed in Fee, until by J. S. diſſeiſed, who infeoffed the Tenant, and he re-entred*, the *Defendant may plead a Releaſe of the Plaintiff to J. S.* for this does fortify the Bar. Co. Litt. 304. a.

2. In *Mortdanceſtor* the *Tenant pleaded Fine and Nonclaim in the Demandant*, and he *ſaid that he was within Age at the Time* &c. and the *Tenant pleaded another Fine and Nonclaim when the Demandant was of full Age*, and was not received to it, the Reaſon ſeems to be inaſmuch as it is a Departure. Br. Departure de ſon ple, pl. 17. cites 2 Aſſ. 6.

Br. Replication, pl. 52. cites S. C. — Litt. Rep. 140. Arg. Aſſ. [but no Year] pl. 86. ſeems to be S. C. with this.

3. *Treſpaſs of Battery Anno* 17 *E.* 3. the *Defendant pleaded Releaſe Anno* 16, *and to any Treſpaſs after Not Guilty*, and the *Plaintiff ſaid, that it was made by Dureſs*, and this is a Non-Maintenance of his Day, and therefore is a Departure from his Day, Per Opinionem, by which he maintained his firſt Day. Br. Departure de ſon ple, pl. 28. cites 22 Aſſ. 86.

Br. Departure de ſon ple, pl. 29 cites S. C.

4. *Treſpaſs by J. Citizen of N. againſt the Bailiffs of S. becauſe King H.* 3. *granted to thoſe of M. that they ſhould be quit of Toll throughout all England, and the Plaintiff came to S. and bought a Ton of Wine, and the Defendant diſtrained him for* 20 *s.* The Defendant *pleaded that King John had Cuſtom in S. ſcil. of every Ton of Wine ſold* 8 *d. which he granted to thoſe of S. by Patent, rendering* 200 *l. and the Plaintiff bought the Wine, and he levied of him* 8 *d. which is Cuſtom and not Toll, and alſo King John granted that this Grant ſhould not be defeated by any Charter of later Date*, and the Plaintiff *replied, that Compoſition was made after upon Suit in B. R. between thoſe of M. and thoſe of S.* ſcil. Southampton, *where it was agreed that thoſe of M. ſhould go quit againſt thoſe of S. and thoſe of S. quit againſt them, and ſhewed thereof Exemplification confirmed by this King*

King, and demanded Judgment, and it was held there No Departure where he claims to be diſcharged of Toll, and the other Juſtifies by Charter, and the Plaintiff replies by Compoſition; Brooke ſays, Quod Miror! It ſeems to be ill Pleading; for it ſeems that *where the Defendant juſtifies for Cuſtom and not for Toll, the Plaintiff ought to have maintained his Writ.* Br. Departure de ſon ple, pl. 8. cites 39 E. 3. 13.

5. Writ of *Scire Facias upon a Fine*, the *Tenant ſaid, that* thoſe, who were *Parties to the Fine, had nothing at the Time* &c. *but one was ſeiſed, Que Eſtate he has*, and the Plaintiff *replied, that J. N. had nothing at the Time of the Fine*, and per Cur. *he ſhall maintain the Fine that the Parties were ſeiſed*, the Reaſon ſeems to be inaſmuch as otherwiſe it ſhall be a Departure. Br. Departure de ſon ple, pl. 3 cites 40 E. 3. 3.

6. In *Scire Facias upon a Fine the Tenant ſaid, that* thoſe who were *Parties to the Fine had nothing at the Time* &c. *but one J. Que Eſtate he has*, and demanded Judgment ſi Actio, and the *Plaintiff ſaid, that J. had nothing at the Time*, &c. and this is no Replication; for he *ought to maintain* the Fine *that the Parties were ſeiſed* &c. for otherwiſe it is a Departure. Br. Replication, pl. 9. cites 40 E. 3. 30.

7. *Reſcous of Diſtreſs taken in a Houſe and two Tofts held of him.* Belke ſaid, *he took them in one Acre of Land, which is Hors de ſon Fee, Abſque hoc that he took them in the Houſe and Tofts.* There the Plaintiff ought to maintain the Place in the Count, for other Matter will be a Departure. Br. Departure de ſon ple, pl. 32. cites 30 E. 3. 32.

8. *Replevin of taking the Fourth Day of May*, the *Defendant avowed in the ſame Place another Day for Damage feaſant in his ſeveral*, the *Plaintiff ſaid that it was his Common* &c. and by this it ſhall be intended that it was taken the Day that the Defendant has avowed which is a Departure from his Count, by which the Plaintiff maintained his Count; but it ſeems that in this Caſe the Defendant ought to have traverſed the Day in the Count. Br. Departure de ſon ple, pl. 31. cites 43 E. 3. 11.

9. In *Avowry in D.* if the Plaintiff *pleads Hors de ſon Fee* and the *Defendant ſays that he took them in E.* this is a Departure. Br. Departure de ſon ple, pl. 26. cites 8 H. 4. 16.

10. In *Aſſiſe againſt Baron and Feme*, the *Baron upon Adjournment made Default*, and the *Feme was received and pleaded Fine levied to W. P. and J. D. and to the Heirs of W. Que Eſtate R. T. had and the Land deſcended from R. T. to the Tenant.* and gave Colour. The *Plaintiff ſaid, that J. D. was thereof ſeiſed in Fee and infeoffed him and he was ſeiſed and diſſeiſed* &c. *Abſque hoc, that R. T. had the Eſtate of the ſaid W. P. and J. D.* And the *Tenant ſaid, that this J. D. is the ſame J. D. named in the Fine, who had only for Term of Life by the Fine*, Judgment if he ſhall be received againſt the Fine, to ſay that he had Fee, Et non allocatur; becauſe the Plaintiff *had made Title and traverſed the Que Eſtate, therefore the Defendant cannot make Departure, or do any Thing but maintain the Iſſue which he tendered and which the other has traverſed. For where the the Party pleads a Plea and traverſes the other, it is no Matter, if the Matter of the Plea be true or not*; for he cannot ſay any Thing but maintain the Traverſe. Br. Departure de ſon ple, pl. 4. cites 11 H. 4. 81.

11. In *Aſſiſe* the *Tenant pleaded Releaſe of the Plaintiff, bearing Date at E.* the *Plaintiff ſaid, that he at the Time* &c. *was impriſoned at D* to which the *Defendant ſaid, that after the Impriſonment the Plaintiff delivered to him the Releaſe at L. at large*, and becauſe he had departed from the Place where the Deed bore Date, therefore the Aſſiſe was awarded. Br. Departure de ſon ple, pl. 13. cites 1 H. 6. 3.

S. P. and *ſo* per Townſend and Brian *in every Caſe where a Man ſhall take Advantage of Primo deliberat' he ought to ſhew it at firſt.*

12. A Man *delivered an Acquittance the 8th Day of March*, and *the other made Obligation bearing Date the 1ſt Day of March, and delivered it the 9th Day of May, and he brought Debt upon the Obligation*, and the other *pleaded Acquittance.* The Plaintiff *replied, that after the Acquittance ſcil. the 9th Day* &c. *the Obligation was Primo ſibi deliberat'*, this is a Departure, for he ought to count that the Defendant per Scriptum ſuum &c. dated the firſt Day of May, Et primo ei deliberat' the 9th Day of May conceſſit ſe teneri &c. Br. Departure de ſon ple, pl. 14. cites 7 H. 6. 4.

Br Departure de ſon ple, pl. 20. cites 5 H. 7. 27.

13. *Treſpaſs of Graſs ſpoiled*, the *Defendant ſaid W. was ſeiſed in Fee, and gave to J. N. in Tail, who had Iſſue D. and died*, and after *D. died*, and the *Defendant entered as Daughter and Heir of D. and gave Colour by D.* the *Plaintiff ſaid, that J. was ſeiſed in Fee and infeoffed the Plaintff by whom he entered and was ſeiſed till the Treſpaſs*, and the *Plaintiff ſaid, that J. was ſeiſed and died ſeiſed, and D. entered and died, and after the Defendant as Heir of D. entered and died, and after the Defendant as Heir of D. entered and wae ſeiſed till by the Plaintiff ouſted upon whom he entered.* And by the beſt Opinion, this Rejoinder is a Departure; *for by the Bar the Gift in Tail is their Title*, and *by the Rejoinder the Dying ſeiſed is* their Title. Br. Departure de ſon ple, pl. 5. cites 21 H. 6. 32.

14. *Treſpaſs of a Cloſe broken and Graſs cut*, the *Defendant pleaded his Franktenement*, the *Plaintiff pleaded that to this he ſhall not be received; for his Father whoſe Heir* &c. *infeoffed him with Warranty by the Deed*, Judgment if againſt the Deed of his Anceſtor, which comprehends Warranty, he ſhall be received. And the *Defendant ſaid, that R. was ſeiſed in Fee, and infeoffed his Father and him, and to the Heirs of the Son, and the Father infeoffed the Plaintiff, by which the Defendant entered into the one Moiety by Alienation to his Diſinheritance, and took the other Moiety by Proteſtation.* Newton ſaid, this is a Departure; for by the *Bar* that it is his Franktenement he *intitles himſelf to the whole*, and by the *Rejoinder* he *intitles himſelf only to the Moiety*, therefore a Departure, by which the Defendant *rejoined for the whole ſcil. the one Moiety for the Alienation*, as above, *and the other for the Diſſeiſin to him* &c. Br. Departure de ſon &c. pl. 6. cites 22 H. 6. 50.

15. *Debt upon an Obligation of 20 l. to pay Annually the Farm of B. at the Feaſt of Eaſter and St. Michael*, the *Plaintiff alledg'd Arrears at Eaſter*, and the *Defendant alleg'd Tender to the Plaintiff at Eaſter and refuſal by the Plaintiff*, to which the *Plaintiff ſaid that he was Arrear at Mich.* This is a Departure, and by this they repleaded after Verdict, quod nota. Br. Departure de ſon ple. pl. 27. cites 22 H. 6. 57.

16. In Quare Impedit the Plaintiff *counted of an Advowſon in Groſs and that he preſented, and after the Church voided and he preſented, and the Defendant diſturbed him*, and the *Biſhop*, one of the Defendants, *pleaded, that he claim'd nothing but* Admiſſion, Inſtitution and Induction *as Ordinary, and demanded Judgment if without ſpecial Deſturbance* &c. The Plaintiff *replied, that ſuch a Day, Year and Place, he preſented to him his Clerk, and he refuſed*, the Biſhop *rejoined, that ſuch a Day he preſented, and one J. N. preſented alſo, by which the Church became litigious, and after the ſix Months paſs'd he made Collation by Lapſe, Abſque hoc, that he refuſ'd after this Day*; and to this the *Plaintiff ſaid, that ſuch a Day, after this Day, he required him to preſent his Clark and he refuſed*; And by the Opinion of the Court this is a Departure; For firſt *the Biſhop juſtified the ſpecial Diſturbance the Day that the Plaintiff complains of, and then the Plaintiff alleges Diſturbance at another Day*, which is a Departure. Br. Departure de ſon ple. pl. 2. cites 33 H. 6. 14.

17. In

17 In *Præcipe quod reddat* the *Tenant ſaid, that J. N. was thereof ſeiſed in Fee, and that it is deviſable* &c. *and devis'd the ſame Land to him in Fee* and died, *by which he entered and gave Colour* &c. The *Plaintiff ſaid, that J. N. was ſeiſed in Fee and died ſeiſed, and he enter'd as Heir, and that J. N. at the Time of the Deviſe was within the Age of 21 Years* et hoc &c. The *Tenant ſaid, that the Cuſtom is, that every Infant of 15 Years may deviſe* his Land there, *and that J. N. was of the Age of 15 Years at the Time of the Deviſe* &c. and the Opinion of the Court was, that the Rejoinder is a Departure, by which the *Defendant amended his Plea, and put all in the Bar*, quod nota. Br. Departure de ſon ple. pl. 9. cites 37 H. 6. 5.

18. In *Debt upon an Obligation* the *Defendant ſaid that it was indors'd, that if the Defendant and all the Tenants of J. of his Manor of D. ſtand to the arbitrement of the Plaintiff of all Matters, that the Obligation ſhall be void, and the Plaintiff did not make Award between the Defendant and the Tenants* &c. And the *Plaintiff ſaid, that he awarded ſuch a Day that the Defendant ſhould pay to the Tenants 10 l. by ſuch a Day, which he has not paid, and* after, to be ſure, he *ſhewed the Names of the Tenants*, and the *Defendant ſaid, that they were not Tenants at the time of the Obligation made* &c. And the *other demurr'd* by which he *ſaid, that every one of them held an Acre of Land by 1 d. at the Time* &c. *of the ſaid J. as of his Manor of B. and ſo they were Tenants, Priſt*, and the others e contra, and the beſt Opinion was that it is no Departure to ſay that they are not Tenants, for the Bar is, that no award was made &c. and the other ſaid, that they awarded that they ſhould pay 10 l. to the Tenants Scil. A. and B. and the other ſaid, that A. and B. were not Tenants which proves that no Award was between the Defendant and the Tenants of J. and ſo no Departure; Nota bene. Br. Departure de ſon ple. pl. 15. cites 39 H. 6. 6.

19. *Treſpaſs by a Feme of a Box of Evidences taken*; the *Defendant ſaid, that after the Treſpaſs the Plaintiff took to Baron B. who releaſed to him all Actions and Demands*, and ſhew'd the Deed as he ought, Judgment &c. The *Plaintiff ſaid, that in the Releaſe all Actions which ſhe might have by the Teſtament of her firſt Husband, are excepted, and that the firſt Husband was poſſeſs'd* &c *and made her Executor* &c. *and died, and the Plaintiff was poſſeſs'd till the Defendant took them and did the Treſpaſs*, to which the *Defendant ſaid, that the firſt Baron was ſeiſed of 20 Acres of Land in B. which the Charters concern'd, in Fee and died ſeiſed, and they deſcended to the Defendant as Son and Heir to him, and the Defendant enter'd as Heir and took the Box and Charters before that the Plaintiff was thereof poſſeſs'd*, et hoc &c. and this is a Departure per Cur; for the *Releaſe is his Bar*, and the *Deſcent and Seiſure of the Evidences is his Rejoinder* and therefore a Departure; for Per Jenny clearly, Rejoinder ought to be always a ſufficient anſwer to the Replication, and that it be ſubſequent and in enforcement of his Bar, and not to be a new Matter; by which the Defendant took the rejoinder for his Bar, quod nota. Br. Departure de ſon ple. pl. 16. cites 39. H. 6. 15.

20. A Rejoinder *ought to have theſe two Properties*, that is to ſay, it ought *to be ſufficient for Anſwer to the Replication, and* ought *to be ſubſequent and inforcing of his Bar, and not new Matter*. Br. Replication, pl. 26. cites 39 H. 6. 16. per Jenny. Br. Departure de ſon ple, pl 16. cites S C.

21. *As* in *Treſpaſs* the Defendant *pleaded Releaſe*, the Plaintiff *replied, that this Action is excepted in the Releaſe; for it was of a Box of Charters*, the Defendant *rejoined, that thoſe Charters concern'd four Acres of Land in B. of which his Father died ſeiſed in Fee, and he is Heir to him, and enter'd and took the Charters*, and per Cur. this is an ill Rejoinder and Departure, by which the Defendant pleaded the Rejoinder for his Bar. Ibid. Br. Departure de ſon Ple, pl. 16. cites S. C.

22. *Treſpaſs upon Anno* 5 *R.* 2. the Defendant *pleaded, that B. was ſeiſed and gave to C. and his Feme in Tail by Fine, and that the Land deſcended to O. as Heir in Tail to the Donees* Scil. *Son of C. Son of C. Son to the Donees, by which O. entered and P was ſeiſed in Tail, and died proteſtando ſeiſed, and P. entered as Daughter and Heir and had Iſſue the Defendant and died, and the Defendant enter'd* and gave Colour to the Plaintiff to which the Plaintiff *replied and confeſs'd the Fine, and that the Land deſcended to C. Brother of O. who enter'd and gave in Tail to the Father and Mother of the Plaintiff who were ſeiſed and died ſeiſed, and the Plaintiff entered and was ſeiſed till the Defendant did the Treſpaſs*, and the *Defendant rejoined, that after the Gift made by C. that C. re-enter'd and died ſeiſed, and the Land deſcended as above, and ſo a Remitter*, and by the beſt Opinion of the Court this is a Departure; For the Bar ſuppoſes O. Heir to the Donees immediate, and the Rejoinder ſuppoſes C. Father of O. to be ſeiſed ſo that O. was Heir to C and not Heir immediate to the Donees, quod nota, by which the Defendant waiv'd this pleading. Br. Departure de ſon ple. pl. 23. cites 1 E. 4. 4.

Co Litt. 304 a. S. P. & S. C. cited in Marg.

23. And per Danby J. if a Man *pleads Feoffment in Aſſiſe in Bar, he ſhall not ſay in the Rejoinder, that it was Leaſe and Releaſe*; for that is a Departure. Ibid.

24. And if *Bar* be made *by dying ſeiſed without Heir as Eſcheat*, and the *Rejoinder is by Attainder* this is a Departure, per Choke J. Ibid.

25. *And* in Aſſiſe if the *Tenant pleads Feoffment of J.* and the *Plaintiff ſays, that he leaſed to J. for Life who infeoffed the Tenant by which he entered for the Forfeiture*, and the *Tenant ſays, that after the Leaſe and before the Feoffment J. the Plaintiff releaſed to O. and his Heirs*, this is no Departure. Br. Departure, pl. 23. cites 1 E. 4. 4.

26. *And* if *Recovery* be *pleaded in Aſſiſe, and the Eſtate of the Plaintiff meſne* &c. and the *Plaintiff ſays, that he, againſt whom the Recovery paſs'd, had nothing at the time of the Recovery*, and the Tenant ſays, that he was Pernor of the Profits, this is no Departure. Ibid.

27. In Aſſiſe where the Entry or Diſſeiſin is *ſuppoſes to be by two, and the one dies or pleads a plea, and the other pleads another Plea* and the *Plaintiff makes Title*, he *ſhall conclude that both entter'd upon him* &c. *or* that he *was ſeiſed till by both diſſeiſed*, and ſhall not ſay till by the one diſſeiſed; for this is a Departure from his Writ. Br. Patents, pl. 101. cites 12 E. 4. 6. and 7.

28. J. B. brought Writ of *forcible Entry againſt N.* the *Defendant ſaid, that A. was ſeiſed in Fee, Que Eſtate he has and gave Colour* to the Plaintiff, and the *Plaintiff ſaid, that after the Defendant had the Eſtate of A. W. B. Coſin of the Plaintiff was ſeiſed in Fee whoſe Heir he is, and died ſeiſed, and the Land deſcended to him as Coſin and Heir* &c. and ſhew'd How &c. *by which he enter'd and was ſeiſed in Fee till by the Defendant diſſeiſed*, and the *Defendant ſaid, that before that W. any thing had, the ſaid A. was ſeiſed till by J. S. diſſeiſed who infeoff'd one A. who infeoff'd the ſaid W. and that after A. died, and the Fee and the Right deſcended to this Defendant as to the Coſin and Heir*, and ſhew'd how; *and after W. B. died ſeiſed this ſame N. being within the Age of* 21 *Years, by which the Defendant entered*, and demanded Judgment &c. And Per Littleton the Rejoinder does not maintain the Bar, and then it is a Departure, for in the *Bar* he *ſaid, that A. had Poſſeſſion before the dying ſeiſed of W. B.* and by the *Rejoinder* he *confeſſes that he had no Poſſeſſion before the dying ſeiſed but only a Right* and ſo a Departure, by which Catesby demurr'd in Law upon it &c. Br. Departure de ſon ple. pl. 7. cites 15 E. 4. 33.

29. In *Treſpaſs* [*of Sheep taken*] the *Defendant pleaded Sale in Market overt by B.* and gave Colour, and the *Plaintiff ſaid, that he himſelf was poſſeſſed till the Defendant took and deliver'd them to the ſaid B. who ſold them to the Defendant*, and the *Defendant ſaid, that the Plaintiff ſold them to B. and B*

ſold

ſold them to the Defendant, and per Cur. this is a Departure; for by the *Bar* he *is to bind the Plaintiff by the Sale by the Law, without conveying from the Plaintiff, and by the Rejoinder he conveys from the Plaintiff by which he omits the Sale in Market overt.* Br. Departure de ſon ple. pl. 24. cites 18. E. 4. 24.

30. *And in Treſpaſs*, if the *Defendant pleads Feoffment of B.* and gives *Colour* &c. and the *Plaintiff ſays, that he was ſeiſed till by B. diſſeiſed, and he entered*, and the *Defendant ſays, that the Plaintiff releaſed to him*, this is no Departure per Brian and Collow; for it is purſuant to the firſt Matter. Ibid.

31. *Entry ſur Diſſeiſin againſt the Baron and Feme*, the *Baron ſaid, that E was ſeiſed, and leaſed to him for Life of E. and gave Colour* &c. The *Demandant ſaid, that before that the ſaid C. any Thing had, the Tenant was ſeiſed and infeoffed A. who infeoffed the Demandant, who was ſeiſed till by the Tenant diſſeiſed, and after the Tenant infeoffed G. who leaſed to the Defendant as in the Bar*; the *Tenant ſaid, that E. leaſed to him at Will, and after the Tenant infeoffed A, who infeoffed the Demandant as in the Replication, and after the Tenant entered upon the Demandant, upon whom E. entered, and after leaſed to the Tenant for Life, as in the Bar*, and it was adjudged a good Rejoinder and no Departure from the Bar. Br. Departure de ſon ple, pl. 25. cites 18 E. 4. 26.

32. Treſpaſs *of Aſſault and Battery*, 1 *July Anno* 1 E. 5. the *Defendant juſtified by the Aſſault of the Plaintiff himſelf at another Day, Abſque hoc, that he was Guilty before, or after this Day*, the *Plaintiff ſaid, that De ſon Tort Demeſne* &c. this is an ill Replication; for by this he departs from his firſt Day and therefore ought *to ſay that Guilty modo & Forma* &c. Br. Replication, pl. 67. cites 2 R. 3. 11.

33. If one *intitles* himſelf to Land *by Feoffment of J. S.* and Defendant *pleads that before the Feoffment J. S. was attaint*, now if the *Plaentiff ſhews an Act of Parliament annulling the Attainder*; this is no Departure; for the Matter of the Title is not changed, but remains as it was at firſt, viz. by the Feoffment; per Popham Ch. J. Yelv. 14. cites 3 H. 7. Sellenger's Caſe.

But Gawdy J. Contra and took a *Diverſity* between *Actions in which the Plaintiffs are bound to a preciſe Form*, and *in which they are not* as in *Formedon*, if the *Demandant intitles himſelf by a Gift*, and the Tenant pleads *Ne dona Pas*, the Demandant may *reply and inforce the Count and maintain it by a Recovery in Value, & ſic dedit*, according to 3 H. 7. 5 and this is no Departure, becauſe the Plaintiff in Formedon is bound to a preciſe Manner and Form of counting; But in Action upon the Caſe it is otherwiſe; for as his Caſe is, ſo the Plaintiff muſt declare, and conſequently in this Caſe the Plaintiff ſhould have declared upon the Letters Patents, and have ſhewn the Statute of Reſumption and the Statute of 4 H. 7. of Reviver in his Declaration; for now he inforces the Matter of his Declaration by a Statute which is another and a new Thing; Quod Curia negavit. Yelv. 14 & 15. in Caſe of Wood v. Haukſhead.

34. *Quare impedit againſt the Biſhop of E.* who *ſaid that he is Ordinary and that he claimed nothing but* Admiſſion and Inſtitution *as Ordinary, Judgment, if without ſpecial Diſturbance* Action &c. the *Plaintiff ſaid, that he was ſeiſed of the Advowſon, and preſented his Clerk, who was admitted, and now the Church voided by his Death, by which he, the 20th Day of May, preſented his Clerk to the Defendant as Ordinary, and he refuſed him within Six Months at B. in the County of N. and ſo he diſturbed him*, to which the *Biſhop ſaid ſaid that the 13th Day of May aforeſaid, one P. preſented to him D. his Clerk as Patron, and after the Plaintiff preſented as in the Bar by which the Church became litigious, and demanded Judgment*, and the Plaintiff demurred, and by ſome this is a Departure; for by the firſt Plea the Plaintiff might have had Writ to the Biſhop, contrary upon the Rejoinder of the Biſhop, therefore a Departure, and the others e contra, therefore Quære. For the one Plea and the other belong to the Ordinary. Br. Departure de ſon ple, pl. 19. cites 5 H. 7. 19.

Br. Reſponder pl. 34 cites S. C.

Fitzh. Departer pl. 10. cites S. C.

35. *Treſpaſs of Goods taken at L.* the *Defendant ſaid, that J. S. was poſſeſſed Ut de Proprio, and bailed them to the Plaintiff and after gave them the Defendant, by which he took them, Judgment,* &c. The *Plaintiff ſaid, that he himſelf was poſſeſſed till J. S. took them out of his Poſſeſſion and gave them to the Defendant and the Plaintiff took them after the Gift and was poſſeſſed till the Defendant took them,* and the *Defendant rejoined that the Plaintiff himſelf after the taking of J. S. gave the Goods to J. S. who gave to the Defendant, as in the Bar.* And it was held that the Replication is good, and the Owner may retake the Goods, notwithſtanding the Gift of the Treſpaſſor, and may retake them, or have Replevin, and per Vaviſor and Brian *this is a good Rejoinder*, and neither a Departure or Repugnant, *for it ſtands with* the Bar *and inforces the Bar.* Br. Departure de ſon ple. pl. 21. cites 6 H. 7. 8.

Br. General Brief, pl. 13. cites S. C.

36. *In Formedon*, the *Tenant ſaid, that Ne dona pas*, the *Demandant ſaid that other Land was given, and this Land was recovered in Value and ſo Dona.* Br. Departure de ſon ple, pl. 22. cites 7 H. 7. 2.

Br. General Brief, pl. 13. cites S. C.

37. And the like in *Cui in Vita, that Vir dimiſit* &c. the *Tenant ſaid, that Non dimiſit*, and the *Demandant ſaid, that he ſuffered a Recovery, and ſo dimiſed*, and no Departure; for there is no other Form of Writ &c. Ibid.

38. In *Aſſiſe* the *Tenant pleaded Feoffment* of J. S. and gave Colour, the *Plaintiff ſaid, that at the Time of the Feoffment he was within Age and entered at full Age and infeoffed the Plaintiff* &c. the *Plaintiff ſaid that the Cuſtom of the ſame Vill is, that every one of the Age of Fifteen Years may make Feoffment, the Plaintiff ſaid, that this is a Departure*, Newport ſaid No, and put *a Difference between the Caſe* 37 *H.* 6. *Fol.* 5. *and this Caſe*; for there *the Tenant pleaded Deviſe Bar, which is a Cuſtom at the Common Law*, and after *in his Rejoinder he alleged ſpecial Cuſtom in the ſame Vill only*, and therefore *becauſe his Bar was of a Cuſtom and he did not ſhew the whole Cuſtom in his Bar*, therefore *this is a Departure, but here the Bar is a Feoffment, which the Plaintiff voided by Nonage, therefore the Defendant came Time enough to allege the Cuſtom and in Inforcement of the Bar*, and Rede and Tremaile J. affirmed the Difference which Newport put, Quod Nota. and *Quære.* Br. Departure de ſon ple, pl. 10. cites 21 H. 7. 17.

39 *Office was found for the King, and that the Tenant of the King made Feoffment to his Uſe, and died ſeiſed of the Uſe* &c. and *J. S.* came and *traverſed the Office, inaſmuch as the Feoffment was to another Uſe and that Recovery was had to this ſecond Uſe, and traverſed the dying ſeiſed in Uſe* and the *King's Attorney replied, that the Recovery was by Covin*, and per Rede J. this is a clear Departure, for as a common Perſon ought to warrant his Count by Pleading and alſo his Bar, ſo the King, when he is intitled to the Office which is traverſed, ought to inforce himſelf to the ſame Office by his Replication, and maintain the ſame Title in the Office, and not to make a New Title by Matter in Fact, or otherwiſe; for this was never found by Matter of Record, and alſo it is *a new Title which is not found in the Office or in any other Office*, Quod non negatur. Br. Departure de ſon ple, pl. 11. cites 21 H. 7. 18.

Br. Pleadings, pl. 46. cites S. C. that the Plaintiff cannot maintain the Matter by Repli-

40. In *Avowry*, if the *Plaintiff counts that his Father was ſeiſed and leaſed rendering Rent, or granted a Rent Charge*, and the *Defendant avows the Defendant indebted*, or the *Plaintiff in Replevin ſays, that the Leſſor or Grantor at the Time of the Demiſe, or at the Time of the Gift had nothing in the Land*, the *other Party cannot ſay that at the Time* &c. *J. and B. were ſeiſed in Fee to his Uſe, and ſo ſeiſed he leaſed or granted*; for all this ought to be ſhewn in the Count or Avowry, Per Rede Ch. J. and Kingſ-

Kingſmill J. and therefore it ſeems clearly a Departure, Quod Nota Br. Departure de ſon ple, pl. 12. cites 21 H. 7. 25.

Cites or Rejoinder to ſhew the Uſe

S. C. cited per Cur. Pl. C. 105. b. Mich. 2 Mar. in Caſe of Fulmerſtone v Steward, and ſaid it was a Departure; becauſe by the Avowry it ſhall be intended that the Father was ſeiſed in Fee, and that the Grant was good by the Common Law, whereas now by the Rejoinder the Defendant does not maintain it, but would enable himſelf by the Statute of Uſes, and ſo would aid himſelf by the Statute-Law.—— Litt. Rep. 215. cites S. C.

41. Forfeiture of Marriage; the Plaintiff *counted that the Father of the Defendant held of him in Chivalry and died in his Homage*, and the *Defendant ſaid that his Father made Feoffment, Abſque hoc that he died in his Homage*, and the *Plaintiff ſaid that this Feoffment was to the Uſe of him and his Heirs*, and ſo the Heir in Ward by the Statute 4 H. 7. and the *Defendant ſaid, that this Feoffment was to the Uſe of his Feme till ſhe came to Twenty-one Years, and after to the Uſe of the Heir in Tail and Remainder over* &c. the *Remainder over in Fee to his Right Heirs*. And per Fitzherbert and Willoughby clearly *this Rejoinder is a Departure; for he might have pleaded this Matter at firſt and did not*, Quod Nota. Br. Departure de ſon ple, pl. 1. cites 27 H. 8. 3.

42. In Replevin, the *Avowant ſet forth, that long before the taking* one *J. S. was ſeiſed of the Lands in Fee, and made a Leaſe to the Avowant for Thirty Years, and avowed Damage Feaſant*; the Plaintiff *replied, that the ſaid J. S. was only Tenant in Tail* &c. *and conveyed the Deſcent to himſelf as Heir in Tail, and that he entered upon the Leſſee* &c. the Defendant *rejoined, that the ſaid J. S. reſerved a Rent on the ſaid Leaſe, which* Rent the *Plaintiff, as Son and Heir, had accepted after the Death of his Father*, Judgment &c. And this was held a Departure. The Reporter adds, Quære bene. D. 95. b. pl. 40. Mich. 1 M. Anon.

Nelſ. Abr. 637, pl. 1. cites S. C. and obſerves that by this Plea he juſtified under a Leaſe made by Tenant in Fee, and in his Rejoinder, he ſets forth the Acceptance of the Rent reſerved upon a Leaſe made by the Tenant in Tail.

43. *Leaſe for Years* by Indenture *without Impeachment of Waſt*, in which the *Defendant covenanted that at every Fell of Wood he would make a Fence to ſave the Spring, and gave Bond for Performance* of Covenants; in *Debt* brought on *this Bond*, the *Defendant pleaded*, that *he had not felled any* Wood &c. the Plaintiff *replied*, and ſet forth, that he had *felled two Acres of Wood, but had not made any Fence* to ſave the Spring; the Defendant rejoined, that he *had made a Fence* &c. and ſo to Iſſue; This was held a Jeofail and a Departure. D. 253. b. pl. 101. Trin. 8 Eliz. Anon.

44. In *Treſpaſs for chaſing his Beaſts* in Berkſhire, Defendant *juſtified Damage Feaſant*; the Plaintiff replied, *that afterwards he drove the Cattle into Oxfordſhire and ſold them*, Defendant demurred, and the Declaration was in Berkſhire, yet *the Sale made him Tort-Feaſor ab Initio*. For where the *Replication maintains the Title and only removes the Impediment*, it is good. Arg. Litt. Rep. 215. cites Mich. 23 & 24 Eliz. C. B. Rot. 2297. Pledall v. Clark.

45. Debt upon a *Bond for Performance of an Award, which was to pay to the Plaintiff* 10 *l. and to do divers other Things*. The Defendant *pleaded Performance, and ſhewed How*. The Plaintiff *replied*, and aſſigned the Breach in *Non-payment of the* 10 *l.* The Defendant *rejoined, that he tendred it to the Plaintiff, and he refuſed it*. It was the Opinion of Dyer, that this is a Departure; For in the Bar the Defendant pleads Performance, and ſhew'd How; and now in the Rejoinder, he pleads a Tender and Refuſal,

So where the *Rejoinder* was, *that he was ready to pay*, and to do the other Thing (which was to ſeal a Re-

leaſe) it was ſuſal, which is not a Performance, though it is not any Breach, of the Award. 4 Le. 79. pl. 167. Mich. 29 Eliz. C. B. Clinton v. Bridges.

adjudged a Departure;

For the pleading Performance is the ſame Thing as pleading Payment &c. and then when he rejoins, that he is ready to pay &c. he by this relinquiſhes his firſt Plea, and Judgment for the Plaintiff. Sid 10 pl. 6. Mich. 12 Car. 2. C. B. Butcher v. Whiting.

46. *Treſpaſs* for *entring into his Houſe, and breaking his Cloſe*; the Defendant *pleaded, that it was his Freehold*; the Plaintiff replied, *that the Place and Cloſe* in which the Treſpaſs was ſuppoſed to be done, *eſt unum Meſſuagium and ſo made a Title to the Meſſuage.* Upon Not Guilty, it was found for the Plaintiff, but becauſe he made Title in his Replication to the Meſſuage only, and did not maintain his Declaration, which was for the Meſſuage and Cloſe, Judgment was, Quod nil capiat per Billam. But the Reporter ſays, Quære, if it amounts not to a Diſcontinuance of the Cloſe only, and ſo help'd, by Verdict. Goldsb. 159, pl. 89. Hill. 43 Eliz. Anon.

S. C. cited Arg. Litt. Rep. 215. as adjudged no Departure; For if he pleads the Reſumption and the Revivor, if there were 20 he ought to plead them all.——S. C. cited Cro. C. in the Caſe of Butler v. the College of Phyſicians, as ſhewn to the Court, but mentions it as Mich. 42 & 43 Eliz. Rot. 397, by the Name of Woodhead's Caſe, and that it was held to be no Departure, but, as it were, a Confeſſion and Avoiding—— Jo. 261. 263. The College of Phyſicians v. Butler. S. C. & S. P. reſolv'd accordingly.

47. In *Caſe for taking Toll* of the Plaintiff *for Paſſage over the Bridge of W. ſhewing a* Title by *Letters Patents* 20 *H.* 6. *to All Souls College* in Oxford *for them their Tenants* and Farmers *to be quit of Toll*, ſetting forth, that he was Farmer to the College &c. the Defendant *pleaded in Bar the Statute* 28 *H.* 6 *of Reſumption of all Liberties &c. granted by him*; the Plaintiff in his *Replication ſet forth the Statute* 4 *H.* 7. *by which the Letters Patents granted by H.* 6. *to the College were made good, Non-Obſtante the Statute* 28 *H.* 6. &c. and upon Demurrer it was objected, that this Replication was a Departure from the Declaration, but adjudged, that it is not; for there is not any new Matter contained in the Replication different from what was in the Declaration, for the Plaintiff's Title ſtill remains upon the Letters Patents, and relies upon it; and the Title ſhewn in the Declaration and Replication, is all one, viz. the Letters Patents. Yelv. 13. Mich. 44 & 45 Eliz. B. R. Wood v. Haukshead.

48. If a Man *pleads Performance of Covenants*, and the Plaintiff *replies, that he did not ſuch an Act according to the Covenant*, the Defendant *ſays, that he offered to do it, and the Plaintiff refuſed it*, this is a Departure, becauſe the Matter is not purſuant; for it is one Thing to do a Thing, and another to offer to it, and the other refuſed to do it; therefore that ſhould have been pleaded in the former Plea. Co. Litt. 304. a.

Covenant upon an Indenture of Apprenticeſhip, the Defendant *pleaded Infancy*, the Plaintiff *replied*, that by *the Cuſtom of London*, Infants after the Age of 14, might bind themſelves Apprentices; and upon Demurrer, Foſter Ch. J. and Windham J. held, that this was not a Departure, but Twiſden and Mallet J. contra, and held, that what is pleaded generally, *as at Common Law*, cannot be maintain'd by Cuſtom, but it is a Departure. Lev. 81. Mich. 14 Car. 2. B. R. Mole v. Wallis, or, Bold v. Warren.——Sid 142. pl. 19. Bold v. Wallis. S. C. and the Court were divided in their Opinion, and therefore adviſed a Diſcontinuance, and the Plaintiff to declare, De Novo upon the Cuſtom.——Raym. 60. Mould v. Wallis, S. C. adjornatur.——Keb. 376. pl. 76. S. C. adjornatur——Ibid. 469. pl. 78. S. C. adjornatur.——Ibid. 512. pl. 85. S. C. the Court gave Leave to diſcontinue, and begin De Novo, and count on the Cuſtom.——S. P. Godb. 122. pl. 143. Hill. 29 Eliz. Wray Ch. J. was of Opinion, that it was no Departure; For he ſaid, it ſhould be frivolous to ſhew the Whole in his Declaration, viz. That he was an Infant, and that by the

49. When a Man in his former Plea *pleads an Eſtate made by the Common Law*, in the ſecond Plea regularly he *ſhall not make it good by an Act of Parliament.* So when in his former Plea he *intitles himſelf generally by the Common Law*, in his *ſecond Plea* he *ſhall not enable himſelf by a Cuſtom*, but ſhould have pleaded it firſt. Co. Litt. 304. a.

the Cuſtom he might make a Covenant which ſhould bind him; But the Reporter ſays, Quære of this Opinion, for that many doubt of it.

The Rule was agreed, that upon a Declaration grounded upon a Fact at Common Law, one cannot maintain it by Replication of a Cuſtom or Statute; As in Covent upon an Indenture of Apprenticeſhip, the Defendant pleads Infancy &c. the Plainiff cannot maiatain his Declaration, by ſaying, that there is a Cuſtom that Infants may bind themſelves Apprentices &c. 2 Ld. Raym. Rep 863. Paſch. 2 Ann. B. R.

50. In *Treſpaſs for chaſing his Beaſts*, 14 May, 1 Jac. the Defendant *juſtified as for Eſtray, and that* 16 *May*, 1 *Jac. he deliver'd them.* The Plaintiff *replied, that* 15 *May he labour'd and worked them.* The Defendant demurr'd. This was held no Departure, but *the Working maintain'd the Treſpaſs* done the 14th, and made him a Treſpaſſor ab Initio. Arg. Litt. Rep. 215. cites Hill. 4 Jac. Bagſhaw v. Gower. Yelv. 96. Bagſhaw v. Gaward. S. C. and held, no Departure.——Cro. J. 147. pl. 6. S. C.

——S. C. cited Ld. Raym Rep. 76. Paſch. 8 W. 3. C. B. by Powell jun. J. that it fortifies the Declaration.

51. *Debt upon Bond* for *Non-performance of an Award*; the Defendant *pleaded, that the Award was, that he ſhould releaſe all Suits to the Plaintiff*, which he had done; the Plaintiff *replied*, that it was true ſuch an Award was made, but *that the Arbitrators did farther award*, that *the Defendant ſhould pay unto the Plaintiff* 15 *l. at ſuch a Time and Place, abſque hoc*, that they had made *ſuch an Award only, as the Defendant had alledged*; the Defendant *rejoins*, that true it is, that *they did award, that he ſhould pay the Plaintiff ſuch a Sum*; *but they did farther award, that the Plaintiff ſhould releaſe to the Defendant all Actions* &c. *which he had not done*; and upon Demurrer, the Court ſeem'd clear of Opinion, that the Rejoinder of the Defendant is a plain Departure; For that he might (and ſo ought) to have ſhew'd all this at the firſt. 2 Bulſt. 38, 39. Mich. 10 Jac. Linſey v. Aſton.

52 On Treſpaſs for an *Aſſault*, Battery and impriſoning the Plaintiff *on the laſt Day of October*, 6 Car. at W. the Defendant *juſtified, for that* 13 *Aug.* 6 *Car. a Supplicavit iſſued out of Chancery, and by a Warrant from the Sheriff, he, on the* 21*ſt Day of September, arreſted the Plaintiff, and detained him two Days, and then delivered him to the Sheriff* &c. the Plaintiff *replied*, and *confeſs'd the Writ, Warrant and Arreſt* 21 *Sept. and Impriſonment for two Days, and* then *ſets forth, that afterwards he gave Bail to the Sheriff, and was diſcharged; and that the Defendant poſtea viz. Præd'* 1 *Die Oct.* 6 *Car. aſſaulted* and impriſoned him of his own Wrong; and upon Demurrer, all the Court conceived, that the Replication was not good, by its varying from the Day in his Declaration, and is a Departure therefrom. Cro. C. 228. pl. 6. Mich. 7 Car. B. R. Tyler v. Wall.

53. In Replevin the Defendant *avow'd the taking in O. for a Rent Charge granted out of the Manor of S.* which extended into S. and O. The Plaintiff *replied, that ſhe recovered in Dower, and had a third Part* &c. *aſſigned in S. and ſo was ſeiſed as Tenant in Dower, till the Defendant diſtrained her Beaſts* in a Place called the Warren in S. Upon Demurrer the Court held, that this was a Departure; and agreed, that in every Replication there ought to be a Vill, and a Lieu Conus, and and that here the Warren is the Lieu Conus, and S. is the Vill, and therefore cannot be in O. where the Avowry is made, becauſe one Vill cannot be in another Vill, nor one Lieu Conus in another Lieu Conus, and here O. ſhall be intended a Vill; then in this Replication S. muſt be a Vill, or no Vill, if it be not a Vill, the Replication is not good, becauſe a Vill is wanting; and if it is a Vill it cannot be in O. becauſe one Vill cannot be in another; and Judgment for the Defendant. Sid. 9. pl. 5. Mich. 12 Car. 2. C. B. Weſton v. Carter.

Sid. 142. pl. 19. S. C. but S. P. does not appear. Raym. 60. S. C. but S. P. does not appear.——Keb. 469. pl. 78. S. C. & S. P. by Twisden.

54. If one *pleads a Statute*, and the other *replies, that it is re-pealed*, the Defendant may *re-join, that it is revived by another Statute*; Agreed per Cur. Lev. 81. Mich. 14 Car. 2. B. R. in Case of Mole v. Wallis, or, Bold v. Warren.

Keb. 469. pl. 78. S. C. & S. P. mention'd as by Twisden, that in such Case it is a Departure.

55. If Defendant *pleads a Statute*, and the Plaintiff *replies, that it was to continue to such a Time only, which is expir'd*, the Defendant may *re-join, that the first Statute was afterwards made perpetual*; because it is no more than fortifying the first Matter; Agreed per Cur. Lev. 81. Mich. 14 Car. 2. B. R. in Case of Mole v. Wallis, or, Bold v. Warren.

Raym. 22. S. C. adjudg'd a Departure.

56. In *Covenant* &c. the Lessee *pleaded Performance generally*; the Plaintiff *replied, and assigned a Breach in Non-payment of Rent*; the Defendant *re-joined, that the Plaintiff had ousted him, and held him out* &c. upon several Arguments the Court held, that this is a Departure, because *the Rejoinder is not in Affirmance of the Plea; but* the Defendant *ought to have pleaded this Special Matter at first.* Sid. 77. pl. 10. Pasch. 14 Car. 2. B. R. Granger v. Henbotow.

Keb 560. 578. S. C. Lee v. Raynes. Raym. 86. S. C. —— Arg. 10. Mod. 251. says, Raym. 86. is not rightly reported, as appear'd by a MS. Report of the S. C. of Ld. Ch. J. Kelyng's, then in his Hand, and is according to what is cited Keb. 999.—— It is no Departure, for it is only an Answer for the Time to the Plea, which before was not material. Lev. 111. Hill. 15 Car. 2. C. B. cites it in the Case of Lee v. Rogers as adjudg'd, as he heard, in the Case of Bremion v. Evelin.

57. *Assumpsit* upon a Promise 1 *May*, 3 *Car.* 1. for Money lent. Defendant *pleads, that the Writ was first brought* 4 *Feb.* 14 *Car.* 2. and that he did not promise within six Years before the said 4th of February. After Verdict it was moved in Arrest of Judgment, that the Declaration is a Departure from the Count. But adjudg'd, that it was not a Departure, for the *Time put in the Declaration was not material*, For he might declare of Assumpsit at any Time. But when the Defendant made the Time material by his Plea, the Plaintiff may by his *Replication answer to this Plea, to maintain his Action for the Time, which before was not material*, and the Plaintiff had Judgment. Lev. 110. Mich. 15 Car. 2. B. R. Lee v. Rogers.

S. C. of Lee v. Rogers was cited per Parker Ch. J. in delivering the Opinion of the Court, and Judgment accordingly, but he cited it by the Name of Lee v. Raynes; And he said, that in the old Books indeed, this would have been a Departure, and cited 22 Ass. 86. and that unless that what, strictly speaking, is a Departure, be *some Times allowed*, unless the Plaintiff (*where the Defendant by his Justification, makes the Time or Place material*) may follow the Defendant's Plea, though it leads him to another Time or Place, all that Doctrine, That in *transitory Actions* where Time and Place are not material the Plaintiff may declare at any Time or Place, must fall to the Ground. Hill. 3 Geo. 1. B. R. 10 Mod. 349. Cole v. Hawkins.

Raym. 94. S. C. it was insisted that it was a Departure, because the Defendant cannot rejoin concerning an Award, when he has pleaded before, that there was no Award, and for the Departure Judgment was given for the Plaintiff.——Keb. 678. pl. 72. S. C. adjudg'd for the Plaintiff ——Lev. 127. S. C. and per Cur. Nul Award is no Award at all; and held this a Departure, and Judgment for the Plaintiff.—— Ibid. the Reporter adds, that Judgment was given in a like Case. Mich. 14 Car. 2. B. R. Horse v. Launder.

58. In Debt on a *Bond* condition'd *to perform an Award*, the Defendant *pleaded Nullum fecerunt Arbitrium.* The Plaintiff *replied and shew'd an Award.* The Defendant *rejoin'd, that there were other Things submitted, and so no Award.* Adjudg'd on Demurrer, that this is a Departure; For the Defendant ought to have pleaded this Special Matter in his Plea at first. Sid. 180. pl. 16. Hill. 15 & 16 Car. 2. B. R. Morgan v. Man.

59. In

59. In *Aſſumpſit for* 5000 *Royals*, the Defendant *pleaded the Statute of Limitations*; the Plaintiff *replied, and tendered an Iſſue as to Parcel, and as to the Reſidue*, he *ſaid, the Defendant was indebted to him at Teneriffe in the Canary Iſlands, in Warda de Cheap*, &c. and upon a Demurrer to this Replication, it was objected, that it is a Departure, becauſe the Plaintiff had *declared for a Debt due in London*, and in his *Replication* he *alledges it was at Teneriffe*; but adjudged that it is no Departure, becauſe it is a Perſonal Thing, for he who is *indebted* to me in *one Place, is ſo in every Place*. Sid. 228. pl. 24. Mich. 16 Car. 2. B. R. Bevin v. Chapman. Lev 143. Beven v. Clapham. S. C. adjudged.

60. *Debt upon a Bond.* The Condition was *to ſave a Pariſh harwleſs from the Charge of a Baſtard Child.* The Defendant *pleaded non Damnificatus.* The Plaintiff *replies, that the Pariſh had laid out* 3 *s.* for keeping the Child. The Defendant *rejoins that he tendered the Money*; *and the Plaintiff paid it De injuria ſua peopriâ.* Whereupon it was demurred, Twiſden ſaid, the Rejoinder is a Departure; you ſhould have pleaded thus, viz. that Non fuit damnificat' till ſuch a Time; and that then you offered to take care of the Child, and tendered &c. Judgment for the Plaintiff, Niſi &c. Mod. 43, 44. pl. 97. Hill. 21 and 22 Car. 2. B. R. Richards v. Hodges. 2 Saund. 83 S C. adjudged clearly a Departure. ——Sid. 444. pl. 1. S. C. adjudged a Departure —— 2 Keb. 612. pl. 53. S. C. adjornatur. Ibid. 619. pl. 7. S. C. held a Departure, and Judgment for the Plaintiff.

61. Debt upon *Bond* conditioned, *that if the Defendant ſerv'd the Plaintiff as a Brewer's Clerk, and performed ſuch Covenants, then the Bond to be void*; the Defendant *pleads Performance of all* &c. The Plaintiff *replied, That one of the Covenants was to give to the Plaintiff a true Account of all Money which he ſhould receive &c. which he had not done*; the Defendant *rejoined and confeſſed that he received ſuch a Sum &c. and that he laid it up in the Plaintiff's Ware-houſe, it was ſtolen by certain Malefactors, to him unknown*, et hoc paratus eſt verificare; upon Demurrer it was objected, that it was a Departure from the Plea, becauſe that was, that he performed all the Covenants, one whereof was to account, but the Rejoinder is rather an Excuſe why he ſhould not account; adjudged no Departure, but a Fortification of the Bar; for ſhewing that he was robbed, is giving an Account. Vent. 121. Paſch. 23 Car. 2. B. R. Vere v. Smith. 2 Lev. 5. S. C. ſays, the *Rejoinder* was, *that he accounted Modo ſequente ſolicet, that Quidam Malefactores broke his Counting-Houſe, and ſtole it, whereof he acquainted the Plaintiff*, Et hoc paratas eſt Verificare; upon which the Plaintiff demurr'd. The Court held it no Departure. And as to the Concluſion, they held it better than to have concluded to the Country, becauſe, now the Plaintiff has Liberty to traverſe the Robbery; Sed adjornatur. But afterwards in Trin Term, the Demurrer was waiv'd, and Iſſue taken upon the Robbery ——2 Keb. 761, pl 30. S. C. ſays, that in the Rejoinder it was expreſs'd, that he gave Notice of the Robbery the next Day after the Night it was done in, and being then required to account, he did thus give an Account; and the Court held it no Departure. —— S. C. cited 6 Mod. 139, and allow'd to be Law; and that the rejoining that he was robb'd of the Money, whereof he gave Notice to the Plaintiff, certainly maintains the firſt Plea; For it was a legal Account of it.

62. Debt upon *Bond for Performance of Covenants*, the Defendant in his *Plea ſet forth the Indenture*, which was *to return all the Effects of Goods ſent to Barbadoes, and* that he had perform'd all the Covenants; the Plaintiff *replied, that ſuch Goods were ſent, of which he had not returned the Effects*; the Defendant *rejoined, that he had no Order to return them*, and upon Demurrer this was adjudged a Departure, becauſe there was *nothing of Order mentioned in the Covenants*; But Per Hale if the Covenant had been to return them on Order, the Plea had been good. The Reporter adds two Quæres. 2 Lev. 67. Mich. 24 Car. 2. B. R. Wood v. Kirkham.

63. A *Covenant* is *to pay*, the Defendant *pleads Performance*, the Plaintiff *replies that he did not pay*; The Defendant *rejoins that he tendered*. 2 Barnard. Rep. in B. R. 193.

Mich. 6 Geo. 2. Winchelſea (Counteſs) v. Higden. S. P. adjudged for the Plaintiff, that it is a Departure; for the Matter in the *Rejoinder goes only by Way of Excuſe.* Tender and Refuſal not being Payment, but only diſcharges the Party from Damages

This is a Departure, cited by Serjeant Jones. Freem. Rep. 157. pl. 174. Paſch. 1674.

In the Caſe above was cited the Caſe of **Dixon v. Reynolds** the ſame Term in C. B. where the Action was Debt on Bond, with Condition to ſave the Plaintiff harmleſs from Tonnage of Coals, the Defendant pleaded Non Damnificatus; the Plaintiff replied, a Diſtreſs taken for it; the Defendant rejoined, that none was due. Upon this there was a Demurrer; but that Court held it to be no Departure. The Ch. J agreed that Caſe to be Law; and ſaid, that the Rejoinder there fortified the Bar.

64. Debt upon *Bond* conditioned *to pay ſuch Sums as the Obligor ſhould receive within* 14 *Days after Receipt at ſuch a Place in W. as the Plaintiff* (the Obligee) *ſhould appoint*; the Defendant *pleaded Payment*; the Plaintiff *replied Non-payment of ſuch a Sum received by the Defendant at a Place by the Plaintiff appointed*; the Defendant *rejoins, that the Plaintiff had appointed no Place*; upon Demurrer this was adjudged a Departure, for the Defendant in his Plea ought to have pleaded firſt, that he had paid all but ſuch a Sum, for which, as yet, the Plaintiff had appointed no Place of Payment. 2 Mod. 31. Paſch. 27 Car. 2. C. B. Sams v. Dangerfield.

65. In *Debt on an award*, the Defendant *pleaded Nullum fecerunt Arbitrium*, Plaintiff *replied, and ſet forth the Award, that the Defendant ſhould pay* 20*l. to the Plaintiff in Satisfaction of all Treſpaſſes*; and likewiſe that they ſhould *give mutual Releaſes to the Time* of the Award, and aſſigns Breach in Non-payment of the 20*l.* Defendant *rejoins, that there were Treſpaſſes done between the Submiſſion and the Award.* All the Court were of Opinion, that when the Plaintiff in his Replication ſet forth the Award, it was no Departure to ſhew that Treſpaſſes were committed betwixt the Submiſſion and the Award; for by that the award appears to be void, and ſo fortifies the Bar of Nullum Arbitrium. Freem. Rep. 265, 266. pl. 290. Mich. 1679. Ayland v. Nicholls.

66. Debt upon a *Bond for Performance of an Award*, the Defendant *pleaded no Award* made; the Plaintiff *replied* and ſet forth the *Award made, that the Defendant ſhould pay the Plaintiff* 250*l. in Right of his Wife, as a full Moiety of the Share of the Eſtate of H. P.* her Father, *and that upon Payment thereof the parties ſhould ſeal general Releaſes, but that the Defendant has not paid the Money awarded*; the Defendant *rejoins*, and ſets forth *that he and the Plaintiff differed about all the perſonal Eſtate of H. P. which they ſubmitted to Arbitrators, but that the Award by* them made *was not of all the Perſonal Eſtate of the ſaid H. P.* Upon a Demur- the Court was clear of Opinion that this Rejoinder was a Departure from the Plea; and the Plaintiff had Judgment. Lutw. 382. 385. Mich. 1 Jac. 2. Mitchell v. Pope.

67. Debt upon *Bond*, conditioned, *that if the Defendant paid the Plaintiff or his Attorney all the Charges of a Suit* &c. *with which the ſaid Attorney ſhould Charge the Plaintiff, and ſhould diſcharge the Plaintiff thereof*, then the Bond to be void; the Defendant *pleads, that he had paid to the Plaintiff all the ſaid Charges*; the Plaintiff *replied, that the Attorney had charged him with* 4*l.* 16*s. which the Defendant had not pay'd, nor diſcharged the Plaintiff thereof*; the Defendant *rejoins, that the Attorney had not delivered to the Defendant any Bill of Coſts under his Hand*, as by the Statute required; Upon Demurrer the Court held the Plea to be too general; for he ſhould have ſhewed that the Attorney charged ſo much and no more, which he had paid, and all agreed that the Rejoinder was a manifeſt Departure from the Bar, for he pleaded, that he paid all the Charges &c. and by his Rejoinder he would excuſe the Non-Payment, becauſe the Attorney had not delivered him a Bill of Coſts under his Hand. Lutw. 419. 421. Trin. 4 Jac. 2. Parkes v. Middleton.

68. *Treſpaſs*

68. *Treſpaſs* for *breaking his Houſe, and taking and carrying away his Goods*; the *Defendant juſtified the taking and carrying away Nomine Diſtrictionis* for Damage feaſant; the Plaintiff *replied, that after the Diſtreſs* aforeſaid, viz. eodem Die &c. *the Defendant converted them to his own Uſe*; upon Demurrer it was inſiſted, that this Replication was a Departure; for it does not make good the Plaintiff's Replication in Treſpaſs, but ſhews rather that the Plaintiff ſhould have brought Trover and Converſion; Sed non allocatur; for he that abuſes a Diſtreſs is a Treſpaſſor ab Initio, and therefore if in Treſpaſs the Defendant juſtifies Nomine Diſtrictionis the Plaintiff may ſhew an Abuſe and it is no Departure, but makes good his Declaration, and ſo in this Caſe; for *the Converting is a Treſpaſs or Trover at Election*, and the Matter diſcloſed in the *Replication* makes good this Election; For it *proves a Treſpaſs as well as a Trover*. 1 Salk. 221. pl. 1. Hill. 2 W. and M. in C. B. Gargrave v. Smith.

69. In Debt upon *Bond for Performance of Covenants in a Leaſe*, one whereof was *to pay ſo much clear of all Taxes*, the Defendant *pleaded Performance*; the Plaintiff *replied, Non-payment of ſo much for half a Years Rent*; the Defendant *rejoined, that ſo much was paid in Money, and ſo much in Taxes upon the Statute for laying 4s. per Pound on Land, which being allow'd amounted to the whole.* Holt Ch. J. Upon Demurrer held that the Matter of this Rejoinder being by way of Excuſe, ought to have been ſet forth in the Bar; but as it is here, it is a Departure; for whereas he ſaid at firſt, that he had performed the Covenants, he ſays now, that he is not obliged to perform them. Judgment for the Plaintiff 1 Salk. 221. pl. 2. Trin. 5 W. & M in B. R. Arran (Counteſs of) v. Criſpe. 12 Mod. 54; 55 S. C. adjudg'd accordingly for the Plaintiff.

70. In *Treſpaſs* for *taking his Cattle in the King's Highway*, the Defendant *juſtified the taking &c. Damage-feaſant*; the Plaintiff *replied, that Time out of Mind &c. there had been a certain Houſe and Foot way pro omnibus inter ſuch and ſuch a Place, and that he drove his Cattle over the Way, and that in Paſſant they eat* &c. The Defendant *rejoined, that the Cattle were Commorant in via prædicta.* Iſſue was join'd thereupon and found for the Plaintiff. It was moved for a Repleader, the Treſpaſs tried being not the ſame Treſpaſs for which the Plaintiff had declared. Per Holt Ch. J. This was a tranſitory Treſpaſs and the mentioning it as done in alta via Regia was nothing to the Purpoſe, but was idle, out of time and mere Surpluſage; and therefore the Plaintiff, by following the Defendant to another way in his Replication, does not depart, for a Departure muſt be from ſomething material; and when the Iſſue is taken upon the Commorancy, it admits the Plaintiff had a Way, but that he continued longer than he ſhould in it. Judgment for the Plaintiff. 1 Salk. 222. pl. 3. Paſch. 6 W. and M. in B. R. Primer v. Phillips.

71. In *Treſpaſs*, if the *Defendant juſtifies on the Day in the Declaration*, the *Plaintiff may alledge another Day* in his Replication. Per Holt Ch. J. 1 Salk. 222. pl. 4. Mich. 7 W. 3. B. R. Webley v. Palmer.

72. *Caſe* &c. *for Work done*, and *ſix ſeveral Promiſes were all laid upon 16th October*, the Defendant *pleaded Infra Ætatem to all* generally, the Plaintiff *replied as to two* of the Promiſes *præcludi non debet* &c. *becauſe the Defendant was at that Time of full Age, and as to the reſt they were for his neceſſary Apparel*; Defendant demurred, alledging that it was repugnant, becauſe the Defendant could not be of Age, and not of Age at one and the ſame; but adjudged, that the Time was only a Circumſtance and not material nor Part of the Iſſue, nor is the Plaintiff tied to a preciſe Day in his Declaration, and if the Defendant, by his Plea, forces him to vary, it is no Departure. 1 Salk. 223. pl. 5. Paſch. 8 W. 3. B. R. Howard v. Jenniſon. Comb. 361. S. C. and the Exception was not allow'd; for the Plaintiff may well divide it in his Replication, if there are four ſeveral Cauſes of four ſeveral Days, the Plaintiff may lay them all at one Time, and if he is forced from his Day, it is no Departure. Judgment for the Plaintiff.

73. If

Lutw. 111. 114 Laughton v. Ward. S. C.

73. If the *Plaintiff diſcloſes new Matter in the Replication*, *which* new Matter *only fortifies the Declaration*, this is not any Departure. Ld. Raym. Rep. 75 Paſch. 8 W. 3. C. B. Lawton v. Ward.

2 Lutw. 1435. 1437. S C reſolv'd accordingly —— If Defendant by his Plea makes a tranſitory Action local, the Plaintiff may anſwer the Plea, and it will be no Departure. As in *Treſpaſs by Executor, de Bonis aſportatis in Vita Teſtatoris apud East R.* in Nottinghamſhire, the Defendant *pleaded, that A. was ſeiſed of a Place called W in North H. in the ſame County, and made a Leaſe thereof to the Defendant, by Virtue of which he entered, and as Leſſee he juſtified the taking* of the Goods, as Damage feaſant, *and traverſes the taking at East R.* The Plaintiff *replies, that before A. was ſeiſed of that Place* &c. in *Fee, J. S. was ſeiſed of the Place, &c. in Fee, and leaſed to the Plaintiff's Teſtator, who entered and put in his Goods, that the Defendant of his own Wrong took them, abſque hoc, that A. was ſeiſed in Fee prout*; the Defendant demurr'd, ſuppoſing this to be a Departure, but Judgment was given for the Plaintiff, for the Reaſon aforeſaid. Arg. Ld. Raym Rep. 121. Mich. 8 W. 3. in Caſe of Serle v. Darford. cites Trin. 13 Car. 2. C. B. Rot. 795. Taylor v. Gabetus.

74. Treſpaſs &c. for an *Aſſault &c. at H.* the Defendant *pleaded that he was poſſeſſed of a Cloſe at T. and that the Plaintiff entered, and refuſing to Depart, the Defendant, molliter manus impoſuit* on him *to maintain his Poſſeſſion, and traverſed the aſſault &c. at H.* The Plaintiff *replied*, and clams *a Way over the Cloſe to T.* by preſcription *and that the Defendant adtunc & ibidem broke the Plaintiff's Head, and traverſed that he molliter manus impoſuit* &c. prout &c. and upon Demurrer Exception was taken that this Replication was a Departure from the Declaration which was of an *Aſſault &c. at H.* and the *Replication admits that it was at T.* but it was anſwered that it is a *Tranſitory Action*, and if the Defendant makes it local by his Plea, the Plaintiff may anſwer the Plea, and it will be no Departure. And of this Opinion was the whole Court; for in tranſitory Actions the *Plaintiff may lay it where he pleaſes, and if the Defendant makes it local by his Plea, the Plaintiff may vary in his Replication either in Time or Place.* And Judgment for the Plaintiff. Ld. Raym. Rep. 120. 121. Mich. 8 W. 3. Serle v. Darford.

75. If a Man *lays a Day in his Declaration that is not material*, and the Defendant by his *Plea makes it material* and then the Plaintiff in his *Replication varies from the Day in the Declaration*, it will be a Departure, otherwiſe if the Day had not been made material by the Plea. Per Holt Ch. J. 6 Mod. 115. Hill. 2 Ann. B. R. Anon.

76 In Treſpaſs, Aſſault, and *Battery*, if the Plaintiff *lays the Aſſault one Day*, and the Defendant *pleads a ſpecial Matter that juſtifies at another Day*, whereby the Day becomes material, the Plaintiff may *reply an Aſſault at another Day*; and it is no Departure, although it has been otherwiſe held, for the Day is not material, and the Plaintiff may maintain his Count; Per Holt Ch. J. 2 Ld. Raym. Rep. 1015. Hill. 2 Ann. Anon.

6 Mod. 139. Parkins v. Woolaſton S. C. adjudged a Departure; for it is new Matter which does not agree with or inforce the Matter of the Plea; for the Plea is that there was no Capias; and the Rejoinder ſays, that there was a Capias, but it was ſuperſeded, and there is great Difference between no Capias and a Capias ſuperſeded; for the ſuperſeding does not make it Null or no Capias, but only ſuſpends the Fruit or Effect of it, and one muſt diſtinguiſh between the Writ itſelf and the Effect of it.

77. In *Debt on the Recognizance of the Bail*, the Defendant *pleaded that there was no Capias ad Satisfaciendum proſecuted and returned againſt the Principal before the Day of exhibiting the Bill againſt the now Defendant.* The Plaintiff *replied, that a Capias ad Satisfaciendum was ſued out, and returned before the exhibiting this Bill.* Defendant *rejoined that the Defendant in the firſt Action brought a Writ of Error on the Judgment before the Ca. Sa. was proſecuted returned and filed.* Upon Demurrer it was adjudged for the Plaintiff, becauſe the Rejoinder is a Departure from the Bar. 2 Ld. Raym. Rep. 1256. Paſch. 3 Ann. B. R. Parkins v. Wilſon.

78. In Debt on *Bond* conditioned that J. L. ſhould *be a true Priſoner without making any Eſcape.* The Defendant *pleads that J. Larkin did remain*

again a true Priſoner without committing any Eſcape, &c. Plaintiff aſſigns *Breach that 13 Jan. J. L made an Eſcape*; Defendant *rejoins* that J. L. went a *little Way out of the Rules of the Priſon, but being ſent for back by the Plaintiff he immediately returned, with Conſent of the Plaintiff, was accepted as his Priſoner, and ſo continued ever ſince*; to which it was demurred; this is a Departure; for if this would excuſe the Eſcape, it ſhould have been pleaded at firſt; ſo Judgment for the Plaintiff. Comyns's Rep. 553, 554 pl. 230. Trin. 9 & 10 Geo. 2. in C. B. Gambier v. Larkin.

79. The Plaintiff brings an Action of *Debt upon a Bond*; Defendant *pleads the Condition*, which was *that he ſhould execute ſuch an Office without the Aſſiſtance of the Plaintiff, and ſays, that he did execute it without his Aſſiſtance*; Plaintiff *replies that he did not execute it* without his Aſſiſtance; Defendant *rejoins*, and ſays, *that if the Plaintiff did give him his Aſſiſtance, it was voluntary*. To which the Plaintiff demurs. And the Demurrer was held to be good, for that the Rejoinder was a Departure from the Plea. Barnard. Rep. in B. R. 4. Mich. 13 Geo. Whight v. Clever. 2 Ld. Raym. Rep. 1449. White v. Clever S. C. the Defendant rejoined Proteſtando that the Plaintiff kept the Defendant's Books out of his Cuſtody without his Conſent from the 22d of April 1725, to the 24th of June next following, Et Libros illos ſemper abinde detinuit, cuſtodivit, & illos eidem Wilhelmo deliberare denegavit, per quod the Defendant, after the detaining of thoſe Books out of his Cuſtody, the Money &c. ſingly could not collect; for Plea ſays, Quod verum eſt that the Plaintiff in propria Perſona ſua exercuit Officium prædictum a prædicto 22 Die Aprilis Anno ſupradicto uſque prædictum 24 Diem Junii ſed quod prædictus the Plaintiff voluntarie ſuſcepit & Officium prædictum a toto Tempore prædicto exercuit ſine Requiſitione vel Aſſenſu prædicti the Defendant, qui per totum Tempus prædictum ſemper paratus fuit & obtulit to the Plaintiff, apud Londinum prædictum in Parochia & Warda prædictis dictum Officium ad Exercendum ſingulus, Anglice ſingly, ſine Aſſenſu prædicti the Plaintiff; & hoc idem the Defendant paratus eſt verificare &c. The Plaintiff demurred ſpecially, and ſhewed for Cauſe, that the Rejoinder was a Departure from the Bar; the Defendant joined in Demurrer. The Court was clear of Opinion, that the Rejoinder was naught; for if the Fact there diſcloſed amounted to ſhew, that the Defendant had executed the Office ſingly, the Defendant ought to have joined Iſſue with the Plaintiff upon the Iſſue offered by him in his Replication, and given this Matter in Evidence; but if the Fact ſet out in the Rejoinder was only an Excuſe for the Defendant's not having exerciſed the Office as the Court took it to be; then it was a Departure from the Bar; and the Defendant ought not to have pleaded, that he did execute the Office ſingly, and rejoin this Matter; but ought to have pleaded this Matter at firſt. Judgment for the Plaintiff, Nov 3. 1726.

For more of Departure in General, See other Proper Titles.

Depoſitions.

(A) Depoſitions read in what Caſes.

1. A *Perſon was examined* as a Witneſs in a Cauſe, and after *became Plaintiff for the Intereſt in that Buſineſs*; allowed and not to be ſuppreſſed Toth. 211. cites 9 Car. Drury v. Drury.

2. A *Witneſs* examined for the Plaintiff, and to be *Croſs examined* for the Defendant, but before he could be croſs examined, *died*; yet this

Court ordered his Depoſitions to ſtand. 2 Chan. Rep. 18. 20 Car. 2. & 22 Car. 2. Moſely v. Maynard.

3. Proofs in an *Original Cauſe* were not allowed to be read on a Bill *of Review*. 2 Chan. Rep. 18. 20 Car. 2. & 22 Car. 2. Moſely v. Maynard.

4. Depoſitions taken *in either Cauſe*, ordered to be *uſed in both*, which Order was after Publication in the firſt Cauſe, wherein the Proof was made, but before Publication in the ſecond Cauſe. Chan. Caſes 236. Mich. 26 Car. 2. Norcliff v. Worſely.

Depoſitions taken in a Cauſe, wherein only the Father *Tenant for Life* was Party ſhall not be read *againſt the Iſſue in Tail.*

5. Depoſitions taken in a former Cauſe cannot be *read in another Cauſe* againſt one that does not claim under the Party againſt whom thoſe Depoſitions were taken; *But* Serjeant Phillips ſaid, that it is a Common Caſe, that if a *Legatee* bring a Bill againſt the Executor and proves Aſſets, another Legatee, though no Party, may have the Benefit of thoſe Depoſitions. Vern. R. 413. Mich. 1686. Coke v. Fountain.

Ch. Prec. 212. Ld. Peterburgh v. Dutcheſs of Norſolk.

6. Creditors of L. obtain a Decree for Payment of their Debts, and to ſet aſide Conveyances got by Fraud, and Sir H. J. and the Legatees are Defendants. The Legatees having a Bill againſt Sir H. J. the Queſtion was, if the Depoſitions in the former Cauſe *could be read in this*; Per Cur. the Queſtion being the ſame in both Cauſes, and Sir H J's Defence the ſame, they ought to be read. 2 Vern. R. 447. Mich 1703. Nevill v. Johnſon.

(B) Depoſitions in Chancery read at Law; In what Caſes.

1. THOUGH a *Bill* be *diſmiſſed* yet the Depoſitions taken on ſuch Bill are to be made Uſe of here or at Law, eſpecially the Bill not being diſmiſſed on the Point of Right, but *for Matter of Form*. And it is uſual and frequent to Uſe Depoſitions taken in one Cauſe, if for the ſame Matter that is in Controverſy *in another*, eſpecially if againſt the ſame *Defendant*, which was admitted by the Counſel of the other Side. Chan. Caſes 174, 575. Trin. 22 Car. 2 Arg.

2. *But* as to *the uſing Depoſitions in a Cauſe diſmiſſed*, this *Difference was taken*, that though where a Cauſe is diſmiſſed, *the Matter of it not being proper for Equity* to decree, yet the Fact in this Caſe proved may be uſed as Evidence in that Fact between the ſame Parties whenever it ſhall come in Queſtion again. Chan. Caſes, 175. Arg.

3 Chan. Rep. 39, 40. S. C. that Depoſitions taken *on a diſmiſſed Bill of Revivor* brought by a Purchaſor were denied

3. *But* when a Cauſe is diſmiſſed not upon that Ground but upon *Irregularity*; as for that it comes by Revivor, when it ſhould come by Original Bill, ſo that in Truth there never was regularly any ſuch Cauſe in Court, and conſequently *no Proofs*, thoſe Proofs cannot be uſed; for Proofs cannot be exemplified without Bill and Anſwer, nor can they be read at Law, unleſs the Bill on which they were taken, can be read. Arg. and ſo it was afterwards ruled about Mich. Term. 1669. by the Ld. Keeper. Chan. Caſes 175. in Caſe of Backhouſe v. Middleton.

by the Court to be uſed on an Original Bill brought by him afterwards, for the Bill of Revivor be-brought by a Purchaſor was void, and ſo the Depoſitions were taken where there was no Bill and Anſwer depending, conſequently no Indictment of Perjury could be brught againſt the Witneſſes.

(C) De-

(C) Depoſitions. Suppreſſed.

1. IF Witneſſes in Chancery *depoſe contradictorily or be falſe in Parcel* they ſhall be rejected, and the Party commanded to bring other Witneſſes. Br. Conſcience, pl. 20. cites 16. E. 4. 9.

2. When Depoſitions are publiſh'd, yet new Proofs may be examined and are called Proofs Obornants; but thoſe are only *Explanatory* of the firſt Proofs; As if it was depoſed that A. and B. did ſuch a Thing, and this is obſcurely ſaid without ſaying how he knows it, and this is publiſh'd the Deponent being dead; A. and B. may depoſe that they were preſent &c. according to the firſt Depoſition &c. But if they depoſe any thing *contrary*, and which alters any Part of the Matter this Depoſition is void. Kelw. 96. a. pl. 4. M. 22 H. 7.

3. A. exhibited his Bill againſt B. *by Practice* of Purpoſe to examine Witneſſes, and did examine Witneſſes accordingly, whereas the Cauſe chiefly concerned W. R. and S. T. and therefore ordered that the Depoſitions ſhould be ſuppreſſed, and the ſaid R. and T. ſhall exhibit a Bill into this Court, againſt all ſuch as they think to be Parties to the fraudulent abuſing of this Court. Cary's Rep. 79, 80. cites 19 Eliz. Walford v. Walford.

4. *Maſter examined* one Witneſs *three Times* to the Account; ordered that the Depoſitions be *ſuppreſs'd*. 2 Chan. Caſs 79. Mich. 33 Car. 2. Anon.

5. Depoſitions *ſuppreſs'd*, becauſe the Solicitor's Clerk in the Cauſe, did *write as a Clerk* in the Execution of the Commiſſion. 2 Chan. Rep. 393. 2 Jac. 2. Newte v. Foot.

(D) Depoſitions ſupplied or amended.

1. AFTER *Publication* the Court would not *amend* a Depoſition miſtaken. Toth. 140 cites 39 and 40 Eliz. Chamberlain v. Pope.

2. A Man after Examination *ſupplies* his Depoſition, *ad Informandam Conſcientiam*. Toth. 140. cites 5 Car. Wynn v. ——

3. A Witneſs having committed a *Miſtake* in his Examination before Commiſſioners, apply'd to them to *rectify it*, but the Commiſſion being returned to London he went there, made Oath of it, and that he was *ſurpriz'd by an haſty Examination*; but the Commiſſon not being opened, it was returned back to the Commiſſioners with a ſpecial Commiſſion to open it, and permit the Witneſs to rectify his Miſtake; the *ſpecial Commiſſion* being executed and returned, it was moved to ſuppreſs the Depoſitions as unduly taken, and that no ſuch ſpecial Commiſſion ought to have been, and they were *ſuppreſs'd*. N. C. R. 92. 15 Car. 2. Randall v Richards. Chan. Caſes 25. 2 June 15 Car. 2. S. C accordingly.—— Upon hearing of the Matter *Threo Witneſſes* examined by Commiſſion *did in open Court depoſe that* the Commiſſioners *have ſet down their Depoſition, otherwiſe than they did depoſe*; therefore it is ordered thoſe Depoſitions ſhall be void, and the ſame Witneſſes ſhall be examined again. Cary's Rep. 66. cites 2 Eliz. Fol 146. Peacock v. Collins.

4. The Lord Chancellor took Notice of what *dangerous Conſequence* it would be, that if after Publication paſſed, and People ſeeing where a Cauſe pinch'd they ſhould then be at Liberty to look out Witneſſes to boulſter up the faulty Part of the Cauſe, the neceſſary Conſequence would be Perjury. Vern. 47. Paſch. 1682. In Caſe of Jones v. Purefoy.

5. After a Witneſs is fully examined, the Examinations are *read over* to him and the Witneſs is at *Liberty to alter* or amend any thing; After which he *ſigns them*, and then, and not before, the Examinations *are* compleat and *good Evidence*. Wms's Rep. 415. Paſch. 1718. by the Reporter.

6. *Therefore* where a Witneſs was examined, aud *before ſigning his Examination died*, the Maſter of the Rolls upon adviſing with a Maſter in Chancery then in Court denied the making uſe of the Depoſitions, as being not perfect. Wms's Rep. 414. Paſch. 1718. Copeland v. Stanton.

7. *But* where *after an Order for Publication*, *Defendant examined* a Witneſs and then perceiving the Irregularity (it being after Publication) the Defendant on the *uſual Affidavit* by himſelf, his Clerk in Court, and Solicitor, *that they had not, nor would ſee any of the Depoſitions*, *got an Order to re-examine* this Witneſs; but before Re-examination the Witneſs died; upon Affidavit of this, Ld. C. Parker ordered that the Defendant might make Uſe of the Depoſitions, the Re-examination of him being prevented by the Act of God. Wms's Rep. 415. cites Mich. 1720. Debrox v. ——

8. On a Petition to amend the Depoſition of a Witneſs, who, being examined, ſwore only, that he was induced to believe, that he did not expreſs himſelf in the Manner the Depoſition was taken, and was poſitive he did not intend or mean to ſwear as the Examiner had taken it, but really as in the Amendment deſired. Lord C. King ſaid, that where it appears to the Court, that *either the Examiner is miſtaken in the taking*, *or the Witneſs in making*, the Depoſition, he thought it was for the Advancement of Truth and Juſtice to amend it, and the ſooner the better, in regard of Death or Abſence, and it would be unjuſt to pin a Witneſs down to a Miſtake by denying to rectify it, and as to the amending it after Publication, it could not be known before and order'd it to be amended, and the *Witneſs to ſwear it over again*. 2. Wms's Rep. (646.) Mich. 1731. Griells v. Ganſell.

For more of Depoſitions in General, See **Evidence**, **Examination**, **Hearing**, and other Proper Titles.

Deputy.

(A) Who may make a Deputy.

Mo. 845. pl. 1141. S. C. & S. P. agreed and reſolved

1. A Conſtable **may make a Deputy, and he may execute the Warrants directed to the Conſtable, and do other Things belonging to the Officer of Conſtable, though he is not ſworn to execute**

execute it well, as the Conſtable himſelf is. M. 13 Jac. B. R. between Phelps v. Winſcombe for this is not any Judicial Office. and reſolved that ſuch Deputy by the Equity of the Statute 7 Jac. cap. 5 may plead the General Iſſue ——— 3 Bulſt. 77. S. C. and the whole Court agreed, that a Conſtable might make a Deputy, but no Judgment given, the ſame being ended (as the Reporter ſays he heard) by Agreement between the Parties.——Roll Rep. 274. pl. 49. S. C. & S. P. and the Juſtices inclined that the Deputy of the Conſtable is within the Statute 7 Jac. cap. 5. to plead the General Iſſue, becauſe he comes in the Right of the Conſtable and repreſents his Perſon —3 Salk. 252. pl. 8. cites S. C.— As to the Point of the Conſtable's making a Deputy, which was mentioned in Sir Walter Vane's Caſe, Sid 355. pl. 5. Hill 19 & 20 Car. 2. B. R. the Court were not agreed in it notwithſtanding the Caſe of Phelos v. Winchcomb was cited.——— Lev. 233. in Sir Walter Vane's Caſe, S. C. Twiſden J. cited Hill. 9 Jac. Rot. 249 B. R Phips v. Winchcombe to be reſolved that a Conſtable cannot make a Deputy; but the other Juſtices e contra.

2. In Writ of Falſe Judgment it was aſſign'd for Error, that Juſticies came to the Sheriff to hold Plea of 1000 l. and he held it before his under Sheriff, and enter'd in the Roll that the Plea was held before him, and therefore it ſeems that a *Judge cannot* make a Deputy, but that an *Officer may* make a Deputy, As the Sheriff &c. may ſerve Capias by Bailiff or Servant, contra in Redifſeiſin, Writ of enquiry of Waſt &c. where he is Judge and Officer, quære for it was not adjudg'd. Br. Deputy pl. 19. cites 21. H. 6. 37.

3. Where *Supplicavit comes to the Sheriff to take Surety of the Peace of J. N. and if he refuſes, then to ſend him to the next Gaol*, there it is agreed by 4 Juſtices that the Sheriff cannot make a Deputy *to take the Surity* but ſhall do it himſelf; for of this he is Judge *but he may award a precept* to another *to arreſt the Party*, for of this he is Officer. Br. Deputy pl. 20. cites 9. E. 4. 31.

4. *So* in *Rediſſeiſin* this ſhall be judged by the Sheriff himſelf and the Coroners; But *to make Execution*, the Sheriff may award Precept to another. Note the diverſity that Miniſter or Officer may make a Deputy contra of Judge or Juſtice. Ibid.

5. It was ſaid that *a Judge or Juſtice of Record cannot* make a Deputy; *Contrary of* the Sheriff who is *an Officer*. Br. Judges, pl. 11. cites 9. 4. 31.

6. *Officer of Truſt* cannot make a Deputy unleſs the Grant be [by theſe Words] to exerciſe by himſelf or his ſufficient Deputy. Br. Deputy, pl. 9. cites 11 E. 4. 1.

7. A *Miniſterial Officer* may make a Deputy, but he *ought to make Returns in the Name of the Immediate Officer*. Per Doderidge J. Roll Rep. 274. in. pl. 49. Mich. 13 Jac. B. R.

8. The *Juſtices in Eyre* could not make a Deputy at Common Law; but now they may by Statute, per Coke Ch. J. Ibid.

9. Sir W. V. having an Eſtate in the Manor of D. was choſen Reeve to gather the Lord's Rents, he moved for a Writ of Privilege, as a *Captain of the Guards*, and ſo his perſonal ſervice requiſite in the Court of the King, but the Writ was denied, becauſe they all (but Twiſden) held that he *may make a Deputy Reeve*. Sid. 335. pl. 5 Hill. 19 and 20 Car. 2. B R. Sir Walter Vane's Caſe.

10. A *Deputy cannot make a Deputy*; becauſe it implies an Aſſignment of his whole Power, which he cannot aſſign over; But he may impower another to do a Particular Act. 1 Salk. 96. Paſch. 13. W. 3. B. R. per Holt Ch. J. in delivering the Opinion of the Court in the Caſe of Parker and Kett.

11. *Tenant for Life of the Bailiwick of the Savoy* from the Crown made a Leaſe thereof for a Year to an Under-Deputy and adjudged good; For by the Statute 5 E. 6. cap. 16. all Officers of Fee are excepted, and ſo are all Sub-Grants and Sub-Demiſes thereof. 3 Salk. 252. pl. 7.

12. A *Gaoler* may make a Deputy; Admitted. See 2 Ld. Raym. Rep. 1574. Mich. 4 Geo. 2. B. R. The King and Huggins.

For more of Deputy in General, See tit. **Officers** &c. Letter (I) to Letter (M) **Privilege**, and other proper Titles.

Deſcent.

(A) Deſcent by the Cuſtom of Gavelkind or Borough Engliſh.

Godb. 166. pl. 232. Rapley v. Chaplin S. C.——4 Le. 242. pl. 395. S. C.

1. **IF the Cuſtom of a Copyhold be, That the** eldeſt Daughter **ſhall have the Land, the** eldeſt Aunt ſhall not **have it by the Cuſtom, for ſhe is not within the Cuſtom. Paſch.** 8 **Jac. B.** *Ratcliffe and Chapman*, **per Curiam.**

Godb. 166. pl. 232. Rapley v. Chaplin S. P. where the Cuſtom was that the Youngeſt Son ſhall inherit. And Foſter ſaid, that ſo it was adjdged in one Dentons's Caſe.——4 Le 242. pl 395. S C. and Foſter J. ſaid, that it was ſo adjudged in one Totman's Caſe——2 Roll Rep. 366. Trin. 21 Jac. B. R. cites it as adjudged in Chapman's Caſe. Paſch. 8 Jac. that if the Middle Son purchaſes Lands in Borough-Engliſh, and dies without Iſſue, that the Eldeſt Brother ſhall have the Land and not the Youngeſt; for the Cuſtom goes to the Sons only and not to the Brothers, and ſhall be taken ſtrictly.——Cro. J. 198. pl. 27. Mich. 5 Jac. B. R. Bailey v. Stephens, S. P.

2. **The** youngeſt Brother **ſhall not have Borough Engliſh Land, for he is not within the Cuſtom. Paſch.** 8. **Ja. B.**

S. C. cited by Holt Ch. J. Wms's Rep. 68. Hill. 1703. in delivering the Opinion of the Court in the Caſe of Clement and Scudamore.

3. **If a Cuſtom be, that if a Man** dies without Heir Male, **that his** eldeſt Daughter ſhall have **the Land,** and **if he hath** no Daughter, **that the** eldeſt Siſter ſhall have **the Land,** and if **he hath** not a Siſter, **the** eldeſt Couſin; **but if he hath an Heir Male, that he ſhall have it before any of them, and the Tenant of the Land** hath ſeveral Daughters, **but no Heir Male, and the** eldeſt Daughter dies in the Life of the Tenant **of the Land,** having Iſſue a Daughter, **this Grandchild is within the Cuſtom, and ſhall have the Land by Deſcent upon the Death of the Grandfather. Mich.** 10 **Jac. B.** 21. **b. between** *Godfrey and Bullock*, **per Curiam.**

And ſays, that by the Common-Law the Eldeſt Daughter has not the Preference before the reſt, but all inherit equally; yet Cuſtom may give the Inheritance to the Eldeſt Daughter, and then her Iſſue ſhall take it in Jure Repreſentationis; And this is as ſtrong as ſtrong as a Deſcent in Borough-Engliſh.

4. By Cuſtom when *one Brother dies without Iſſue* all the other Brothers may inherit Gavelkind Lands. Co. Litt. 140. a. b. cites 23 Aſſ. 21.

5. There is a *ſpecial Kind of Borough Engliſh Land; as it ſhalll deſcend to the Younger Son if he be not of the Half-blood, but if he be, then to the Eldeſt.* Co. Litt. b. cites 32 E. 3. Age. 81.

6. The Father being ſeiſed in Fee of Borough-Engliſh after the Stat. of 27 H. 8. made a *Feoffment* in Fee *to the Uſe of himſelf and the Heirs Males of his body according to the Courſe of the Common Law*, and afterwards died ſeized, leavIng IſſIue two Sons; It ſeemed to all the Board in Serjeants Inn, that the Youngeſt Son ſhall have the Lands by Deſcent, by Virtue of the Cuſtom, notwithſtanding thoſe Words. Dyer 179. b. pl. 45. Paſch. 2 Eliz. Anon.

7. Where a *Feoffment* is made of *Borough-Engliſh* Lands *upon a Condition* to be performed, which was not done, the *Heir at Common Law ſhall take the Advantage of the Non-Performance* of ſuch Condition, *but the youngeſt Son ſhall be entituled to all Actions in Right of the Land, As* to a Writ of *Error* to reverſe a Judgment, by which the Lands are affected, or *Attaint* &c. Nelſ. Ab. 396. pl. 2. cites Mich. 20 Eliz.

This is taken from Hughes's Abr. tit. Cuſtoms, 546. cap. 4. pl. 31. which cites it as adjudged

8. The Father havinſt the *Impropriate Tithes ariſing out of the Manor of W. which is Borough-Engliſh*, had two Sons, the Queſtion was, whſch of the Sons ſhould have the Tithes; Adjudged that the Eldeſt Son ſhall have them, becauſe Tithes do *not ariſe naturally from the Land*, but by the Labour and Induſtry of Man; *beſides, of Common Right* Tithes *are not Inheritances deſcendable to an Heir*, but come in Succeſſion from one Clergyman to another; it is true, by the *Statute of Diſſolution* of Monaſteries they are made deſcendable to Heirs, *but that being within Time of Memory the Cuſtom of Borough-Engliſh will not prevail in ſuch Caſe. Nelſ. Ab. 397. pl. 6. Mich. 10 Jac.

This is taken from Hughes's Abr. tit. Cuſtoms 546. cap. 4. pl. 30. cites it as the Opinion of the Court. * This laſt Part is not in Hughes.

9. If a Man have Iſſue two Sons by ſeveral Venters and having Lands holden in Socage in the Nature of Borough-Engliſh dies, the Younger Brother being within the Age of fourteen Years, the Elder Brother of the Half-blood ſhall not have the Cuſtody of the Land, becauſe by Poſſibility the Elder may inherit the Land; for if the Youngeſt dies without Iſſue, and and the Land deſcend to an Uncle, the Elder Brother of the Half-blood may be Heir unto him. Co. Litt. 88. b. (m)

10. If the *Youngeſt Son* makes his Title to Land in Borough-Engliſh he *muſt plead that Time out of Mind the Cuſtom* of the ſaid Manor *has been, that when* or at what Time ſoever *a Copyholder dies ſeiſed of any Copyhold Lands in the ſame Manor having divers Sons*, that *the ſame has uſed Jure Hæreditario to deſcend unto the Younger* Son &c. Calth. Reading 44.

11. A. ſeiſed of Gavelkind has three ſons, B. C. and D. D. dies, leaving a Daughter E. and then A dies. E. ſhall inherit D's. Part. 2 Ld. Raym. Rep. 1025 Marg. ſays it was ſo ruled in an Ejectment for Lands in Kent Mich. 8 Ann. Leonard v. the Earl of Suſſex.

Fol. 624.

See tit. Gavelkind (B) See tit Heir (F. 5.)

(B) [*Borough Engliſh*]

To Whom it ſhall deſcend.

Cro C 410. pl. 6. S. C. and the Court was divided accordingly. —Jo. 361. &c. S. C. and the Court wss vided and ſo no Judgment——S. C. cited by Holt Ch J. Wms's Rep. 67. in Caſe of Clement & Scudamore, Hill. 2 Ann. B. R. & Ibid. 69. he ſaid that if Jones's and and Croke's Opinions were to prevvail, it could not but occaſion Uncertainty and conſequently Confuſion. ——S. C. cited by Holt Ch. J. in delivering the Opinion of

1. IF A. be ſeiſed of Copyhold Lands in Fee of the Nature of Borough-Engliſh Land, and ſurrenders it into the Hands of the Lord, ea Intentione that he ſhould re-grant it to him and his Wife, and to the Heirs of himſelf, and the Lord re-grants it accordingly, and there is a Cuſtom, That if any Perſon be ſeiſed in Fee of any ſuch Cuſtomary Land, and dies ſo ſeiſed, that the Land ſhall deſcend after his Death Filio juniori hujuſmodi Tenentis cuſtomar' ſic obientis ſeiſiti ſecundum Naturam of Borough-Engliſh Land; and after A. having Iſſue three Sons, dies ſo ſeiſed, and after, ten Years after his Death, the youngeſt Son dies in the Life of his Wife without Iſſue, it ſeems the Eldeſt Son ſhall have this Land as Heir to the Youngeſt, and not the Middle Son, for the Cuſtom cannot extend to a Collateral Deſcent, ſcilicet, to direct the Deſcent between Brothers, for this is out of the Cuſtom, and the Cuſtom was once ſatisfied by the Deſcent to the Youngeſt, and the Cuſtom fixed the Land in the Youngeſt, and there is an End of the Cuſtom; and when the Cuſtom fails, the Common Law ſhall guide the Deſcent; and by this Special Cuſtom, this Son, which was the Youngeſt at the Time of the Death of his Father, ought to have the Land, and not any other who ſhould come to be the Younger after. Tr. 11 Car. B. R. between *Reeve and Malſter*, it was argued by the Court, and Brampſton and Barkly inclined, that the Middle ſhould have the Land, and Jones and Croke e contra. But they all agreed, if this had not been Cuſtomary Land, that the Eldeſt would have it as Heir to the Father, inaſmuch as this was a Reverſion expectant upon an Eſtate for Life, and no actual Seiſin in the Youngeſt; And they differed only in this, whether the Cuſtom ſhould guide in the Deſcent in the ſame Manner as in the Courſe of a Deſcent at Common Law. And Croke and Jones held, that upon this Special Cuſtom, if the Copyholder died ſeiſed, having a Son, and his Wife enſeint of another Son, who is born after, that he ſhould not have the Land; but Brampſton and Berkly e contra. Intratur, Hill. 9 Car. Rot. 583.

the Court in the ſaid Caſe of Clement and Scudamore 2 Ld. Raym. Rep. 1026.— 1 Salk. 244. Holt Ch. J. inclined againſt the Opinion of Croke in the Caſe of Reeve v. Malſter.——6 Mod. 122. Holt Ch. J. approved of the Opinions of Berkley and Brampſtone in this Caſe; for he ſaid, if the other Opinion had prevailed it would beget Abundance of Confuſion, whereas following the other would ſettle Things upon a laſting Foundation.

2. If the Cuſtom be, that the Youngeſt Son ſhall inherit, and a Man has Iſſue two Sons, and the Eldeſt has Iſſue two Sons, and dies, and after the Lands deſcend to the Youngeſt Son, who dies without Iſſue, the Eldeſt Son of the Eldeſt Brother ſhall have the Land, becauſe the Cuſtom holds not in the Tranſverſal Line, but only in the Lineal Deſcent. M. 24 & 25 El. at Hertford Term, reſolved per Curiam, cited M. 10 Ja. B.

D. 179 b pl. 45. Paſch. 2 Eliz. S. C & S. P. by all the Board at

3. A. ſeiſed in Fee of Land in Borough-Engliſh, makes a *Feoffment to the Uſe of himſelf, and the Heirs Males of his Body, according to the Courſe of the Common Law*; theſe Words, *according to the Courſe of the Common Law, are void*; for Cuſtoms which go with the Land, as this is

and

and Gavelkind, and ſuch like Cuſtoms, which fix and order the Deſcents of Inheritances, can be altered only by Parliament. By Catlin, Dyer, Sanders, Whiddam, Browne, and Bendlowes. Jenk. 220. pl. 70. Serjeant's Inn.

4. Reſolved, That where Land in Borough-Engliſh deſcends to the *youngeſt Son*, and he *dies without Iſſue*, it *ſhall not go to the younger Brother without a ſpecial* and particular *Cuſtom*. Cro. J. 198. pl. 27. Mich. 5 Jac. B. R. Bayly v. Stevens.

5. If the *youngeſt Son* in Borough-Engliſh *dies*, the *middle Brother* ſhall have the Land by the Cuſtom. Per Williams J. 1 Bulſt. 93. Mich. 8 Jac. in Caſe of Davis v. Hales.

6. In Treſpaſs done in Lands within the Dutchy of Cornwall, which were Borough-Engliſh where the *Cuſtom* was, *that if there were an Eſtate in Fee* in thoſe Lands, that *they ſhall go to the younger Son, according to the Cuſtom*; *but if in Tail*, they ſhould deſcend *to the Heir at Common Law*; and it was moved, that the Cuſtom was not good, becauſe it cannot be at one Time Cuſtomary, and go according to the Cuſtom, and at another Guildable. The whole Court (Crooke only being abſent) held, that the Cuſtom was good. Mar. 54. pl. 82. Mich. 15 Car. Chapman v. Chapman.

7. Twiſden J. denied the Opinion of Lambert, That if the *King purchaſes Gavelkind Lands*, that it ſhould go to all his Sons; For Lambert had it out of Plowden, 247. a. from Southcote's Opinion, and he from 35 H. 6. 28. a. and Mallet and Foſter were of the ſame Opinion. Raym. 77. Paſch. 15 Car. 2. B. R. in Caſe of Wiſeman v. Cotton.

8. The Copyhold Lands of every Tenant dying ſeiſed, were by the Cuſtom of the Manor deſcendable to the youngeſt Son, and a *Surrender* was made *to the Uſe of B. and his Heirs, who died before Admittance*; It was agreed, if B. had been admitted, the youngeſt Son, after his Death, ſhould have inherited, but in regard B. died before Admittance, the Queſtion was between the eldeſt and youngeſt Son of B. who ſhould have the Land? and adjudged, that in this Caſe, the *eldeſt Son ſhould have the Land*, becauſe of the Straitneſs of the Cuſtom, and *there never having being any Seiſin in the Anceſtor*; but by my Report it would be *otherwiſe*, *had* it been alleged, that the Lands were *in the Nature of Borough-Engliſh*, which it was not, *but only ſet forth as a particular Cuſtom*; for the Law takes Notice of the Cuſtom of Borough-Engliſh, but not of this Special Cuſtom; which is likewiſe the Reaſon, why in pleading that Lands are of the Nature of Borough-Engliſh, you need not ſet forth the Nature of the Cuſtom Specially. Wms's Rep. 66. cited by Holt Ch. J. as about 15 & 16 Car. 2. C. B. Hale's Caſe. Ibid. The Reporter ſays that this ſeems to be the ſame Caſe that is cited in 2 Keb. 158, 159. by the Name of Pain v. Herbert —— S. C. cited accordingly 2 Ld. Raym. Rep 1025, 1026. —— 1 Salk 243. S C. cited by Holt Ch. J. as the Caſe of Pain v. Barr.

9. In Special Verdict in Ejectment in N. the Caſe was, a *Copyholder in Fee* held of the Manor of T. *had Iſſue two Daughters*, and died; that *the Cuſtom* of that Manor *was, that the eldeſt Daughter ſhall inherit the Whole for her Life, and after her Death, the next Heir Male to the Father, who can make a Deſcent by Males, ſhall have the Lands to him and his Heirs, and if there is no ſuch Heir Male, then they ſhall eſcheat to the Lord*; after the Death of this Copyholder, his *Widow entred, having her Widow's Eſtate, and in her Life the eldeſt Daughter died*, and *then the Widow died*; and the Queſtion was, Whether the ſecond Daughter ſhould have the Land, or it ſhould eſcheat to the Lord? It was argued, that if ſuch a Cuſtom had been annexed to Lands in Fee at Common Law, it had been void, becauſe a Fee Simple can never eſcheat as long as there are Heirs to inherit it; but this Eſtate being created by Cuſtom, may be modified by Cuſtom, not only as to the Enjoying, but to the Extent of it; and though ſuch a General Cuſtom ſhall not be Lev. 172. S C. adjudged that the Cuſtom was good, and that the 2d Daughter ſhould have the Land for her Life within the Cuſtom.

good, yet in this Caſe it may be good ratione loci, becauſe this Manor borders on Scotland, and the Scots in former Times uſually made Invaſions, and therefore it was ſafe for the Lords there, to provide themſelves of ſuch Tenants as might defend their Poſſeſſions, viz. Men and not Women. After ſeveral Arguments this was adjudged a good Cuſtom, and that the Daughter was within this Cuſtom for the eldeſt Daughter in this Caſe, ſhall not be only Primogenita Filia, but the eldeſt at the Death of her Mother, who derived her Eſtate from her Husband, by the Cuſtom. Sid. 267. pl. 18. Trin. 17 Car. 2. B. R. Newton v. Shaſtoe.

See tit. Heir (G 5) pl. 7. that it was adjudged a deſcendable Freehold.

10. Land of the Nature of Borough-Engliſh is *granted to A. and his Heirs for three Lives*; *A. dies.* The Queſtion was, whether the eldeſt Son or the youngeſt Son ſhall have it? and the Court all inclined that the youngeſt ſhould have it, for he is in by Deſcent. And he is not in as a Perſon deſigned by Deſcription, for then an Executor might have it; but that it is held, that if it *be granted to a Man and his Executors*, the *Executor ſhall not have it*; and Hale ſaid, the Reaſon of that was, becauſe the Law will not ſuffer a Freehold to run out of its Chanel. Adjurnatur. Freem. Rep. 395. pl. 513. Trin. 1675. Barkſdale v. Dowdſwell.

11. The *Law takes Notice of* Borough-Engliſh and Gavelkind Cuſtoms. 6 Mod. 121. in Caſe of Clement v. Scudamore.

2 Ld. Raym. Rep. 1024. S. C. in totidem Verbis. — 1 Salk 243. pl. 4. S. C. held accordingly. — 6 Mod. 120. S. C. adjudged for the Daughter.

12. One ſeiſed of a Copyhold in Fee in Nature of *Borough-Engliſh*, has *five Sons*, the *youngeſt dies in the Life of the Father*, *leaving Iſſue a Daughter*, and then the *Father dies*; the youngeſt Son's Daughter is inheritable. Holt Ch. J. in delivering the Opinion of the Court, ſaid, that wherever this Cuſtom has obtained, the youngeſt Son is there placed in the Room of the Eldeſt, who inherits by the Common Law; and there is no Difference in the Courſe of Deſcents, but that the Cuſtom prefers the youngeſt Son, and the Common Law the Eldeſt; and therefore, as by the Common Law, the Iſſue of the eldeſt Son, Female as well as Male, de Jure Repreſentatonis, inherit before the other Brothers, ſo by the ſame Reaſon, when this Cuſtom has transferred the Right of Deſcent, from the eldeſt to the youngeſt Son, it ſhall alſo by the like Repreſentation, carry it to the Daughter of the youngeſt Son; and there is no Ground to make any Difference betwixt a Deſcent by this Cuſtom, and by the Common Law. Wms's Rep. 63, 64. Hill. 1703. Clements v. Scudamore.

13. A *Leaſe* was made *to a Man and his Heirs*, *during three Lives of Lands in Borough Engliſh*, the youngeſt Son ſhould inherit that deſcendible Freehold, though it were *a new created Eſtate*; becauſe the Cuſtom was ſo annexed to the Land, as to affect that Eſtate, cited by Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Ann. as adjudg'd in B. R. in one Townſend's Caſe.

14. So if a *Rent be granted out of* Lands of the Nature of *Gavelkind*, *or Borough Engliſh*, *to a Man and his Heirs*, it ſhall deſcend to the Youngeſt, or all the Sons; cited per Holt Ch. J. 2 Ld. Raym. Rep. 1028. Hill. 2 Ann. as adjudged in Townſend's Caſe.

15. If Lands of the Nature of *Borough-Engliſh*, *or Gavelkind*, *are ſettled to certain Uſes*, *as to all but the Reverſion in Fee*, but the Reverſion in Fee is not ſettled, this *Reverſion*, *as Part of the old Eſtate*, *ſhall deſcend in Gavelkind*, *and Borough-Engliſh*, *as before*; Per Ld. Chancellor and the Judges Aſſiſtants. 3 Wms's Rep. 62, 63. Trin. 1730. Obiter, in the Caſe of Cheſter v. Cheſter.

(C) Baſtard

(B. 2) Ancient Manner of Deſcent.

1. BY the Law uſed in England *before*, and at the *Time of the Conqueſt*, *all the Deſcendants* of a Perſon dying Inteſtate had Preference *not only in Perſonal*, *but alſo in Real Eſtates*; for if a Man had died having three Sons and a Daughter, they all equally inherited his Real Eſtate; and this appears in Seld. Eadm. 184. Lamb. Saxon Law 66. Siquis inteſtat' deceſſerit liberi ejus hæreditatem æqualiter dividunto. But *after the Conqueſt*, the Kingdom and Conſtitution were to be new modelled; and this Alteration was made in the *Time of Henry* 1. and then *Daughters were excluded* if there were Males, and it was by the 36th Law of H. 1. See Lamb. 202, 203. and then the *Males did inherit all alike*, eſpecially all the Common Socage Men. But even then if one had died without Iſſue, and had a Father or Mother, the *Land ſhould not go to any Collateral*, *but to the Father or Mother*; and this appears by the Law of H. 1. Lamb. ubi ſupra. Siquis ſine liberis deceſſerit Pater aut Mater in hæreditatem ſuccedat vel Frater aut Soror, ſi Pater & Mater deſit; ſo the Collateral was not to come in but upon Failure of Father and Mother. And where 1 Inſt. 11. a. this is taken Notice of as an exploded Opinion; But Coke had not ſeen the Laws of H. 1. then, and the Red Book in the Chequer, that he contradicts, is very ancient, and of great Authority in Law. 12 Mod. 623. Hill. 13 W. 3. B. R. in Caſe of Blackborough v. Davis.

2. *But* this Law did not continue long, but was *altered*, *between the Reigns of H* 1 *and H.* 2. *and* the *Father and Mother altogether excluded*, and then the Law came to be adjudged as it is to this Day, that the Land ſhould not aſcend to Father or Mother, but rather go to Collaterals; and this appears by Glanvill, Lib. 7. 1, 2, 3, 4. C. — But this Alteration was only as to Real Eſtates; and Perſonal Eſtates were left as they were. 12 Mod. 624. in Caſe of Blackborough v. Davis.

3. The *Feudal Succeſſion came in this Manner*; The Lords gave Lands unto ſuch Perſons as behaved themſelves well in the War, for their Lives only; ſometimes they alſo married their Daughters to them. Then by their Feudal Donations, they limited the Lands to go not only to the Feudary himſelf, but alſo to the Iſſue of that Marriage; and this brought in the Notion of Succeſſion among the Northern Nations that invaded the Roman Empire. The Lands therefore in the elder Times went to the immediate Deſcendants of ſuch Marriage, and originally to none elſe; and firſt they went to Males, as the moſt worthy of Blood, and moſt capable of doing the Services annexed to ſuch Donations; for want of Males it went to Females, as Deſcendants of the ſame Marriage. The Feud was united in the eldeſt Male, becauſe he was obliged to do the Duty in the Wars; and for every Knight's Fee, was to go out 40 Days with his Lord; ſo that the Feud did not divide among the Males becauſe the Duty could not be divided commodiouſly. Becauſe 2dly, the Males were to keep up the Grandeur of the Family, therefore the Inheritance was not ſhared nor broken. Hence it came to paſs, that among the Males the Eldeſt was preferred as the moſt worthy, ſince he was ſooneſt able to go to the Wars, and do the Duties of the Tenure. Gilb. Treat. of Ten. 9.

2 New Abr. 27. S. P. in totidem Verbis.

(C) Baſtard

(C) Baſtard, Mulier.

[By what Dying ſeiſed the Mulier ſhall be bound.]

Br. Entre Congeable, pl. 75. cites S. C. —— Br Baſtardy pl. 34. cites S C. that

1. IF a Baſtard enters after the Death of the Father, and continues ſeiſed for an Year, and after aliens to another, and the Alienee dies ſeiſed without any Interruption, yet this Dying ſeiſed of the Alienee ſhall not bind the Right of the Mulier, for this is not within the Maxim. 36 Aſſ. 2. adjudged.

ſome held that the Feoffee of the Baſtard dying ſeiſed ſhould bar the Mulier, but Brooke ſays Quare inde ——Fitzh. Baſtardy, pl 17 cites S. C. —— Br. Diſcent, pl. 29 cites S C. and ſays it ſeems that this is out of the Maxim.

Br. Entre Congeable pl. 31. cites S. C. —— Br. Eſtoppel pl. 74 cites S. C.

2. If a Feme has Iſſue a *Daughter Baſtard and* another *Daughter Mulier* and dies, and *both enter* and make Purparty, and the *Baſtard dies ſeiſed of her Purparty* and her Heir enters, the Mulier cannot enter but has loſt the Land. Br. Diſcent. pl. 9. cites 21 E. 3. 34.

——Co. Litt. 244. a. S. P. —— 8 Rep. 101. b. S P. cites 2 E. 4. tit. Baſtardy 19. 21 E. 3 34 b. 30. Aſſ. 7.

3. Aſſize. Baſtard Eigue and Mulier Puiſne; the Baſtard entered, and the *Mulier made continual Claim*; the Baſtard died ſeiſed and his Heir entered and the Mulier entered, and the Heir ouſted him, and he brought Aſſize; And ſo ſee that continual Claim ſhall avoid the Deſcent of the Baſtard. Br. Baſtardy, pl 13. cites 14 H. 4. 9. 10.

4. *So* elſewhere of *Nonage* of the Mulier. Br. Baſtardy, pl. 13. cites S. C.

8 Rep. 101. b. S P. and ſays the Law is the ſame, if the Feme of the Father of the Baſtard Eigne and Mulier Puiſne be endowed yet the Iſſue of the Baſtard ſhall have the Reverſion thereof for the Reaſon abovementioned.

5. If a *Baſtard dies ſeiſed* and his *Iſſue endows the Wife of the Baſtard*, yet is not the Entry of the Mulier lawful upon the Tenant in Dower; for his Right was barred by the Deſcent. Co. Litt. 244. a.

6. If a Baſtard eigne *enters into the Land* and *has Iſſue and enters into Religion*, this Deſcent ſhall bar the Right of the Mulier. Co. Litt. 244. a.

7. If a Man has Iſſue ſuch Baſtard as is aforeſaid and dies, and the Baſtard enters and dies ſeiſed, and the Land deſcendeth to his Iſſue, the *collateral Heir of the Father is bound*, as well as where there be two Sons. Co. Litt. 244. a.

8 Rep. 101. b. S. P.

8. If a Man had Iſſue Baſtard-Eigne and Mulier-Puiſne and the *Baſtard in the Life of the Father has Iſſue and dies*, and then the *Father dies* ſeiſed, and the *Son of the Baſtard enters as Heir to his Grandfather* and dies ſeiſed, this Deſcent ſhall bind the Mulier. Co. Litt. 244. b.

9. If the *Baſtard dies ſeiſed without Iſſue* and the *Lord by Eſcheat enters*, this dying ſeiſed ſhall not bar the Mulier, becauſe there is no Deſcent. Co. Litt. 244. a.

10. And ſo it is to be underſtood albeit the Mulier after the Deceaſe of the Baſtard does enter before the Heir of the Baſtard, for the *Deſcent binds and not the Entry* of the Heir. Co. Litt. 244. a.

11. If the Baſtard enter and the *Mulier dies, his Wife Privement enſeint with a Son*, the *Baſtard has Iſſue and dies ſeiſed*, the *Son is born*, his Right is bound for ever. Co. Litt. 244. a.

8 Rep. 101. b. S P. for inaſmuch as the Father died in Poſſeſſion without Interruption the Mulier ſhall not allege againſt the Iſſue Baſtardy who is dead. in his Father

12. *But* if the *Baſtard dies ſeiſed, his Wife enſeint* with a Son, the *Mulier enters, the Son is born*, the Iſſue of the Baſtard is barred, for Littleton puts his Caſe, that there muſt not only be a Dying ſeiſed, but alſo a Deſcent to his Iſſue. Co. Litt. 244. a.

13. The Deſcent of *Services, Rents, Reverſions expectant* on Eſtates Tail, or for Life, whereupon Rents are reſerved &c ſhall bind the Right of the Mulier; But a Deſcent of theſe ſhall not drive them, that have Right, to an Action. Co. Litt. 244. a.

8 Rep. 101. a. b. S. P. and cites 14 E. 2. tit. Baſtardy pl. 26. but it ſhall not toll the Entry or Claim of the Diſſeiſee. —— Co Litt 15. a. ſays it is clear, that if the Father makes a Gift in Tail, or Leaſe for Life reſerving a Rent and dies, and the Baſtard receives the Rent and dies, this ſhall bar the Mulier.

14. Baſtards, or Children born out of Wedlock, were *totally excluded from all feudal Succeſſion though their Parents had afterwards intermarried*, becauſe the Lords would not be ſerved by any Perſons that had that Stain on their Legitimation, nor ſuffer ſuch Immoralities in their ſeveral Clans, though the Civil Law admitted them as adopted by the ſubſequent Marriage, and ſo the Canon Law, becauſe the Matrimony wiped off the precedent Guilt. Gilb. Treat. of Ten. 17.

15. The *Iſſue of the Baſtard eigne* not only *gains* a Right of Poſſeſſion but *a Right of Propriety by the Enjoyment of his Anceſtor*. Such Iſſue are held legitimated by the Civil Law, becauſe they are adopted by the Marriage of the Mother; ſo by the Canon Law becauſe, the Matrimonium ſubſequens tollit reatum preceden'; but by the Feudal Law they were excluded, becauſe ſuch a ſtain was thought to continue from the Crime of the Parents, that *they could not do the Feudal Service* with Honour to the Feudal Lords therefore they were anciently excluded, *niſi nominatim ad feuda legitimatum*. But by our Law, if they had an uninterrupted Enjoyment during Life, the Iſſue for ever inherited; for ſince there was no Objection to their Legitimation during their Lives, the perſonal Defect muſt die with their Perſon, inaſmuch as it were Inhumanity to throw Reproach on them after their Deceaſe; and having done the Feudal Duties without Objection, the Objection comes too late when then the perſonal Diſhonour ceaſes, and to the next Perſon in Poſſeſſion no Reproach can ariſe. Gilb. Treat. of Ten. 26. 27.

(D) *Who* ſhall be *bound by* the *Deſcent from the Baſtard.*

Baſtard and Mulier.

1. IF Tenant in Tail hath Iſſue Baſtard-Eigne and Mulier-Puiſne, and dies, and the Baſtard enters, and continues peaceably for his Life, and dies, and this deſcends to his Iſſue, this ſhall bind the Mulier, though this be an Eſtate Tail. 39 E. 3. 38. b. admitted.

Br. Diſcent pl. 16. cites S. C.

Fol. 625.

2. But it ſeems the Iſſue of the Mulier ſhall not be bound by ſuch Deſcent, for then (*) this ſhould be a Bar of the Tail by the Act of his Father, which is againſt the Statute.

For it ſeems that ſuch *Deſcent of the Baſtard is no Bar, but againſt the Mulier and his Heirs,* who are privy by the Maxim, and *not to Strangers.*

3. If there be Tenant in Tail, the Remainder over to another, and the Tenant in Tail dies, having Iſſue Baſtard-Eigne and Mulier-Puiſne, and the Baſtard enters, and dies ſeiſed, having Iſſue, the Deſcent from the Baſtard ſhall not bind the Right of him in Remainder, but he ſhall have his Action; for the Continuance of the Poſſeſſion by the Baſtard ſhall not be prejudicial to him. 39 E. 3. 38. b.

And it ſeems that ſuch Deſcent *ſhall not bind the Iſſue of the Mulier*, if he had Iſſue, becauſe of the Tail, and this by *the Statute de Donis* Conditionalibus in Tail. Br. Deſcent, pl. 16 cites 39 E. 3. 38.

See (C) pl. 1. and the Notes there.

4. If the Baſtard dies ſeiſed, the Mulier being within Age, it ſhall bind him. Contra, Brooke Deſcent 29.

——Br. Deſcent pl. 49 cites 5 E. 2. and Fitzh. tit. Verdict pl. 48. where the beſt Opinion is, that ſuch Dying ſeiſed ſhall not bind the Mulier, but Norton e contra, becauſe the Continuance makes the Baſtard Heir; but Brooke ſays, Quære inde ut hic ——S. P. and ſo likewiſe if the Mulier be beyond Sea, or in Priſon, or non Sanæ Memoriæ. 8 Rep. 100. b. 101. a ſays, that ſome hold the Mulier barred for ever, but others hold the contrary; but the Reporter ſays, it ſeems to him, that the beſt Opinion is, that the Mulier is barred for ever; becauſe Continuance of Poſſeſſion and dying ſeiſed peaceably and Deſcent to his Iſſue makes him Heir, and his Iſſue ſhall inherit as Heir, becauſe he was legitimated by the Law of Holy Church.——The Law prefers Legitimation before the Privilege of Infancy. Co. Litt. 244 a.——8 Rep. 101. a. S. P. by the Reporter.

5. If Baſtard-Eigne and Mulier-Puiſne are, and the *Baſtard* enters and *makes a Feoffment* and dies, this is no Bar to the Mulier; for the *Maxim is taken ſtrictly that he ſhall die ſeiſed.* Br. Deſcent, pl. 41. cites 6 E. 2. and Fitzh. Baſtardy 24.

S. P. if *without Interruption.* Br. Entre Cong pl. 68 cites 31 Aſſ. 18. & 22.

6. In Aſſiſe A. is ſeiſed *in Fee*, and has Iſſue T. Baſtard-Eigne, and J. Mulier-Puiſne, and dies; T. the *Baſtard enters, and dies ſeiſed*, and has Iſſue E. and the Mulier has Iſſue J. and dies; there if the Deſcent be *in the Time of the Mulier* who was *of full Age* (as in that Caſe it ſeems he was) then the Heir of the Mulier has no Remedy. Br. Deſcent, pl. 26. cites 31 Aſſ. 18. and 22.

Br. Entre congeable pl. 68. S. P. cites 31 Aſſ. 18 & 22.—— Br. Age pl 37. cites S. C.

7. *Nevertheleſs* it ſeems clear, that if the Deſcent of the Baſtard to his Heir had been *in the Time of the Heir of the Mulier*, who was Infant *during his Nonage*, then clearly the Entry of the Heir of the Mulier is lawful. Br. Deſcent, pl. 26.

8. If the *Baſtard enters* after the Death of the Father, and the *Mulier ouſts him*, and after the *Baſtard diſſeiſes the Mulier*, and hath Iſſue, and dieth ſeiſed, and the Iſſue enters, then the Mulier may have a Writ of Entry ſur Diſſeiſin againſt the Iſſue of the Baſtard, and ſhall recover the Land &c. And ſo you may ſee a Diverſity where ſuch Baſtard continues the Poſſeſſion all his Life without Interruption, and where the Mulier entreth and *interrupts the Poſſeſſion of ſuch Baſtard &c.* Lit. S 401.

9. This Deſcent *differs from other Deſcents*; For this Deſcent *bars the Right* of the Mulier, whereas other Deſcents take away the Entry only of him that Right hath, and leaves him to his Action; But here by the dying ſeiſed of the Baſtard, his Iſſue is become lawful Heir. Co. Lit. 244. a.

8 Rep. 101. b. S P. and ſays that with this 17 E. 3. 59. Fitzh. Abridgment tit. Baſtard 32. becauſe they other Title.

10. If a Man has Iſſue *two Daughters*, the *Eldeſt being a Baſtard, and they enter and occupy peaceably as Heirs*; now the Law in Favour of Legitimation, ſhall not adjudge the whole Poſſeſſion in the Mulier (who then had the only Right) but in both, ſo as *if the Baſtard has Iſſue and dies, her Iſſue ſhall inherit.* Co. Lit. 244. a.

——Co. Litt. 368. a. S. P. the ſole Poſſeſſion ſhall not be adjudged in the Mulier only both claim by one and the ſame Title, and not one by one Title, and the other by an-

11. If

11. If a Man has Iſſue a *Son*, being a *Baſtard-Eigne*, *and a Daughter*, and the *Daughter is married*, the *Father dies*, the *Son enters and dies ſeiſed*, this ſhall bar the Feme Covert. Co. Lit. 244. a.

(D. 2) What ſhall be an Interruption of the Poſſeſſion of Baſtard-Eigne.

1. IF the Mulier interrupts the Baſtard's Poſſeſſion, or a Stranger does it, and he agrees in the Baſtard's Life (as when a *Stranger enters to avoid a Fine, and within the five Years he that has Right aſſents)* in this Caſe the Re-entry of Baſtard, and his dying ſeiſed, bars not the Right of the Mulier; *but if the Baſtard recovers in Aſſize againſt the Mulier*, this avoids the Interruption of the Baſtard's Poſſeſſion by the Mulier's Entry. Hawk. Co. Lit. 330. Litt. S. 401. Co Litt. 245. a. —Gilb. Treat. of Ten. 27. ſays that if the Poſſeſſion be once once interrupted by the Mulier and the Baſtard re enters, this only gets the Poſſeſſion, and by ſuch Deſcent the Iſſue acquires only a Jus Poſſeſſionis.

2. If the *Mulier comes on the Land by Conſent of the Baſtard*, he ſhall not avoid his Poſſeſſion thereby; but if he cuts down a Tree, or *does any* other *Act which muſt be either a Treſpaſs or an Entry*, he thereby avoids the Baſtard's Poſſeſſion, for where an Act may be done lawfully, the Law will not adjudge it to be wrongful. Hawk. Co. Lit. 330. As if it be by Invitation to ſee his Houſe and Pictures &c. or to dine with him, or to hawk, hunt, or ſport with him &c. Co. Litt. 245. b.

3. If the *Baſtard enters*, and *the King ſeiſes for a ſuppoſed Contempt &c. of the Baſtard, and he dies, and his Iſſue is reſtored on Petition*, the Mulier is barred; for the Poſſeſſion of the King, when he has no good Right to ſeiſe, ſhall be judged to be the Poſſeſſion of him in whoſe Right he ſeiſed. But if after the Father's Death the *Mulier* be *found Heir of Knight Service Land, and within Age*, and *the King ſeiſes*, the Baſtard is foreclоſed for ever; and if the King ſeiſes for a Contempt of the Anceſtor, and the Iſſue of the Baſtard be reſtored on his Petition, for that the King ſeiſed without Cauſe, the Mulier is not barred. Hawk. Co. Lit. 330, 331. Co. Litt. 245 b.

(E) Heir. *What* Things *ſhall deſcend to the Heir or Executor.*

1. IF a Nobleman, Knight, or Eſquire be buried in a Church, and hath a Coat of Armour and Penons, with his Arms, and ſuch other Enſigns of Honour as belong to his Degree or Order put in the Church, or if a Grave-Stone or Tomb be laid or made &c. for a Monument of him; in this Caſe, though the Freehold of the Church be in the Parſon, and theſe are annexed to the Freehold, yet the Parſon or any other cannot take them or deface them, but he is ſubject to an Action to the Heir and his Heirs, in Honour and Memory Godb 199, 200. pl. 286. Garven v. Pym S. C. but the Principal Caſe is not the S. P. but Cook Ch. J. in that Caſe

cites 9 E. 4. 14. the Dame

mory of whoſe Anceſtor they were put there. Mich. 10 Ja. B. *Pym's* Caſe, per Curiam. Co. Lit. 18. b.

Wiche's Caſe, in which the S. P. was adjudg'd accordingly. ——— 3 Inſt. 202. cites Corven v. Pym. S. C. and Lady Wiche's Caſe. ——— Same Caſes cited per Cur. Cro. J. 367. Hill 12 Jac. for the Heir is inheritable to Arms as to Heir-Looms, cites 30 E. 3. 2. 39 E. 3. 14.

Godb. 200. pl. 286. S. P. cited by Coke Ch. J. to

2. And the Wife or Executors that firſt erected them, may in the ſaid Caſe have an Action againſt thoſe that defaced them in their Time. Co. Lit. 18. b.

have been adjudged 9 E. 4. 14. in Dame Wiche's Caſe. And he ſaid that he had ſeen a Judgment in 6 E. 6. That if Executors lay a Grave Stone upon the Teſtator in the Church, or ſet up his Coat Armour in the Church; if the Parſon or Vicar removes them or carries them away, they or the Heir may have the Action on the Caſe againſt the Parſon or Vicar ——— Mo. 878. pl 1232. Pym v. v. Gorwyn S. C. but not S P. but Coke Ch. J. cited the Lady Gray's Caſe, who put up the Arms and Helmet of her Husband in the Church at his Funeral, and in Treſpaſs brought by her againſt the Parſon for pulling them down, the Action was adjudged maintainable. ——— 12 Rep. 104 in Corven's Caſe S. C. Coke Ch J. cited Dame Wiche's Caſe. ——— 3 Inſt. 202 cites S. C. of Corvin v. Pym. and Lady Wiche's Caſe.

3. In ſome Places the Heir by the Cuſtom ſhall have the beſt Chattle of his Anceſtor, by the Name of an Heir-Loom. Co. Lit. 18. b.

(E. 2) What ſhall be ſaid a Deſcent by Relation &c.

1. WHERE the *Tenant by the Curteſy ſurrenders to the Heir*, and *he is impleaded by Writ of Entry*, his *Entry ſhall be ſuppoſed by his Mother*, and not by the Tenant of the Curteſy; for he is in by her, per Rolf, quod non negatur. Br. Enter en le pl. 26. cites 1 H. 6. 1.

2. If *Tenant in Tenant in Tail enfeoffs his Son and after diſſeiſes him* and the Son enters, he ſhall be adjudged in by the Feoffment and not by Deſcent, Per Tremayle. Br. Diſcent, pl. 39. cites 18. E. 4. 25.

3. *And* if the *Father and the Son diſſeiſes J. N.* and after the *Son releaſes to the Father* all his Right, and after the *Father dies*, the Son ſhall not be adjudged in by Deſcent but by Diſſeiſin, for he was *Party to the Wrong*. Per Brian Ch. J. Br. Diſcent, pl 39. cites 18 E. 4. 25.

4. *But* if the *Father diſſeiſes J. N. and* after *enfeoffs his Son*, *and* after *diſſeiſes the Son and dies*, the Son ſhall be adjudged in by Deſcent. Per Brian. Br. Diſcent, pl. 39. cites 18 E. 4. 25.

5. *Diſſeiſor*, Abator, or Intrudor *enfeoffs A. who dies ſeiſed*, and after *his Heir entered and enfeoffed the Diſſeiſor*, Abator or Intrudor, he ſhall be adjudged in by the Feoffment of the Heir againſt all except the Diſſeiſor and thoſe againſt whom he did the Wrong; and againſt them he ſhall be adjudged in as Abator, Diſſeiſor or Intrudor, as he was at firſt, as he was Party to the Wrong, Per Keeble. Br. Diſcent, pl. 33. cites 5 H. 7. 6.

6 *If the Diſſeiſor himſelf dies without Heir and the Lord enters by Eſcheat*, the Diſſeiſee may enter; for *there was no Deſcent*. Br. Diſcent, pl. 92. cites 9 H. 7. 24.

7. The Wife after the Death of her Baron *waving Jointure made after Marriage*, has ſuch *Relation* and Operation in the Law, that now upon the Matter the Baron was ab Initio ſole ſeiſed, and by Conſequence the Lands deſcend after his Deceaſe. 3 Rep. 28. a. Mich. 33 and 34 Eliz. B. R. Butler v. Baker.

(F) *What Perſons may be Heir* to another, and *to Whom.*

1. BAſtard-Brothers cannot be Heir one to another. 43 E. 3. 32. b.

2. If there be Father and Son, and the *Son makes Leaſe for Life and dies*, and the *Reverſion* deſcends to the Uncle and he dies, the Reverſion ſhall not deſcend to the Father but ſhall eſcheat; becauſe he muſt make himſelf Heir to the Son and not to the *Uncle* who had the Reverſion caſt upon him. Arg. Show. 246. in Caſe of Kellow and Rowden, cites 1 Inſt. 11. 5 Ed. 4. 7.

3. If a *Son purchaſes Lands in Fee-Simple* and *dies without Iſſue*, living his Father, the *Uncle ſhall have the Land* as Heir to the Son and *not the Father*; For Inheritances may lineally deſcend but not aſcend. But if in ſuch Caſe the Son dies without Iſſue and the Uncle enters and dies without Iſſue living the Father, the Father ſhall have the Land as Heir to the Uncle; becauſe he comes to it by Collateral Deſcent and not by Lineal Aſcent. Litt. S. 3.

3 Rep. 41 b. 42. a. S. P. for he, who claims any Hereditaments in Poſſeſſion as Heir, ought to make himſelf Heir to him, who was laſt actually ſeiſed.

4. *Ideots*, *Madmen*, *Lepers*, *Outlaws in Debt*, Treſpaſſes or the like, *Perſons excommunicated*, Men *attainted* in a Præmunire, or convicted of *Hereſy* may be Heirs. Co. Litt. 8. b.

(F. 2) Who, by Way of Preference, ſhall take as Heir.

1. IF there is Grandmother, Mother and Son, and the Mother has a Brother and the Grandmother has a Brother, and the Son purchaſes and dies without Iſſue, the *Grandmother's Brother* is Heir. D. 314. pl. 95. Trin. 14 Eliz. Cleer v. Brook. —Pl. C. 444. 451. a. Paſch. 15 Eliz. S. C. and S. P. agreed by all the Juſtices.

2. If an *Advowſon deſcends from the Son to the Uncle*, the Father ſhall not have it, if the *Uncle dies before he does or can preſent*; So of a Rent. Co. Litt. 11. b. ad finem.

3. It is an old and true Maxim in Law, that none ſhall inherit any Lands as Heir but only the *Blood of the firſt Purchaſor*, for Refert a quo fuit perquiſitum. Co. Litt. 12. a.

4. The next of the *Worthieſt Blood* ſhall ever inherit as the *Male*, *and all Deſcendants from him before the Female*, and the *Female of the Part of Father before the Male or Female of the Part of the Mother*, becauſe the Female of the Part of the Father is of the Worthieſt Blood; and ſo among the Male, the *the Eldeſt Brother and his Poſterity* ſhall inherit Lands in Fee Simple as Heir *before any Younger Brother or any deſcending from him.* Co. Litt. 14. a. in Principio.

5. By the *Ancient Cuſtom of Wales Females cannot inherit.* 4 Inſt. 241. cites a Charter to that Purpoſe.

6. None can be Heir to a Fee Simple by the Common Law but he that hath *Sanguinem Duplicatum*, the whole Blood both of the Father and the Mother; and therefore the half Blood is not inheritable by Deſcent. Co. Litt. 14. a. 84. b.

3 Rep. 41. Ratcliff's Caſe, Deficiente uno non poteſt eſſe Hæres.

2 Roll. Rep. 256. S. C.

7. Where a Man has ſeveral Daughters and he deviſes Land to a third Daughter, Remainder *Proximo Conſanguineo* of the Deviſor the Eldeſt Daughter is the next. Palm. 303. Mich. 20 Jac. B. R. Periman v. Pierce.

Hale's Hiſt. of the Com. Law 244. &c. S P.

8. If a *Son purchaſes and dies without Iſſue*, the Father, Grandfather, and Great Grandfather and ſo upward, *all the Male Line are dead* except Brother or Siſter; *But there is Great Grandmother and Grandmother*, and *each of theſe have a Brother*, the *Grandmother's Brother* here ſhall inherit the Son, becauſe he *is the next Heir to the Son on the Father's Part*, but *if the Father purchaſes and dies without Iſſue*, the *Great Grandmother's Brother is then Heir to him on his Father's Part*; But *if the Father dies having a Son and that Son dies without Iſſue*, the Lands here muſt go to *the next Heir of his Father on his Father's Part*, and that *is the Son's Great Grandmother's Brother*, and the Father's Mother's Brother is not to take, for the whole Line is ſpent; for here is the ſame Devolution and and Hereditary Succeſſion, as if the Father had died without Iſſue; *but if the Son enters, and is ſeiſed*, the *Lands devolve upon the Son's Grandmother's Brother (i. e.) the Father's Mother's Brother.* Hales de Succeſſ. 96. &c.

(G) [Who may be Heir]

By Matter ſubſequent.

2 Rell. Voucher (T) pl. 1. cites 21 E 3. 46. S P.

1. A Baſtard **may be Heir** againſt a Stranger **by Continuance.** 43 E. 3. 32.

——A Baſtard may be Heir by Continuance of Poſſeſſion. B Parol Demur &c. pl. 12. cites 21 E 3. 46. Per Thorp.——Co. Litt. 8. a. in Principio S. P.——See (C) pl. 1.

2. An Hermaphrodite, **that is as well Male as Female, ſhall be Heir either as Male or Female, according to the Sex which prevails. Co. Lit.** 8. [a. in Principio.]

3. **If an** Alien **be** made a Denizen, **the** Iſſue which he hath after **ſhall inherit him, but not the Iſſue that he has before. Co. Lit.** 8. [a. in Principio.]

See tit. Alien (F) per tot.

4. **If an** Alien hath Iſſue in England two Sons, **theſe Sons are Denizens, and yet the** one of them cannot be Heir to the other **of them, becauſe there never was any Inheritable Blood between the Father and them, and** where the Sons could by no Poſſibility be Heir to the Father, the one of them ſhall not be Heir to the other. **Co. Lit.** 8. [a. verſus Principium.]

4 Le. 5. pl. 21 S. C. accordingly.—Palm. 19. S. C. reſolved; for though there is no lawful Blood between the Sons and Father, yet upon the Rule put by Littleton, there is lawful Blood of the Part of the Mother.——Noy. 158. to 171. The King v. Boreſton and Adams S. C. argued very fully but no Judgment.——S. C. cited and affirmed by Doderidge and Haughton J. to have been reſolved in the Exchequer, 2 Roll, Rep. 93.——Cro. J. 539. pl. 7. S. C. cited as adjudged, that the Daughter ſhall inherit——Cro C. 543 pl. 8. cites S. C.——S. C cited Litt. Rep 28. as adjudged that he ſhould not be Heir to the Brother, becauſe the Bridge was broken by the Attainder of the Father.——2 Sid 25, 27 cites S C.——S. C. cited by Ld. Ch. B. Hale, Vent. 425. as ruled, that the Siſter ſhould inherit her Brother.

5. **If a Man** hath Iſſue two Sons, and **after** is attainted **of Treaſon or Felony, the** Sons may be Heirs one to the other, **for the Attainder of the Father corrupts the Lineal Blood, but not the Collateral Blood between the Brothers, which was veſted in them before the Attainder. Mich.** 40, 41 **El. in Scaccario,** *Hobby's* **Caſe; quod vide, Co. Lit.** 8.

6. But

6. But if a Man be attainted of Treaſon or Felony, and after hath Iſſue two Sons, in this Caſe they cannot be Heir one to the other, becauſe they never could be Heir to their Father, nor ever had any Inheritable Blood in them. Co. Lit. 8. Sid. 201. Paſch. 16 Car. 2. in the Exchequer Chamber in Caſe of Caſe of Collingwood v. Pace, it held contra, and ſays that ſo it appears in the Caſe of Boraſton and Adams, Nov 158, 159. and in the MS. and that for Authorities there is only the ſingle Opinion of Ld. Coke 1 Inſt. 8. a. in Hobbis's Caſe, which is againſt this Judgment, and ſays, that this is Confirmed by the Caſes of Godfrey v. Dixon, in Cro. J. 539. and by Foſter and Ramſey's Caſe, 3 Rep. 8. b. —See tit. Blood corrupted. (B)

7. He that is born deaf and dumb may be Heir to another. Co. Lit. 8. [a. verſus finem.] Fol. 626.

8. So he that is born deaf, dumb, and blind, may be Heir to another. Co. Lit. 8. [a. verſus finem.]

9. When the *Tenements given in Frankmarriage to one Daughter are put in Hotchpot between other Parties*, they are become in the ſame Courſe as other Tenements, of which the common Anceſtor died ſeiſed. Br. Mortdanceſtor, pl. 24. cites 10 Aſſ. 14.

10. The *youngeſt Son* enter'd after the Death of his Father, yet he cannot be Heir by Continuance of Poſſeſſion. Br. Parol demur &c. pl. 12. cites 21 E. 3. 46. Per Thorp.

11. One was Tenant by the Curteſy and the Heir within Age, and *Aſſiſe of Rent* was brought againſt them, and the *Tenant by the Curteſy ſurrender'd to the Heir pending the Writ, and died pending the Writ*; and per June he ſhall not be adjudg'd in by Deſcent as to the Plaintiff to abate the Writ, becauſe the taking of the Surrender is his own Act, and if the Tenant by his Curteſy had charg'd, the Heir ſhould hold charged during his Life. Per Rolf, if *Writ of Entry* be *brought againſt the Heir after the Surrender*, he ſhall be ſuppoſed in by his Mother, and not by the Thenant by the Curteſy. Br. Surrender, pl. 24. cites 1 H. 6. 1.

12. If a Man has Iſſue a *Son and a Daughter*, the *Son purchaſes* Land in Fee Simple, and dies without Iſſue, the Daughter ſhall inherit the Land; But if the Father has *afterwards Iſſue a Son*, this Son ſhall enter into the Land as Heir to his Brother, and if he has Iſſue a Daughter and no Son, ſhe ſhall be Coparcener with her Siſter. Co. Litt. 11. b. (s)

13. If the *Daughter conſents to a Raviſher*, and the *next Heir enters* and the *Daughter dies*, the Heir is now in by Deſcent; Per Jones. Palm. 405, in a Nota. Lat. 72. Paſch. 1 Car. B. R. Gulielm's Caſe; Per Jones. S. C.

(H) What ſhall be an *Impediment* of a Deſcent.

See tit' Blood corrupted. And tit' Alien.

1. If a Man hath Iſſue two Sons, and the Eldeſt is attainted of Felony, and dies in the Life of the Father, and after the Father dies ſeiſed of Lands, this ſhall deſcend to the ſecond Son, or to the Daughters of the Father, if he hath no Son; for the Attainder of the Eldeſt Son did not corrupt the Blood between the Blood between the Youngeſt Son and the Father. 46 Aſſ. 1. Curia. Co. Lit. 8. dubitatur. 27 E. 3. 77. b. All the Books cited here ſeem to be miſprinted, for I do not obſerve the the S. P. in any one of them nor in 46 Aſſ. pl. 2 cited by Mr. Danvers.——But if the Son attainted has a Son at the Death of the Grandfather the Land ſhould eſcheat. Br. Diſcent, pl. 22. cites 27 Aſſ. 11 ——D. 48. a. pl. 16. Mich. 32 H. 8. S. P. held accordingly in Caſe the Eldeſt Son had no Iſſue living, but if he had, the Land ſhould eſcheat and not go to the Younger Son, becauſe ſuch Iſſue would be inheritable by the

the Law had it not been for the Attainder——S. P. and ſame Diverſity by Berkley J. and Jones ſaid, that when he was Judge in C. B. it was ſo adjudged in Mackwilliams's Caſe, and ſo alſo in B. R. in Caſe of Croker v. Kelſey and afterwards affirmed in a Writ of Error. Cro. C. 435. Jo. 34. Arg. cites 20 E. 2. Fitzh. tit Deſcent [16] & D. 48. a. ——Hob. 334. in a Note at the End of Mackwilliams's Caſe cites D. 48. 8. S. P.

S. P. but in ſuch Caſe the Land ſhall eſcheat to the Lord as it ſeems there; but if he dies without Iſſue living the Father,

2. But if the Eldeſt **Son, being attainted of Felony,** ſurvives the Father, **he ſhall be an Impediment to his Brother or next Heir to have the Land by Deſcent from the Father.** 26 Aſſ. 1. [2.] **adjudged,** 1 H. 4. **Rotulo Parliamenti, Numero** 132. **a Petition was preferred, That where the Eldeſt Son, during the Life of his Father, is attainted, the next Brother might notwithſtanding ſucceed as Heir to his Father &c. To which it was anſwered by the King, Let the Common Law run. Co. Lit.** 8.

then another Heir of the Father ſhall have it, who is next of Kin to the Son attainted, provided that he is not his Son. Br. Diſcent, pl. 22. cites 27. Aſſ. 11. ——An attainted Perſon cannot be an Heir, nor have an Heir, unleſs his Blood be reſtored by Act of Parliament; neither can his Children, if he has any, be Heirs to any other Anceſtor. Co. Litt. 291. b.——3 Rep. 41. a. They cannot inherit either Father or Mother; for Want of Sanguinem Duplicatum. ——Hob 334. in a Note at the End of Firzwilliams's Caſe cites D. 48. 32 H. 8. S. P.——Jo. 34 Arg cites S C. and Fitzh. Diſcent [16] 20 E. 2. S. P. ——Cro. C. 435. S. P. by Berkley and Jones J.

* See tit. Blood corrupted (B) pl. 2. and the Notes there,

But ſee Lev 60. Sid. 200, 201. Vent 422 per Hale Ch J. e contra.

3. **If a Man hath** Iſſue an Eldeſt Son, born out of the Allegiance of the King, and after **hath Iſſue** a Younger Son born in the Realm, **the** Youngeſt Son ſhall be Heir to the Father, **and the Eldeſt ſhall not be any Impediment to him, becauſe the Eldeſt never had any Inheritable Blood in him. Co. Lit.** 8.

4. Treſpaſs of a Cloſe broken. Priſot intitled the Defendant becauſe the Defendant was born Ultra mare, and that he was ſeiſed of eight Acres of Land, where &c. in Fee, and in the Time of H. 4 *went beyond Sea without Licence of the King out of the Allegiance of the King, and there eſpouſed B. who had Iſſue there the Plaintiff, and there remained all their Lives without Licence, and died ſole without any other Iſſue of his Body,* and the Land deſcended to W. as Coſin and Heir, and ſhewed How Coſin &c. who entered and enfeoffed B. Que Eſtate the Defendant has, and gave Colour to the Plaintiff, Judgment &c. Newton ſaid, if he who was born beyond Sea ſurvived his Father, there he cannor be Heir, nor any other of the Blood of him who died ſeiſed; for there is a Meſne Impediment. Br. Deſcent, pl. 12. cites 22 H. 6. 38.

5. A Man has *Iſſue two Sons,* the *Eldeſt is attainted* &c. *and dies*; the *Father dies* ſeiſed, the Youngeſt Son ſhall inherit, otherwiſe if the Eldeſt had had any Iſſue. Dy. 48. a. pl. 16. Trin. 32 H. 8. Anon.

6. There is a *Diverſity* between a *Diſability Perſonal and Temporary* and Diſability *Abſolute and Perpetual*; *As* where one is *attainted of Treaſon and Felony,* this is an Abſolute and Perpetual Diſability by Corruption of Blood for any of his Poſterity to claim any Hereditament in Fee Simple, or as Heir to him or to any other Paramount him; But when one is *diſabled by Parliament (without any Atiainder) to claim the Dignity for his Life,* this is a Perſonal Diſability for his Life only, and his Heir after his Death may claim as Heir to him or to any Anceſtors Paramount him; Reſolved. 11. Rep. 1. b. 39 Eliz. in Ld. Delaware's Caſe.

7. If a Man be *ſeiſed of* Lands *in Fee,* and *has Iſſue two Daughters,* and *one* of the Daughters *is attainted of Felony,* the *Father dies, both Daughiers being alive*; the one Moiety ſhall deſcend to the one Daughter and the other Moiety ſhall eſcheat. Co. Litt. 163. b.

8 But

8. But if a Man make a *Leaſe for Life*, the *Remainder to the right Heirs of A. being dead, who has Iſſue two Daughters, whereof* the *one is attainted of Felony*; in this Caſe ſome have ſaid that the Remainder is not good for a Moiety, but void for the Whole, for that both the Daughters ſhould have been (as Littleton ſays) but one Heir. Co. Litt. 163. b

9. If a *Son has a Son who purchaſes Lands*, and the *Mother of the Son is attainted*, and he *dies without Iſſue*, the Uncle on the Part of the Father ſhall inherit, for he does not convey nor make a Deſcent by the Mother. Arg. Noy. 159. Trin. 4. Car. in the Exchequer in Caſe of the King v. Boreſton and Adams.

10. So if the *Iſſue of a Baſtard purchaſes Lands* and *dies without Iſſue*, although that Land cannot deſcend to any Heir on the Part of the Father, yet the Heir of the Part of the Mother may; So if the Baſtard was attainted. For the Heirs of the Part of the Mother makes not any Conveyance by the Baſtard. Arg. Noy. 159. in the Exchequer in the Caſe of the King v. Boreſton and Adams.

11. The *Husband and and Wife have ſeveral Inheritances* and they have *Iſſue one Son, and die*, this Son ſupplieth the Place of ſeveral Heirs and makes his Claim and Deſcent to Land ſeverally, viz. to the Lands of the Father as Son and Heir to the Father, and ſhall not intitle himſelf to that Land as Son to his Mother, nor name his Mother, and to the Land of the Mother as Son and Heir to the Mother, and never mention the Father; and yet it is true that the Son, as he had a Father, ſo had he a Mother, and from them both does derive his Blood and Iſſue; yet will it not follow, that *by the Attainder of the Father the Son ſhall be diſabled to inherit the Mother; nor by the Attainder of the Mother be diſabled to inherit the Father*; for the Son claimeth not to be Heir to both by the Intire Blood he receiveth from both, but ſeverally to be Heir to the Father by the Blood from the Father, and Heir to the Mother by the Blood of the Mother. There is *ſanguis naturalis* and ſanguis *hæreditarius*. The Son as touching his natural Blood has it proceeding both from the Father and the Mother, jointly, intirely and inſeparably; But as touching his hereditary Blood that is deſcended unto him, he has that dividedly and ſeverally, viz. from his Father for his Inheritance, and from his Mother for her Inheritance; Therefore the Father's Attainder which does not corrupt Sanguinem, but jus Sanguinis, is not the natural but the hereditary Blood, may be an Impediment that the Son cannot be his Heir becauſe between them the hereditary Blood is corrupted, but it can be no Impediment to the Son to inherit the Mother's Land, for that hereditary Blood between the Mother and the Son is not corrupted by the Attainder of the Father. Arg. Noy. 168. in Caſe of the King v. Boreſton and Adams.

12. If the *Father is attainted of Felony in the Life of the Grandfather* and afterwards the *Grandfather dies*, the Land ſhall eſcheat; for the Son ought to make his Deſcent by him, which cannot be; Per Berkley, J. Cro. C. 435. Hill. 11. Car. B. R.

13. Without an *actual Entry of him in Reverſion* upon the Poſſeſſion no Deſcent can be caſt, per Cur. held in Evidence. 2. Keb. 139. pl. 74. Mich. 13. Car. 2. B. R. in Caſe of Burton v. Laſſel.

(I) In what Caſes a Man ſhall be ſaid to be *in by Deſcent*, *or* by *Purchaſe*.

Hob. 30. S. P. per Hobart Ch. J. cites 4 H. 6. —— Vaugh 271. S. P. by by Vaughan Ch. J. and cites Cro E. 833. pl. 2. Trin. 41 [43] Eliz. Hainſworth v. Pretty.

1. IF a Man deviſes Lands to one that is his Heir, this is void, and it ſhall operate by Deſcent. Hobert's Reports 42. b. *Counden's* Caſe, for where there is not any Alteration of the Eſtate by the Deviſe of the Eſtate which the Law gives to him, he ſhall be in by Deſcent, which by Intendment is more for his Advantage, as to take away an Entry, and for a Warranty, and is the more ancient Title.

Sty. 148, 149. S. C adjudged for the Plaintiff

2. If a Man deviſes Lands to his Wife for Life, the Remainder to J. S. who is his next Heir in Fee, this is a void Deviſe to J. S. and he ſhall be in after the Death of the Deviſor by Deſcent, for the Alteration of the Eſtate in Reverſion, which the Law gives him, to a Remainder, which is given by the Deviſe, is not any Alteration of the Eſtate in Point of Eſtate, and therefore he ſhall be ſaid to be in by Deſcent, which is the more ancient and better Eſtate, and not by Purchaſe by way of Remainder. Mich. 24 Car. B. R. between *Preſton and Holmes*, adjudged upon a Special Verdict. Intratur. Tr. 23 Car. Rot. 252.

2 Le. 11. pl. 16. Hill. 20 Eliz. C. B. Hinde v. Lyon, S. P. held accordingly, and ſeems to be S. C. notwithſtanding the Difference of the Years.— 3 Le. 64. pl. 96. S. C. in totidem Verbis ——Ibid. 70. pl 107. S. C. in totidem Verbis.——S. C. cited by Hobart Ch. J. Hob. 30. —— S. C. cited 2 Roll Rep. 217. Arg.

3. If a Man deviſes Lands held by Knight's Service to his Wife till J. S. who is his next Heir, comes to the Age of 24 Years, and at that Age he deviſes all to the ſaid J. S. in Fee, and when he comes to the ſaid Age of 24 Years, that his Wife ſhall have the third Part for her Life, and if J. S. dies before the Age of 24 Years, then the Land ſhall remain to the Wife during her Life, and after her Deceaſe, (if J. S. have no Iſſue) the Remainder to his Daughter in Tail, the Remainder to the right Heirs of the Deviſor; the Wife dies after the Heir comes to the Age of 24 Years; In this Caſe no Intail is made by the Will, but J. S. ſhall have it by Deſcent in Fee. D. 2 3. Ma. 124. 38. adjudged.

Sty. 249. Bawſy v. Lowdall S. C adjornatur.—— Ibid. 273. S. C. and the former Judgment in C. B. reverſed. See tit. Parols (H) pl. 4 S. C. and the Notes there

*Fol 627.

4. If A. be ſeiſed of a Copyhold in Fee, and ſurrenders it to the Uſe of his Will, and after by his Will deviſes it to B. his Couſin, for his Life, and after his Deceaſe to the Heirs of his Body begotten for ever. (*) In this Caſe the Word Heir being limited to the Body of B. eſt Nomen collectivum, and all one with the Word Heirs; and the Words for ever, in Caſe of a Deviſe, makes a Fee, and is only put to ſhew his Intention, as is uſual when Land is given to another and his Heirs for ever; and therefore in this Caſe this is a Fee executed in B. and his Heir is in by Deſcent, and not by Purchaſe; and it is not like to *Archer's* Caſe, Co. 1. where the Deviſe is to one for Life, and after to his Heirs Male, and to the Heirs Male of ſuch Heir Male, for there the Inheritance is limitted to the Heir of the Body of the Heir Male, D. 1651. adjudged in a Writ of Error upon a Judgment in Banco, upon a Special Verdict between *Pawſy and Lowdall*, and the Judgment given in Banco; e contra reverſed for this

this Error, Intratur, P. 1650. Rot. 279. this reverſed by the Opinion of the Court, præter Juſtice Jermyn, who was of the contrary Opinion.

5. If a Man leaſes to one for Life, the Remainder to the right Heirs of J. S. J. S. being dead at the Time, his right Heirs hath the Remainder by Purchaſe. 27 E. 3. 87.

6. So the right Heir ſhall have the Remainder by Purchaſe, though J. S. was living at the Time of the Grant. 27 E. 3. 87. See tit. Heir (G. 3) pl. 13.

7. When the Anceſtor by any Gift or Conveyance takes an Eſtate of Freehold, and in the ſame Gift or Conveyance an Eſtate is limited immediately to his Heirs in Fee or in Tail, there the Words, his Heirs, are Words of Limitation, and not of Purchaſe, for his Heir ſhall be in by Deſcent. Co. 1. Shelly 104. * 40 E. 3. 9. b. † 45 E. 3. 19. 17 E. 3. 43. b. 64. Contra, ‖ 7 H. 4. 23. b. *Br. Diſcent pl. 6 cites S C. —— Br. Eſtate, pl. 6. cites S. C. † Br Eſtates, pl. 7 cites S. C. —— Br Nuper obiit pl. 1. cites S. C. ſo that the Heir is in by Remainder and not by Purchaſe; And Brooke ſays, Sic vide, that it is a Fee Simple executed.

‖ Fitzh. Mottdanceſtor, pl. 4. cites S. C. ——See tit. Remainder (G) pl. 7. & (H) pl. 3. 4. and the Notes there.

8. So it will be if an Eſtate in Fee or in Tail to his right Heirs be limited immediately. Co. 1. Shelly 104. * 40 E. 3. 10. adjudged. † 11 H. 4. 74. ‖ 24 E. 3. 36. 27 E. 3. 87 b. *Br. Diſcent pl. 6 cites 40 E. 3 9. S C † Br. Dower, pl. 33. cites 11 H 4. 73. but nothing is ſaid to this Point directly. ——Fitzh. Dower, pl. 27. cites S. C.

‖ Fitzh. Age. pl. 105. cites S. C.

9. If a Copyholder of Inheritance ſurrenders it to the Uſe of another and his Heirs, and he to whom the Surrender was made dies before Admittance, and after the Lord admits his Heir, he ſhall be ſaid in by Purchaſe, and not by Deſcent, for he is in by the Lord, for nothing was in his Father by the Surrender before Admittance. Tr. 40 El. B. *Moore's* Caſe.

10. If A. bargains and ſells Land to B. in Fee for Money, and after dies before Inrolment of the Deed, and after the Deed is inrolled, his Heir ſhall be in by Deſcent; and if it be held in Capite, ſhall ſue Livery if he be of full Age, and ſhall be in Ward if within Age, for upon the Inrolment it ſettles in the Bargainee, between the Bargainor and him, ab initio by the Statute of Uſes; and the Statute of Inrolments ſays, That nothing ſhall paſs except it be incoll'd, ſo that if it be inrolled it veſts not by the Statute of Inrolments, but by the Statute of Uſes. Hobert's Reports 184. *Dimmock's* Caſe. Hob. 136. pl. 185. Paſch. 15 Jac. S C.— Cro. J 408. pl. 5 S. C. held accordingly.

11. Where *Land is given in Tail*, the *Remainder to the right Heirs of the Donee*, and he *dies without Iſſue*, his *Heir Collateral ſhall be* adjudg'd *in by Deſcent* from his Anceſtor, and not by Purchaſe from the Donor. Thel. Dig 177. Lib. 11. cap. 54. S. 54. cites Hill. 30 E. 3. Entry 58.

12. And *ſo* it ſhall be where *Leaſe* is made *to one for his Life*, the *Remainder to his Right Heirs*. Thel. Dig. 177. Lib. 11. cap. 54. S. 54. cites 45 E. 3. 19. and 33 H. 6. 5.

13. Where *Land is given to the Father for Life*, the *Remainder to the eldeſt Son in Tail*, the *Remainder to the right Heirs of the Father*, and the *Father died*, and after the *Son died without Iſſue*, and the *youngeſt Son enter'd*, and was adjudg'd to pay Relief, as Heir to his eldeſt Brother, and not to be Purchaſor by Name of Right Heir of the Father. Br. Eſtoppel, pl. 25. cites 40 E. 3. 9.

14. In Aſſiſe, a Man *leaſed to the Baron and Feme for Life*, *Remainder to A. in Tail*, *A.* by Deed *releaſed to the Baron and Feme all his Right without*

without Warranty, and after *died, his Iſſue within Age*; the *Baron alien'd to B. in Tail, Remainder to C. in Fee*, and after *B. died without Iſſue*, and then *the Heir of A. entered upon C* and C. ouſted him, and A. brought Aſſiſe and recover'd; For his Entry was lawful, becauſe by the Releaſe without Warranty, nothing paſſed but his own Eſtate for his Life who releaſed, and the Entry is good upon the Feme Covert, and ſhe is put to her Cui in Vita. Quod Nota. Br. Entre congeable, pl. 83. cites 43 Aſſ. 17.

15. If the *Son diſſeiſes J. N. to the Uſe of his Father*, and *J. brings Aſſiſe againſt the Father and Son*, and the *Father dies pending the Writ*, the Writ ſhall abate, for the Writ is in by Deſcent. Br. Diſcent, pl. 17. cites 1 H. 6. 1.

16. Land is given *to W. and A. his Feme, in Special Tail*, the *Remainder to R. in Tail*, the *Remainder to the right Heirs of R* the *Baron died without Iſſue*, and *A. his Feme ſurviv'd*, and is Tenant in Tail after poſſibility of Iſſue extinct, *and took another Baron and had Iſſue*, and after *R. died without Iſſue, to whom A.* the Feme *is Heir*, and after *A. died*, the *ſecond Baron ſhall be Tenant by the Curteſy*, for when the Remainder in Fee came to the Feme Tenant in Tail, after poſſibility of Iſſue, the *Frank-tenement was extinct in the Fee, and ſo A. was ſeiſed in Fee*, but per Pigot, if A. was within Age, ſhe ſhall not have her Age, nor ſhe ſhall not be in Ward, for ſhe had the Poſſeſſion by Purchaſe; Per Pigot and Choke; and per Needham, if he in the Reverſion or Remainder had charged the ſaid A. ſhould hold diſcharged. Br. Eſtates, pl. 25. cites 9 E. 4. 17, 18.

17. If the *Heir within Age recovers by Writ of Entry ſur Diſſeiſin*, he ſhall be in Ward; For he is as if his Anceſtor had died ſeiſed, and he *is in by Deſcent*, and the ſame Law if the Heir within Age recovers by Writ of Cofinage. Br. Garde, pl. 42. cites 15 E. 4. 10. Per Browne.

18. If a Man *gives in Tail* the *Remainder to his right Heirs*, the Fee Simple never was out of him, and therefore it deſcends to his Heir. Br. Livery, pl. 61. cites 32 H. 8.

19. *But otherwiſe* it ſeems where a Man makes a *Feoffment in Fee in Poſſeſſion, and diſmiſſes himſelf of all, and re-takes for Life* the *Remainder in Tail*, the *Remainder to his right Heirs* and dies, and after the *Tenant in Tail dies without Iſſue*, there the Heir who is *right Heir, is Purchaſor*. Ibid.

20. *But if* the *Tenant in Tail had died without Iſſue, in the Life of the Tenant for Life*, and after the Tenant for Life dies, there the Fee Simple was veſted in the Tenant for Life, by Extinguiſhment of the Meſne Remainder, and therefore there the Fee Simple deſcends. Ibid.

21. If *Baron makes Feoffment in Fee, to the Uſe of himſelf and Feme in Tail, (within the* 11 *H.* 7. *cap.* 10. *ex Provis' viri) Remainder to the Heirs of the Husband*; they *have Iſſue a Daughter*, the *Baron dies*; the *Wife privement enſeint with a Son*; the *Feme before the Birth of the Son levies a Fine, or ſuffers a Common Recovery*; in this Caſe, though the Daughter do or do not enter, or though the Daughter had joined in the Fine, or had been vouched in the Common Recovery, or by any other Act had diſabled herſelf to take Advantage of the Act, yet the Son born afterwards ſhall take Advantage of it, for *the Daughter cannot do any Act to bar the Son of his Entry*; *But upon the* 6 *R.* 2. *cap.* 6. which enacts quod proximus de ſanguine eorundem rapientium, et raptorum cui Hereditas deſcendere &c. deberet poſt mortem rapientis vel raptæ habeat Titulum &c. intrandi &c. Here if the Daughter enters, ſhe ſhall retain it always againſt the Son born afterwards, for the Daughter by this Statute has the Land merely as a Perquiſite in Fee Simple; For the Statute ſays, intrabit &c. et tenebit de Jure Hæreditario. 3 Rep. 61. b. Mich. 37 & 38 H. 8. in a Nota by the Reporter.

22. And

22. And compare it to the Caſe, where if a *Remainder is limited to the right Heirs of J. S.* and *he dies, having a Daughter*, the *Daughter ſhall have this as a Purchaſor*, and ſhall retain the Land againſt the Son born afterwards, *but when the Daughter enters by* 11 *H.* 7. *ſhe is in* of an Eſtate Tail Per formam Doni and ſo *in Nature of a Deſcent, and not merely as a Purchaſor*, for ſhe is to claim as if the Wife had been dead. 3 Rep. 61. b. 62. a in a Nota by the Reporter, cites 9 H. 7. 25 b.

23. If a Man *leaſes for Life*, the *Remainder over in Fee*, and he in *Remainder dies*, his Heir within Age; his Heir ſhall not be in Ward, and *contra if* the *Tenant for Life*, who was Tenant to the Lord, *dies*; For there the Heir has the Remainder and Land by *Deſcent*. Quod Vide in the Writ of Ejectment of Ward, in Old Nat. Brev. Br. Garde, pl. 113.

But if a Man *leaſes for Life, reſerving the Reverſion* and dies, the Heir within Age, *ſhall be in Ward in the Life of the Tenant for Life*; For he in *Reverſion is immediate Tenant. Contra of* him in *Remainder* living the Tenant for Life. Br. Garde. pl. 113. cites Old Nat. Brev.

24. If a *Man ſeiſed of the Manor of S. covenants with another, that when J. S. ſhall infeoff him of the Manor of D. then he will ſtand ſeiſed of the Manor of S. to the Uſe of the Covenantee and his Heir*, the Covenantee dies, the Heir within Age, J. S. enfeoffed the Covenantor; and here it was holden in Wood's Caſe. (3 Eliz) that the Heir ſhall be adjudged to be in, in Courſe and Nature of a Deſcent, and yet there was no right Title, Action or Uſe which deſcended, but only a Poſſibility of an Uſe, which cannot be releaſed or diſcharged, but this might, if the Condition had been performed, have veſted in the Anceſtor, then the Heir muſt have had claimed by Deſcent, and therefore the Heir in this Caſe was not in by Purchaſe, but by Courſe of Deſcent. 1 Rep. 98. b. 99. a. in Shelly's Caſe, cites Pl. C. 284. a. Chapman's Caſe.

25. The Father made a *Feoffment to A. for Life*, the Remainder *unto the Heirs Males of the Body of the Feoffor*, the Remainder *to his own Heirs in Fee.* The Father *had two Sons*, and the *Elder had a Daughter and died*, and it was adjudged *for the Daughter againſt the Uncle*, either becauſe the Entail to the Heirs Males was void, or becauſe it ceaſed in the elder Son. Hob. 30. cites D. 156. Mich. 4 & 5. P. & M. Greſwold's Caſe.

And. 3. pl. 4. Creſwold's Caſe, S. C. ——D. 156. a. b. pl. 24, 25. S. C. and Saunders Ch. J. and Dyer thought the Limitation of this Remainder in Tail void; becauſe the Donor cannot make his own Right Heir a Purchaſor without departing from the whole Fee Simple out of himſelf, and for the one Cauſe or the other the Juſtices were againſt the Tail and with the Heir General, and adjudged accordingly.——Mod. 238. S. C cited per North, Windham and Atkins, who agreed that *at Common Law*, a Man could not make his Right Heir a Purchaſor without parting with the whole Fee, but that *by Way of Uſe* he might; that Creſwold's Caſe in Dyer is of an Eſtate executed.——S. C. cited 2 Mod. 2 Mod. 209 Arg. and Ibid. 211. per Cur. Paſch. 29 Car. 2. C. B. and they held the Opinions of Dyer and Saunders there to be good Law.

26. *E. S. had Iſſue H. and R. H. dies, having Iſſue M. a Daughter, and leaving his Wife Privement enſeint with a Son; E. S. being Tenant in Tail, ſuffers a common Recovery to the Uſe of himſelf for Life, and after, to the Uſe of the Heirs Males of the Body of E. S.* lawfully begotten, *Remainder over; E. S. dies the very Day the Common Recovery paſſes*, and *Execution is iſſued after his Death*; R. the Uncle enters. *A Son is born to H.* deceaſed, *and he enters*, adjudged lawful, for the Uncle did not enter as a Purchaſor; for if the Father had lived, he would have had the Eſtate, and not the Uncle; Adjudged by the Ld. Chancellor Bromley, and all the Judges except one of C. B. 1 Rep. 93. b. to 107. Trin. 23 Eliz. Shelly's Caſe.

Mo. 136. pl. 281. S. C. the Juſtices were all agreed that R. was in by Deſcent and not by Purchaſe after the Death of E. and before the Birth of H. the Defendant; and adjudged Quod querens nihil capiat per Breve. —— And. 69 pl. 143. S. C. adjudged. ——D. 373. b. 374. a. pl. 15. S. C. reſolved by the Juſtices of both Benches and the Chief Baron, that the Poſthumous Son ſhall have the Land as next and eldeſt Heir Male. —— Jenk. 249. pl. 42. S. C.

27. An *Uſe* is limited to the Uſe of *himſelf for Life*, Remainder *to the Uſe of his Heirs, and the Heirs Females of the Body of the ſaid Heirs*; the Heir here takes by Purchaſe; for then the Words ſubſequent, viz. "And of their Heirs Females of their Body," ſhall be void; Per Anderſon. 1 Rep. 95. b. Trin. 23 Eliz. in Shelly's Caſe.

28. *Where the Heir is to take any Thing which might have veſted in his Anceſtor*, the Heir ſhall be in by Deſcent; ſo that although an Eſtate or Right do firſt veſt in the Heir, and not all in the Anceſtor, yet the Heir ſhall take this in the Nature and Courſe of Deſcent. 1 Rep. 98. a. Trin. 23 Eliz. in Shelly's Caſe.

29. When an *Eſtate for Years* is *limited to the Anceſtor*, the *Remainder to another for Life*, the *Remainder to the right Heirs of the Leſſee for Years*; the Heirs here are Purchaſors. 1 Rep. 104. a. Trin. 23 Eliz. in Shelley's Caſe.

30. *So* if the *Remainder* be *limited to the Heir in the Singular Number, upon a Leaſe for Life.* 1 Rep. 104. a. in Shelley's Caſe.

In Archer's Caſe 1 Rep. 66. Mich. 39 & 40 Eliz. agreed that the Heir ſhall be a Purchaſor.

31. M. *deviſed* Lands *to R. his Daughter, for Life, and if ſhe* marry after my Death, and *had the Iſſue of her Body* lawfully begotten, *then I will, that her Heir after my Daughter's Death ſhall have the Lands, and to the Heirs of their Bodies begotten*, the *Remainder to a Stranger*; Adjudg'd, the ſhe had not Eſtate Tail, but for Life only, and the Inheritance in her Heir by Purchaſe, it reſting in Abeyance all his Life, and ſettling in the Inſtant of her Death. Mo. 593. pl. 803. Hill. 35 Eliz. Clerk v. Day.

Cro. E. 313. pl. 5 S. C. the Daughter married and had Iſſue; Gawdy and Fenner held that R. had only an Eſtate for Life, and that her Heir ſhall take as a Purchaſor, but Popham held e contra, Et adjornatur.——Cw. 148. Lilly v. Taylor S. C. and Gawdy and Fenner held it, an Eſtate for Life only in R. and that the Iſſue was a Purchaſor; but Popham and Clench held e contra ——See tit. Remainder (G) pl. 7. in the Notes where this Caſe is fully and truly ſtated by the Ld. Ch. J. Raymond.

32. Deviſe *to Truſtees to the Uſe of the Heir*, for ſo long a Time as he and his Heirs ſhould ſuffer B. to enjoy &c. the Son doth not take by Deſcent but Purchaſe. Mo. 727. pl. 1013. Paſch. 36 Eliz. in the Court of Wards. Digby's Caſe

33. If *Lands* be *given to A. and B. ſo long as they jointly live together*, the *Remainder to the right Heirs of him that dies firſt*. A. dies, his Heir is now in by Deſcent. Co. Litt. 378. b. in Principio.

34. In the Caſe of an *Exchange*, if *one of the Exchangers enters and dies* and the *Heir of the other enters*, after his Father's Death he hath it by Deſcent although his Father hath nothing in it. Jenk. 249. pl. 40.

35. *So* of *Covenant upon a Conſideration and a Condition precedent to raiſe an Uſe* to A. and his Heirs, and A. dies before the Performance of it, and the Condition is performed afterwards; yet the Heir of A. ſhall take by Deſcent. Jenk. 249. pl. 40.

36. *So* of a *Condition broken in the Life-time of the Father, or after his Death* and the *Heir enters* for the Condition broken; the Heir is in by Deſcent. Jenk. 249. pl. 40.

37. *So* of a *Fine Sur Render* to the Conuſee and his Heirs, and the *Conuſee dies before Entry*, his Heirs ſhall have it by Deſcent. Jenk. 294. pl. 40.

The Caſe of Pybus v Wilford was denied to be Law in the Caſe of Southcott v.

38. A Man having *Iſſue by one Venter R.* and *S. by a ſecond Venter, covenants to ſtand ſeiſed to the Uſe of his Heirs Male begotten or to be begotten on the Body of Jane his ſecond Wife, and died*; *S.* is here in by Deſcent; But if S. did not take by Deſcent, yet this was a contingent Uſe in him by Purchaſe; for the Limitation to the Heirs of the Body J. will make a Special Heir to ſerve the Turn, and per Hale and Wild, the

the Heirs of the Body of the ſecond Wife is a good Name of Purchaſe. 1. Vent. 372. 381. Trin. 26 Car. 2. B. R. Pibus v. Milford. Stowell, 2 Mod. 211. Paſch. 29 Car. 2. C. B.—2 Vern. R. 735 S. C. cited per Cowper C. and holds with Hale Ch. J. that the Implication was needleſs, and that Mitford took by Purchaſe and Deſcription; and that Wylde, as convinced, by his Argument declared he was of the ſame Opinion; ſo that the Opinions of Hale and Wylde may outweigh by Way of Authority the Opinion of Cook Obiter in Shelly's Caſe, and that of Hobart in Caſe of Counden v. Clarke, their Opinions not being upon the Point adjudged.

39. A Man cannot either by Conveyance at the Common Law, or by Limitation of Uſe, or by Deviſe make his right Heir a Purchaſor. Vent 372. Trin. 26 Car. 2. B. R. agreed by Wylde, J. in the Caſe of Pybus v. Milford. Whenſoever the *Anceſtor takes an Eſtate for Life, and after a Limitation is made to his Right-Heirs*, the Right Heir ſhall not be Purchaſors. Co. Litt. 22. b.

40. *The Rule*, that where a Man takes Frank-Tenement and the Eſtate is after limited to his Heirs that they ſhall take by Deſcent, *fails in divers Caſes*; *As* if Lands are given *to A. for Life*, Remainder *to B. for Life, and if A. dies before B then to the right Heirs of A.* In this Caſe the Heirs ſhall take by Purchaſe. Arg. Litt. Rep. 258. Paſch. 5 Car. C. B.

41. *So Leaſe to A. and B. and if A. dies, living B.* the Remainder *to the Heirs of A.* The Reaſon ſeems to be, becauſe there is *no Poſſibility that the Frank-Tenement and the Fee ſhall be conjoined in A. during his Life.* Arg. Litt. Rep. 258. Paſch. 5 Car. C. B.

42. *But* if *Leaſe be to A and B. for the Lives*, and if J. S. dies during their Lives * there the Right Heirs of A. ſhall take by Deſcent, becauſe there is a Poſſibility that J. S. may die during their Lives. Arg. Litt. Rep. 258. Paſch. 5 Car. * Theſe Words ſeem to be wanting, viz. "Then to "the Right Heirs of A."

43. An Uſe of a Term *to the Husband and Wife*, and after *to their Iſſue*, they then *having none*, is all one as limited to them and the Heirs of their Bodies; the Iſſue takes nothing as a Purchaſor. Per Lord Keeper. Chan. Caſe 266. Mich. 27 Car. 2. Bullock v. Knight.

44. Though *at Common Law* a Man could not be Donor and Donee without he part with the whole Eſtate; yet it is otherwiſe on a *Covenant to ſtand ſeiſed* to Uſes; Reſolved. 2 Mod. 211. Paſch. 29 Car. 2. C. B. Southcott v. Stowell.

45. Where the Heir takes by *a Deviſe with a Charge*, as *paying* 20 *l. &c.* he does not take by Deſcent but by Purchaſe. Per North Ch. J. and Atkins. 2 Mod. 286. Hill. 29 and 30 Car. 2. C. B. Brittam v. Charnock. Freem. Rep. 248. pl. 263. S. C. the Court ſeemed to take this Rule that whereſoever the Heir has his Election to one Way or the other, and that he comes to the Eſtate both Ways alike, there the Law for the Benefit of Creditors, adjudges him in by Deſcent, rather than by Purchaſe and Deviſe; but here, unleſs the Deviſe be void, he cannot take but upon the Payment of 20 l.——*But where the ſame Eſtate is deviſed to A. which he would have taken by Deſcent*, he is in by Deſcent nothwithſtanding the *Poſſibility of a Charge*; 1 Salk. 241. pl. 2. Hill. 10 & 11 W. 3. C. B. Clerk v. Smith.——And Ibid. Treby Ch. J. and Powell J. denied Gilpin's Caſe, Cro. C. 161.

46. In *Debt upon Bond* brought *againſt the Defendant as Heir* to his Father, and *Riens per Deſcent pleaded*, the Plaintiff *replied Aſſets*, and Iſſue thereupon; and the Evidence was, that the *Obligor*, the Defendant's Father, *deviſed to the Defendant his Son and Heir certain Meſſuages* in Exchequer Alley *in Fee*, but *chargeable with an Annuity or Rent-charge payable to the Defendant's Mother*; and it was held by Holt Ch. J. that theſe Meſſuages deſcended to the Defendant and were Aſſets; for (by him) *the Difference is*, where Deviſe makes an *Alteration of the Limitation of the Eſtate*, from that which the Law would make by Deſcent; and where the Deviſe *conveys the ſame Eſtate, as the Law would make by Deſcent, but charges it with Incumbrances.* In the former Caſe the Heir takes by Purchaſe, in the latter by Deſcent. Ld. Raym. Rep. 728. cites Trin. 13 W. 3. B. R. Guildhall London; Emerſon v. Inchbird.

47. *Heirs*

47. *Heirs or Heir Male* cannot be a Name of Purchaſe, but *Heirs Males of his Body* may; Therefore if there is no ſuch Thing in Propriety of Speech as an Heir Male, without ſaying of whoſe Body, for that Reaſon Heir Male of his Body, or Heirs Males of itſelf, where the Law will ſupply theſe Words, of his Body, as it will in a *Deviſe* may be a good Name of Purchaſe; but yet the Party who would take by ſuch a Limitation muſt be ſuch a Perſon as may be an Heir by the Common Law, and would take by that Name. 3 Salk. 336, 337. pl. 2. Mich. 7 Ann. Lord Oſſulſton's Caſe.

48. The *Diſtinction* between taking by Deſcent and taking by Purchaſe, *where the Words are the ſame*, though it be mentioned in Books of good Authority yet it ſeems to have *no ſufficient Foundation* of Reaſon or Authority of Law to ſupport it, and if it ſhould prevail, in all Caſes would *overthrow another Rule* as certain, viz. that a Man may take by Purchaſe if he be *ſufficiently deſcribed*, though without Addition of Chriſtian or Surname, nay, though his Chriſtian Name be falſe or miſtaken, as appears by ſeveral Caſes put in Co. Litt.. 3. a. per Lord Cowper. Ch. Prec. 463. Hill. 1716. in Caſe of Brown v. Barkham.

49. If a *Feoffment* is made *to ſeveral Uſes*, the *Reverſion in Fee to the Heirs of the Feoffor*, in ſuch Caſe the Heir ſhall take the Reverſion by Deſcent, becauſe it was part of the old Eſtate of the Feoffor; For ſo much of the Uſe of the Lands as he did not diſpoſe of by the Feoffment ſtill remained in him as Part of the old Eſtate 8 Mod. 23. Mich. 7. Geo. in Caſe of Smith v. Trigg.

See tit. Copyhold. (C. e)

(K) In what Caſes it ſhall deſcend to the *Half Blood*. *What* ſhall be *a Seiſin to take away the Deſcent*.

1. IF J. hath Iſſue two Daughters by ſeveral Venters, and dies ſeiſed of Socage Lands, and the Lord ſeiſes the Land to know who ſhall be his Tenant, and for the Safety of his Rent, and leaſes it for ſeven Years for the Suſtenance of the Daughters of J. ſaving his Rent; this ſhall not make ſuch a Seiſin in the Eldeſt, but that after her Death the Second Daughter ſhall have the Land. 34 Aſſ. 10. adjudged.

Br. Diſcent, pl. 27 cites S. C.—— Br. Mortdanceſtor

2. So if the Eldeſt Daughter being an Infant, releaſes to the Abator after the Death of her Father, this does not make ſuch a Seiſin in him, but that it ſhall deſcend to the Youngeſt Daughter. 34 Aſſ. 10. adjudged.

Fol. 628.

pl. 43. cites S. C that

3. But if the Eldeſt Daughter being an Infant, enters upon the Abator, and makes a Feoffment, this ſhall bar the Youngeſt of the half Blood, for this Entry made a Seiſin in him. 34 Aſſ. 10.

one had Iſſue Two Daughters by diverſe Venters, and died ſeiſed, and A. abated, and the Eldeſt releaſed within Age and died without Iſſue, and the other brought Mortdanceſtor, and recovered the whole of the Seiſin of the Father; for ſhe who releaſed, never was ſeiſed and the Releaſe is void by Reaſon of Infancy; Contra if ſhe had made Feoffment (Nota Differentiam) for then it had been good for a Moiety and the one cannot be Heir to the Anceſtor by Reaſon of ſeveral Venters.—— Br. Releaſes pl. 2. cites S. C.

Br. Diſcent, pl. 28. cites S. C. which was that A. was ſeiſed

4. If a Man leaſes for Life, rendring Rent, and dies, having Iſſue two Sons by ſeveral Venters, and the Eldeſt Son dies before the Rent-Day, the Second Son ſhall have it as Heir to his Father, becauſe the Eldeſt had not the actual Poſſeſſion. 35 Aſſ. 2.

5. But

5. But **otherwiſe it would have been, if the Rent-Day had incurred in the Life of the Eldeſt, and he had** received the Rent, **for this would have made an actual Seiſin in him.** 35 Aſſ. 2.

in Fee and *leaſed* the Land *to J. S. for Life rendering* 14 s. *per Annum to A. and his Wife* which A had *Iſſue B. by his Firſt Wife, and C* the Plaintiff *by the ſecond Wife*, the *Rent was payable at Michaelmas and Eaſter*, and A *ſurvived Michaelmas, but he died before that he received the Rent*, and *B ſurvived* him *and died before Eaſter*, ſo that he had only a Seiſin in Law of the Rent, and no Seiſin in Fact, and after *B. died*, and then *J. S. Tenant for Life died*, and D. as Couſin and Heir of B entered, and C. as Heir of A. ouſted him, and D. re-entered and infeoffed E. againſt whom C and her Husband brought Aſſize and recovered. And ſo ſee that the Reverſion ſhall be to the Heir of the Father of Half Blood, if it fall not in Demeſne to the Son of the firſt Venter in the Life of the Son. Br. Seiſin, pl 25. cites S. C. but Brooke ſays, Quære if the Eldeſt Son had had Payment and had died in the Life of the Tenant for Life, whether this Seiſin of the Rent had been ſufficient Seiſin of the Reverſion to diſappoint the Daughter of the Half Blood.

If the *Father makes a Leaſe for Life, or* a *Gift in Tail and dies*, and the *Eldeſt Son dies in the Life of Tenant for Life, or Tenant in Tail*, the Younger Brother of the Half-Blood ſhall inherit, becauſe the Tenant for Life, or Tenant in Tail is ſeiſed of the Freehold and the *Eldeſt Son had nothing but a Reuerſion expectant* upon that Freehold or Eſtate Tail, and therefore the Youngeſt Son ſhall inherit the Land as Heir to his Father who was laſt ſeiſed of the Actual Freehold; Co. Litt. 15 a. —— And albeit, a *Rent* had been *reſerved upon the Leaſe for Life*, and the *Eldeſt Son had received the Rent and died*, yet it is holden by ſome that the Younger Brother ſhall inherit, becauſe *the Seiſin of the Rent is no Actual Seiſin of the Freehold of the Land.* Ibid —— But 35 Aſſ pl. 2. ſeems to the contrary, becauſe the Rent iſſues out of the Land and is in Lieu thereof, wherein the only Queſtion is, whether ſuch a Seiſin of the Rent be ſuch an Actual Seiſin of the Land in the Eldeſt Son as the Siſter may in a Writ of Right make her ſelf Heir of this Land to her Brother. Co. Litt. 15 a.

If a Man has Iſſue a Son and a Daughter by one Venter, and a Daughter by another Venter, and *leaſes to another for* Term of his *Life without any Rent* reſerved and dies and the Reverſion deſcends to his Son who has Iſſue a Son and dies, and the Son dies without Iſſue, and then the Tenans for Life dies; The two Daughters ſhall have the Land notwithſtanding there was a Deſcent of the Reverſion to the Son of the Son; by the Opinion of the Juſtices of C. B. And. 31. pl. 74. Mich. 7 Eliz. Anon. —— Bendl 143. pl. 202. S. C. held accordingly.

6. **If there be a** Gift to the Baron and Feme in Special Tail, **the** Remainder to the right Heirs of the Baron, **and they** have Iſſue, **and the** Feme dies, **and the** Baron takes another Feme, and hath Iſſue and dies, **and the** Eldeſt Son enters, and dies without Iſſue, **the Second Son of the half Blood ſhall have the Remainder, becauſe the Eldeſt was** not ſeiſed **thereof** in his Demeſne. * 37 Aſſ. 4. **adjudged; but there the Reaſon is given, becauſe the Remainder did not commence till after the Gift.** ‖ 24 E. 3. 30. b. 31.

* Br. Diſcent, pl. 30. cites S. C. accordingly, where the Uncle of the Eldeſt brought Aſſiſe as Heir to him, but was barred by Award; for the Remainder in Fee cannot come into Seiſin till the Tayle be determined, and yet it was in the Eldeſt Son to give or forfeit, but it was not in Poſſeſſion; for it is the Poſſeſſion which makes the Heir of the Eldeſt to be inheritable. ——— Fitzh. Aſſiſe, pl. 327. cites S. C.

† Fitzh. Deſcent, pl 11. cites S. C. and S. P. as the Caſe above except that in this the Remainder was limited to the Right Heir of the Feme, who had Iſſue by the firſt Baron and afterwards had Iſſue by a Second Baron. ——— Co. Litt. 14. b. S. P. and cites S. C.

7. **If Land be given** to J. for Life, **the Remainder** to R. his Son in Tail, **the Remainder** to the right Heirs of J. **and** J. dies, **and** R. enters **as Tenant in Tail,** and dies without Iſſue, **T. the Son and Heir of J. of the half Blood to R. ſhall have the Land by Deſcent, and not the Heirs of R. becauſe R. was** never ſeiſed of the Fee in Demeſne. 39 E. 3. **Deſcent** 5.

8. So **if a Gift be** to another in Tail, **the Remainder** to his own right Heirs, **and after the** Donee dies, having Iſſue a Son by one Venter, and a Son by another, **and the** Eldeſt Son enters, and dies without Iſſue, **his Brother of the half Blood ſhall have the Land by Force of the Remainder as Heir to his Father, becauſe his Brother was never ſeiſed of this Eſtate in Demeſne.**

9. So **if the** Eldeſt **Son** be ſeiſed in Tail, **with a Remainder or** Reverſion by Deſcent to him from his Father in Fee, **and** dies without Iſſue, **his Brother of the half Blood ſhall have this Remainder or**

Reverſion by Deſcent, becauſe his Brother was never ſeiſed thereof in Demeſne. 32 E. 3. Deſcent 9. adjudged. 5 E. 3. Deſcent 14. adjudged.

Fitzh. Deſcent, pl. 3 cites S. C. — Br. Diſc. pl. 32. cites S. C. — Co. Litt. 15. b. S P. cites S. C. & 19 E. 2 Quare Impedit. 177 — 3 Rep. 41. b. S. P.

10. If a Man ſeiſed of an Advowſon in Groſs hath Iſſue a Son and a Daughter by one Venter, and a Son by another, and dies, and the Eldeſt Son dies before any Preſentation, the Youngeſt Brother ſhall have the Advowſon, becauſe the Elder never had any Seiſin thereof. 3 H. 7. 5.

11. But if the Eldeſt had preſented, and died without Iſſue, the Youngeſt Brother ſhould not have had the Advowſon, becauſe this Preſentation puts the Seiſin in him. Fitz. Nat. 36. E. contra, 19 E. 2. Quare Impedit 177. adjudged.

——If a Man recover an *Advowſon*, and after the Biſhop collates for Lapſe, the ſame is an Execution of the Judgment and will make a Poſſeſſio Fratris. Le 234. pl. 316. Mich. 22 & 23 Eliz. B. R. Anderſon Ch. J. cites 22 H. 6. per Moyle.

12. If two Daughters by ſeveral Venters makes Partition of an Advowſon in Groſs, to preſent by Turns, and after one dies without Iſſue, before any Preſentation, the other ſhall have the Advowſon, becauſe there was no Seiſin thereof. Fitz. Natura 34. E.

13. But otherwiſe it would have been, if ſhe that had died had preſented after the Partition. Fitz. Na. 34. E.

14 If Lands deſcend to two Coparceners, and they make Partition, being of the half Blood, and after one dies without Iſſue, the other ſhall not have it, becauſe ſhe ought to have it as Heir to her, and not as Heir to the Anceſtor. Contra, 19 E. 2. Quare Impedit 177.

15. *The Indowment* cuts off and *deſtroys the Seiſin of the Heir.* Br. Diſcent, pl. 19 cites 9 E. 2.

Br. Dower, pl. 87. cites S. C. — Ibid. pl 100. cites S. C. — Br. Seiſin, pl 18. cites S. C. & P. For of the Dower the Seiſin of W. is defeated, and the Feme is in by the Baron, and the Indowment was before the Birth of W. But Brooke ſays, it ſeems that all is one; For it is ſaid elſewhere, that where the Heir is ſeiſed, and endows his Mother, and ſhe dies, and a Stranger enters, the Heir ſhall have the Mortdanceſter, and not Aſſiſe of Novel Diſſeiſin, and See Littleton, tit. Deſcents, that if the Diſſeior dies ſeiſed, and his Feme is endow'd by his Heir, the Entry of the Diſſeiſee is reviv'd, for the third Part put in Dower. And P. 19 E. 2, where the Heir takes Feme, and enters and endows his Mother, and aliens the Reverſion and the Mother dies, and after the Mother dies the Feme of the Heir ſhall not have Dower of the Land of which the Mother was endow'd; For the Seiſin of the Heir, who was her Baron, was determined by the Endowment, and the Feme is in by her Baron and not by the Heir; For if the Heir is charg'd, ſhe ſhall hold diſcharg'd quod Nota. And ſo ſee above, that the Seiſin of the Lord of the Ward is ſufficient Seiſin for the Infant to bring Aſſiſe.

16. J was ſeiſed and had *Iſſue, Robert the Eldeſt, and Richard the Youngeſt*, and died, and *Robert entered* and took Feme, *and had Iſſue Alice*, the Feme died, and he *took another Feme and died, the Feme privement enſient with a Son*, and the *Lord ſeiſed the Ward* of the Land, and *of Alice*, for the Nonage of Alice, and leaſed the Ward to J. who *endowed the Feme* of Robert, and after the *Feme is delivered of W. a Son*, by which the Lord *reſeiſed the Ward of W.* and *W. lived* 10 *Years, and died without Iſſue*, by which H. the Plaintiff enter'd as Heir of Richard the youngeſt Son of J. and Alice ouſted him, and he brought Aſſiſe, and prayed the Diſcretion of the Juſtices. And becauſe W. to whom Alice was of Half Blood, was ſeiſed, it was awarded, that Henry ſhould recover. And ſo Note, that the *Seiſin of the Guardian* makes the Heir of the Infant of the entire Blood to be Heir, and the Siſter of the Half Blood was barred of the Land, but by the Opinion of the Court the *Dower* of the Feme *ſhall revert to* Alice, becauſe W. was not ſeiſed of it, Quære. Br. Diſcent, pl. 19. cites 8 Aſſ. 6.

Contra Jo. 361. where the Father dies ſeiſed in Poſſeſſion,

17. If a Man has Iſſue a *Son and a Daughter* by one Venter, and a Son by another Venter, if the Father dies ſeiſed, and the *Son dies before Entry*, the Siſter of his Whole Blood ſhall have the Land, as Heir

to

to her Brother, and not the Brother of the Half Blood, becauſe the Eldeſt Brother had the *Poſſeſſion caſt on him, by Courſe of Law*, and the Freehold alſo was in him, and therefore the Siſter ſhall have the Land, as Heir to him, and not the Younger Brother of the Half Blood &c. Kelw. 110. pl. 31. cites it as adjudg'd, 8 E. 3.

or of a Reverſion on Eſtate for Life, Half Blood ſhall inherit, and

and ſhall make immediate Deſcent to him from his Father, and not mention his Brother, and yet the Eſtate was in his elder Brother to grant or charge, or intitle his Wife to Dower. Trin. 11 Car. B. R. Reeve v. Malſter.

18. In Aſſiſe, if a Man has Iſſue *three Daughters by one Venter, and one by another* Venter, and dies ſeiſed of Land, and *all enters* and after *two of the firſt Venter die*, the Third of the firſt Venter ſhall be Heir to them, and ſhall have their two Parts, and the fourth ſhall have only her fourth Part, as before, and no Part of the two Parts; for ſhe cannot be Heir to them, becauſe ſhe is of Half Blood to them. Br. Diſcent, pl. 20. cites 10 Aſſ. 27.

19. A Man has Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and *gives his Land to his Eldeſt Son in Tail*, the Father dies, the Fee deſcends to his Eldeſt Son, and the Eldeſt Son after *dies without Heir of his Body*, and by all the Juſtices of C. B. the Youngeſt Son ſhall have the Land, and not the Daughter. The Reaſon ſeems to be, becauſe it was in Reverſion, and cannot veſt in Poſſeſſion to the Eldeſt Son, during the Tail. Et *Poſſeſſio fratris* &c. facit ſororem eſſe Hæredem, *and not Reverſio fratris.* And Thorpe Juſtice of B. R. ſaid, that the Daughter ſhall have it, nevertheleſs, the Law ſeems to be contrary. Br. Diſcent; pl 13. cites 24 E. 3. 13.

20. Land was *tailed by Fine to Baron and Feme, and the Heirs of the Feme*, who had *Iſſue two Sons by divers Barons*, and they died, the Eldeſt Son entred and died without Iſſue, and the Youngeſt of Half Blood brought Scire Facias, and obtained; for Poſſeſſio Fratris or ſuch like de feodo ſimplici facit ſoroem & eſſe Hæredem, and here was no Poſſeſſio, Quod Nota Bene. Br. Diſcent, pl. 14 cites 24 E. 3. 30.

21. Scire Facias upon a Fine that was levied to *J. and A. his Feme in Tail*, the *Remainder to A. in Fee*, the Baron and Feme *had Iſſue a Son*, the Baron died, and after the *Feme took another Baron, and had Iſſue another Son*, and died, *the Eldeſt Son enter'd and died without Iſſue*, and the *Heir Collateral* of the Eldeſt Son *enter'd* as in the Remainder in Fee, againſt whom the *Youngeſt Son of the Half Blood brought Scire Facias to execute the Fee Simple*, and the beſt Opinion was, that it well lay, for the *Fee Simple was not executed in the Eldeſt Son*, for he was ſeiſed in Tail, and the *Fee was in Abeyance*, and therefore it was not executed in him, and now the Youngeſt Son of the Half Blood is Heir to A. of the Fee Simple, therefore he ſhall execute it, and 37 E. 3. Lib. Aſſiſe 4. it is adjudg'd for the Youngeſt Son, and yet the Eldeſt Son by Feoffment might have given the Fee Simple, or charged it, or forfeited it by Attainder of Felony, but yet it was not executed in him, therefore whoſoever is Heir to the Anceſtor, when the Fee falls, he ſhall have Execution thereof, Quod Nota. Br. Scire Facias, pl. 126. cites 24 E. 3. 30. 62.

Br. Executions, pl. 67. cites S. C.— The Poſſeſſion is the Thing which makes the Heir of the Eldeſt to be Inheritable. Br. Diſcent, pl. 30. cites 37. Aſſ. 4.—— S. C cited 3 Mod. 257. in Caſe of Kellow v. Rowden.

22. If the *King* be *ſeiſed of Land in jure Coronæ, and of other Land by Purchaſe*, or by Reaſon of the *Dutchy*, and has a Son and a Daughter by one Venter, and a Son by another Venter, and dies, the Eldeſt Son enters into all, and dies without Iſſue, there the Youngeſt Son ſhall have the one Land, and this ſeems to be de Jure Coronæ, and the Daughter ſhall have the other Land. Per Moyle Arg. which none denied. Br. Diſcent, pl. 5. cites 34 H. 6. 34.

23. A Man had Iſſue *a Son and a Daughter by one Venter, and three Daughters by another* Venter, and *enfeoff'd four to perform his Will, and after to enfeoff his Heirs*, and declared his Will and died, *the Son died, the*

the Will not perform'd, and by the Reporter, the Daughter by the firſt Venter ſhall have Subpœna, to have Execution of the Eſtate of the Land of the Feoffees, for the Will is no Impediment of Poſſeſſion of the Uſe and poſſeſſio fratris *of the Uſe* facit ſororem eſſe Hæredem to the Uſe of the Fee Simple. Nevertheleſs, Quære if it be Poſſeſſion, becauſe the Will is not fulfilled, nevertheleſs it is ſaid here, that *the taking of the Profits of the Land in Uſe* is ſuch Poſſeſſion by the Brother, as ſhall make the Daughter of the Whole Blood to be Heir as of Land, but the one and the other muſt be of Fee Simple. And by the Reporter, *the Will to take the Profits during a Term*, is no Impediment, but that the Brother has good Poſſeſſion, and *e contra* of a Will &c. to *take the Profits for Life*, or other Eſtate of Frank-Tenement, Note the Difference, for *the one is in Nature of a Reverſion*, and the other not. Br. Diſcent, pl. 36. cites 5 E. 4. 7.

24. Feoffees are ſeiſed to the Uſe of A. who has a Son and a Daughter by one Venter, and two Daughters by another Venter, and makes a *Will* [and deviſes] *for Years* and dies, the Eldeſt Son dies within the Years, yet the Daughter ſhall be Heir to the Uſe, for *Poſſeſſio fratris* &c. *contra* where the Will is *for Life*. Br. Feoffments al' Uſes, pl. Uſes, pl. 33. cites 5 E. 4. 7.

There ſhall be Poſſeſſio Fratris, of an *Uſe* of a *Seignory*, a *Rent*, an *Advowſon*, of other Hereditaments.

25. *Ceſty que Uſe* has Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and dies. The Eldeſt Son takes the Profits, and dies, without Iſſue The Uſe ſhall deſcend to the Daughter, as Siſter and Heir of him, and not to the Younger Son. Arg. D. 10. b. cites 5 E. 4. 7. 2. Co. Litt. 14 b.

Poſſeſſio Fratris cannot be of an *Uſe* (though it was formerly held otherwiſe,) for one cannot be poſſeſs'd of an Uſe, though one may be ſeiſed to an Uſe. 2 And. 146. Hill. 41 Eliz. in Corbet's Caſe.

26. In Treſpaſs the *Defendant ſaid, that J. N. was ſeiſed in Fee, and took to Wife A. and had Iſſue the Wife of the Defendant, and A. died, and he took K. to Wife, and had Iſſue the Wife of the Plaintiff, and died*, and the *Femes enter'd*, and the *one married the Plaintiff, and the other the Defendant, and ſo they held in Common*, Judgment ſi Actio, the *Plaintiff confeſs'd the Bar, and ſaid further, that J. N. had Iſſue W. by the ſecond Wife, and the Wife of the Plaintiff*, [and that] *J. N. died, and after W. the Son of J. N. enter'd as Son and Heir, and was ſeiſed, and died ſeiſed without Heir of his Body, and the Wife of the Plaintiff as Siſter and Heir of the Whole Blood enteer'd, and was ſeiſed till the Treſpaſs.* Pigot maintain'd the Bar Abſque hoc, that W. died ſeiſed, and the Iſſue was ſuffer'd, and yet the *Seiſin of the Brother ſuffices, notwithſtanding that he did not die ſeiſed*, and Seiſina fratris facit ſororem eſſe Hæredem. Br. Traverſe, per &c. pl. 108. cites 15 E. 4. 2.

27. If the *Diſſeiſor dies ſeiſed*, the Entry of the Diſſeiſee is toll'd, but if the *Heir of the Diſſeiſor endows the Feme of the Diſſeiſor*, there the *Diſſeiſee may enter* into the Land aſſign'd in Dower; For *ſhe was in by her Baron*, and not by the Heir, and ſo the Deſcent remov'd. Br. Tenant per le Curteſy, pl. 10. cites Littleton tit. Deſcents.

To make Poſſeſſio Fratris of Land there muſt be an *Entry*, or other Actual *Seiſin* in the Brother.

28. Where a Man *dies ſeiſed*, and has *two Sons of half Blood*, and the *Eldeſt dies before Entry* made by him, the Youngeſt of the half Blood ſhall have the Land; Quod Nota the Entry. Br. Diſcent, pl. 51. cites Littleton tit. Fee Simple. Arg. Show. 246. Mich. 2 W. & M.

3 Rep. 41. b. S. P.— Co. Litt. 15. b. S. P.— Show. 246. Arg. S. P.—

29. *Advowſon* ſhall deſcend to the Brother of the half Blood, unleſs the firſt hath preſented to it in his Life-time; But if he has preſented in his Life-time, then it ſhall deſcend to the next Heir of the intire Blood. Dod. of Advowſons 21.

S. P. if it be an Advowſon in Groſs. Br. Diſcent, pl. 32, cites 3 H. 7. 5.

30. *Re-*

30. *Recovery* by the Brother, *without Execution*, will not make the Siſter to be Heir; For without Execution, he has not Poſſeſſion, and ſo the Execution makes the Judgment full and perfect. Arg. Pl. C. 43. b. Mich. 6 E. 6. in Caſe of Wimbiſh v. Tailboyes.

31. A. has a Son and a Daughter by one Venter, and a Daughter by another Venter, and he makes a *Leaſe for Life* of Land, *without reſerving any Rent*, and the Father dies, and the Reverſion deſcends to the Son, and the ſaid *Son has Iſſue a Son, and dies*, and the ſaid Reverſion deſcends to his ſaid Son, who dies without Iſſue, and after *Leſſee for Life dies*, now both the Siſters of divers Venters ſhall have the ſame Land as Heir to their Father, and not the Siſter of the firſt Venter only. Per the Juſtices of C. B. Ben. 143. pl 202. Mich. 7 Eliz.

And. 31. pl. 74 S. C For in this Caſe, the Claim is from the Father Jenk. 242. pl. 25. And the Reaſon why there ſhall by a Poſſeſſio Fratris is, that every Heir in Fee Simple in Demeſne ought to make himſelf Heir to him who laſt died ſeiſed. Jenk. 242. at the End of pl. 25.

32. A Copyholder in Fee has Iſſue a Daughter and a Son by two Venters; the *Lord commits the Cuſtody of the Land, and of the Son, to the Mother*, who takes the Profits, and the *Son dies before any Admittance*; this Copyhold was ordered alſo for the Heir Collateral againſt the Siſter of the half Blood, becauſe the *Mother's Poſſeſſion* ſerveth for the Son. Cary's Rep. 8. cites 12 Eliz. D. 291.

33. Two Daughters by two Venters enter after Death of their Father, and *take the Profits jointly ſeveral Years* of a Copyhold Eſtate before any Admittance of the Lord; Eldeſt dies without Iſſue. Per 2 Juſt. The Poſſeſſion aforeſaid is ſufficient, *without any Admittance*, to make the Collateral Heir inheritable, and it was ordered by the Lord Keeper accordingly. D. 291. b. pl. 69. Trin 12 Eliz. Anon.

34. A. ſeiſed of Land in Fee has *two Daughters by ſeveral Venters*, B. the Eldeſt, and C. the Youngeſt; he *deviſes a Moiety* of the ſaid Land *to his Wife for ſeven Years, and that B. in die Maritagii ſhall enter into the other Moiety*; A. dies, his *Wife enters* and educates the Daughters; *B. enters with her Husband into the other Moiety*; *C. dies without Iſſue*; the Heir of the whole Blood of C. ſhall have her Moiety. For the *Poſſeſſion of the Mother for ſeven Years was an actual Poſſeſſion in C. and* if the Wife had not entered at all, *the Entry of B.* although of half Blood only, *would have given Poſſeſſion* to C. Adjudged in both Benches, Jenk. 242. pl. 25. cites 17 El. D. 342.

3 Le. 125. pl. 53. Mich. 15 Eliz. B. R. the S. C. — And. 47. pl. 121. *Cowper v. Burrold.* Trin. 17 Eliz. S. C. — Bendl 264. pl. 278. Anon. S. C. and cites the Caſe of Cower v. Borrough, S P. adjudg'd accordingly, becauſe it was againſt the Intent and Mind of the Deviſor, by the Words of the Will as it appears. — But Palm. 373. Doderidge ſaid, that if one has five Daughters and deviſes all his Land to one of them, ſhe takes all by the Deviſe and nothing by the Deſcent; for her Title is intire. And ſee Reading v. Royſton accordingly.

35. The *Husband* is *ſeiſed in Right of his Wife of* certain *Cuſtomary Lands in Fee*, and *he and his Wife, by Licence* of the Lord, *make a Leaſe for Years by Indenture, rendring Rent*, have *Iſſue two Daughters*, and the *Husband dies*; the *Wife takes another Husband*, and they have *Iſſue a Son and a Daughter*, the *Husband and Wife die*, the *Son is admitted* to the Reverſion, *and dies without Iſſue*; and by Manwood that Reverſion ſhall deſcend to all the Daughters, notwithſtanding the half Blood, for *the Eſtate for Years*, which is made *by Indenture by Licence of the Lord, is a Demiſe, and a Leaſe according to the Common Law, and according to the Nature of the Demiſe the Poſſeſſion ſhall be adjudged*, which Poſſeſſion cannot be ſaid Poſſeſſion of the Copyholder, for his Poſſeſſion is cuſtomary, and the other is mere contrary, therefore the Poſſeſſion of one ſhall not be the Poſſeſſion of the other, therefore there ſhall be no Poſſeſſio Fratris in this Caſe; *But if* one had been the Guardian by Cuſtom, or *the Leaſe had been made by Surrender*, there the Siſter of the half Blood ſhould not inherit. And Mead ſaid, the Caſe of the Guardian had been adjudged. 4 Le. 38. a. 103. Mich. 17 Eliz. C. B. Anon.

36. *Deviſee for Years enters*, that will make a Poſſeſſio Fratris. Jenk. 242. pl. 25. cites D. 342. [a. b pl. 54. Trin. 17 Eliz. Anon.]

37. *Demeſnes of a Manor extend into two Counties*, the Eldeſt Son enters into the Demeſne in one County only, and takes the Profits in one County only, and dies without Iſſue, his Siſter of the whole Blood ſhall have and inherit the Demeſnes and Services whereof her Brother was ſeiſed, and her Brother of the half Blood the reſt. Per Manwood J. Le. 265. pl. 355. 20 Eliz. C. B in Bracebridge's Caſe.

38. The * Poſſeſſion of a † *Termor for Years*, is the Poſſeſſion of him in Remainder. Per Yelverton J. 4 Rep. 23. b. Trin. 26 Eliz. B. R. in Clerk and Pennyfeather's Caſe.

* Jenk 242. pl. 25—S. P. per Clench J. Godb. 46 S. P.—

If a Man has a Son and Daughter by one Venter and makes a *Leaſe for Years* and dies, the Eldeſt Brother dies during the Term, this is no Impediment of Poſſeſſion, but that the Eldeſt Daughter of the whole Blood ſhall be Heir to him. Br. Diſcent, pl. 36. cites 5 E. 4. 7.———Co. Litt. 15. a. (k) S. P. and cites S. C.

39. There ſhall be Poſſeſſio Fratris of a *Copyhold* before Admittance, ſaid per Wray Ch. J. to have been ſo adjudged lately. 4 Rep. 23. b. Trin. 26 Eliz. B. R. Clerk v. Pennyfeather.

Fin. Law, 8vo pag. 20.—For the Seiſin given to his Anceſtor is ſufficient for him and all his Heirs. D. 291. b. 69 and in Marg. 23 Eliz. Holmes v. Fane.

40. If a *Gift* be *to A. and the Heirs of his Body*, and he has Iſſue a Son and a Daughter by one Venter, and a Son by another Venter; A. dies; the Eldeſt Son enters and dies; the Youngeſt Son ſhall inherit *per formam Doni*; For he claims as Heir of the Body of the Donee, and not generally as Heir of his Brother. 3 Rep. 41. b. Hill. 34 Eliz. B. R. in Ratcliff's Caſe.

S P. and the Diffe-ls between *Fee ſimple* and *Fee Tail*. Br. Diſcent, pl. 31. cites 37 Aſſ. 15.

41. If a Man has Iſſue *two Sons by divers Venters*, and the *Elder purchaſes Lands in Fee* Simple, *and dies without Iſſue*, the Younger Brother ſhall not have the Land, but the Uncle of the Elder Brother, or ſome other his next Couſin ſhall have the ſame, becauſe the Younger Brother is but of half Blood. Litt. S. 6.

42. If a Man has *Iſſue a Son and a Daughter by one Venter, and a Son by another* Venter, and the *Son of the firſt Venter purchaſes Land in Fee, and dies without Iſſue*, the Siſter ſhall have the Land by Deſcent as Heir to her Brother, and not the Yonnger Brother, for that the Siſter is of the whole Blood of her Elder Brother. Litt. S. 7.

43. If there be *two Brothers by divers Venters*, and the *Elder is ſeiſed of Land in Fee, and dies without Iſſue*, and *his Uncle enters as next Heir* to him, *who alſo dies without Iſſue*, now the Younger Brother may have the Land as Heir to the Uncle, for that he is of the whole Blood to him. Litt. S. 8.

44. If *Lands* are given to a Man and his Wife and the Heirs of their two Bodies, the Remainder to the Heirs of the Husband, and they have Iſſue a Son and the Wife dies, and he takes another Wife and has Iſſue a Son, the Father dies, the Eldeſt Son enters and dies without Iſſue, the ſecond Brother of the Half-Blood ſhall inherit; Becauſe the Eldeſt Son by his Entry was not actually ſeiſed of the Fee Simple, being expectant, but only of the Eſtate in Tail. And the Rule is, that Poſſeſſio fratris de feodo Simplici facit ſororem eſſe hæredem, and here the Eldeſt Son is not poſſeſſed of the Fee Simple, but of the Eſtate Tail. Co. Litt. 14. b.

45. If the *Father makes a Leaſe for Years*, and the *Leſſee enters and dies*, the *Eldeſt Son dies during the Term before Entry or Receipt of Rent*, the Yonnger Son of the Half-Blood ſhall not inherit, but the Siſter; becauſe the *Poſſeſſion of the Leſſee for Years is the Poſſeſſion of the Eldeſt Son*, ſo as he is actually ſeiſed of the Fee Simple, and conſequently the Siſter of the Whole-Blood is to be Heir. Co. Litt. 15. a.

46. If the *Eldeſt Son enters and gets an actual Poſſeſſion of the Fee Simple*, yet if the *Wife of the Father* be *endowed of the third Part*, and the *Eldeſt Son*

Son dies, the Younger Brother ſhall have the Reverſion of this third Part notwithſtanding the Eldeſt Brother's Entry, beeauſe his *actual Seiſin* which he got thereby *was by the Endowment defeated.* Co. Litt. 15. a.

47. *But if the Eldeſt Son had made a Leaſe for Life*, and the *Leſſee had endowed the Wife* of she Father, and *Tenant in Dower had died*, the Daughter ſhould have had the Reverſion, becauſe the Reverſion was changed and altered by the Leaſe for Life, and the Reverſion is now expectant on a new Eſtate for Life. Co. Litt. 15. a.

48. Half-Blood is not reſpected in Eſtates in Tail. Becauſe that the Iſſues do claim in by Deſcent, per formam Doni, and the Iſſue in Tail is ever of the Whole-Blood to the Donee. Co. Litt 15. b.

49. If a *Rent or an Advowſon deſcends to the Eldeſt Son*, and *he dies before he has Seiſin* of the Rent, or preſents to the Church, the Rent or Advowſon *ſhall deſcend to the Youngeſt Son*, for that he muſt make himſelf Heir to his Father. Co. Litt. 15. b.

50. The like Law is of *Offices*, *Courts*, *Liberties*, *Franchiſes*, *Commons of Inheritance*, and ſuch like And this Caſe differs from the Caſe of the Tenant, by the Courteſy, for there if the Wife dies before the Rent Day, or that the Church become void, becauſe there was no Laches or Default in him, nor Poſſibility to get Seiſin, the Law in Reſpect of the Iſſue begotten by him will give him an Eſtate by the Courteſy of England. But the Caſe of the Deſcent to the Youngeſt Son ſtands upon another Reaſon, viz. to make himſelf Heir to him that was laſt actually ſeiſed, as hath been ſaid. Co. Litt. 15 b.

51. Poſſeſſio fratris *holds not of Lands of the Poſſeſſions of the Crown*, nor Half-Blood is no Impediment to the Deſcent of the Lands of the Crown, as it fell out in Experience after the Death of E. 6. to Queen Mary, and from Q. Mary to Q. Eliz. both which were of the Half-Blood, and yet inherited not only the Lands which E. 6. or Q. Mary purchaſed, but the ancient Lands, Parcel of the Crown alſo. Co. Litt. 15 b.

52. If the *Elder Brother grants the Reverſion* (expectant *upon a Freehold) for Life*, it ſhall cauſe Poſſeſſio fratris. Co. Litt. 191. b.

53. In Caſe of two Sons or Daughters by divers Venters and a *Remainder* or *Reverſion is purchaſed* by the Father *upon Eſtate for Life*, where the *Father dies*, *living Leſſee for Life*, and the *Eldeſt Son* or Daughter *die living Leſſee*, Half-Blood ſhall inherit; for in this Caſe the Claim is from the Father. So where Father is ſeiſed in Fee, and Eldeſt Son after the Death of his Father dies *before Entry*, the Younger Son of the Half-Blood ſhall inherit. Otherwiſe, if the *Father made Leaſe for Years*, and Leſſee entered, or had purchaſed Remainder or Reverſion *upon Eſtate for Years*, and Leſſee entered, the Half-Blood ſhall never inherit; for Poſſeſſion of this Leſſee ſerves both where the Eldeſt Son ſurvives the Father, being of Half-Blood to the Younger Brother, and dies before Entry, the Youngeſt Son ſhall inherit the Land of the Father. The Law is, in Caſe of Poſſeſſio Fratris, for the Siſter of the Whole-Blood to be Heir to her Brother before the Younger Brother of Half-Blood. The Reaſon is, every Heir for Fee Simple in Demeſne ought to make himſelf Heir to him who laſt died ſeiſed. Jenk. 242. pl. 25.

And. 31. pl. 74 Mich. 7. Eliz. Anon. S P. —Bendl. 143. S. P. — Jo. 361. S. P. agreed per Omnes J. in Caſe of Rede v. Malſter.

54. A. has *Iſſue*, *B. a Son*, *and M. a Daughter*, *by one Venter*, *and N. and O. Daughters by another Venter*, *and C. a Son by a third Venter*, *and deviſes all his Land to his Wife Durante Viduitate*, and dies, the *Wife enters* into all. *B. before actual Entry*, *dies.* Adjudged, the Will was void for a third Part, and that the *Entry of the Wife into all* made her ſeiſed but of two Parts and in common with her Son of the third Part and that the Entry of the Wife ſhall veſt ſuch Poſſeſſion in common in the Son of the third Part as ſhall make Poſſeſſio Fratris in him for his Siſter

Hob. 120. pl. 152. S. C. adjudged for the Siſter.

Sister of the Whole-Blood to inherit after the Younger Son. Mo. 868. pl. 1201. Trin. 12. Jac. C. B. Small v. Dale.

55. If a Rent Service becomes *Rent Seck*, there shall be a Possessio Fratris. Jo. 234. Pasch. 7 Ca. B. R. in Case of Faulkner v. Bellingham.

56. The Court inclined that the *receiving Rent by Reversioner on Estate for Life* doth not make a Possessio Fratris. Allen, 89. Mich. 24 Car. B. R. in Case of Amys v. Cowley.

Though the the Law will not allow one of the Half Blood to inherit, or be Heir, yet there *is no solid Reason for it*; for the Uncle is not only more remote, but has but half the Blood he having none of the Mother's Blood, per the Master of the Rolls who said, that our Law takes the *Computation from the Canon-Law*, which shortened the Degrees grees of Relation to increase the Number of Dispensations from Rome but the Computation by the Civil Law is otherwise. 2 Wms's Rep. 667. Mich 1734. in Case of Cowper v. Earl Cowper.

57. The *Descent between Brothers differs from all other Collateral Descents whatsoever*; for *in other Descents Collateral the Half-Blood doth inherit*, but in a Descent between Brothers the Half-Blood doth impede the Descent, which argues that the Descent is immediate. The Uncle of the Part of the Father hath no more of the Blood of the Mother, than the Brother of the second Venter. The Brother by the second Venter hath the immediate Blood of the Father, which the Uncle (viz.) the Father's Brother hath not, but only as they meet in the Grandfather. The Brother of the *Half-Blood* is nearer of Blood than the Uncle, and therefore *shall be preferred in the Administration.* And so it hath been resolved in 5 E. 6. in Brown's Case, and though the Book of 5 E. 6. Br. Administration 47. mistakes the Law in preferring the Brother of the Half-Blood before the Mother, yet it hath been right in the Case of a Competition between him and the Uncle; and yet the *Uncle is preferred in the Descent before the Brother of the Half-Blood*, and the Reason is, *because that is a mediate Descent, mediante patre*; but the *Descent to the Brother must be immediate if at all*, and therefore the Half-Blood impedes it. Again, it is apparent, that if in the Line between Brother the Law took Notice of the Father as the Medium thereof, the Brother and Brother by the second Venter should rather succeed the other Brother, because he is Heir to his Father; therefore *in a Descent between Brothers the Law respects only the mediate Relation of the Brothers as Brothers, and not in Respect of their Father*, though it is true, the Bosom or Foundation of their Consanguinity is in the Father and Mother. Vent. 424. Pasch. 16 Car. 2. in Cam. Scacc. in Case of Collingwood v. Pace.

Mod. 120. pl. 22. S. C. adjudged. — Vent. 260. Batmore v. Graves S. C. adjudged. ——3 Keb. 263. pl. 11 S C. adjornatur. ——Ibid. 329. pl. 24. Blackborough v. Graves S. C adjudged.

58. *Admittance of particular Tenant for Years* of Copyhold Land is Admittance of him in Remainder in Fee to make a Possessio Fratris. Adjudged. 2. Lev. 107. Trin. 26. Car. 2. B. R. Blackburn v. Graves.

Fin. R. 216. Trin. 27 Car. 2 Edwards v. Allen, Webb and Shower, S. P.

59. *Seisin of an Estate Tail* will not make a Possessio Fratris of a *Reversion expectant* thereupon. Arg. Show. 245. Mich. W. and M. in Case of Kellow v. Rowden. Fin. R. 216. Trin. 27 Car. 2. Edwards v. Allen,

Holt's Rep. 166 pl. 11. Hill. 5 Ann The Court gave Judgment for the Plaintiff, and Holt delivered the Opinion of his Brethren viz. that the Eldest Son

60. Ejectment. D. seised in Fee according to the *Custom*, which is, *for Lands to descend to the Younger Son*, and the *Wife* to have *an Estate during her Life.* The Father had *Issue a Son at one Venter, and another by another* Venter; the Father dies, the Wife enters, and then the youngest Son dies without Issue. 1. Whether the *intermediate Estate of the* Wife so broke the Descent from the Younger Son, as to make the Elder Son of the Half-Blood to the Younger incapable of Inheriting. Per Powell J. this Customary Estate for Life he compared to the Case of the Freehold, which hindered the Descent of the Demean and Freehold; and the Court seemed to incline strongly to construe the Descent according to the

the Common Law. Sed adjornatur. 11 Mod. 98, 99. Mich. 5 Ann. B. R. Brown v. Dyer.

was in of the Fee ſimple for

for there was no Admittance upon the Surrender which was made 4 Car. 1. and therefore the Surrenderor did continue ſeiſed as he was before. Powell ſaid, there could be no Admittance by Implication; to the Second Point he ſaid, that the Wife having this Cuſtomary Freehold after the Death of her Children, and ſhe dying, then the Eldeſt Son ſhould take as Heir to the Father according to Eſtate at Common Law; and he ſaid, where the Cuſtom is doubtful, it is the beſt Way to follow the Rules of the Common Law, as this Court did in the Caſe of Clements v. Scudamore.

61. Two *Daughters by a firſt Venter* being then Heirs, on the Death of their Father their *Step-Mother enters*, takes the Profits, held Courts in the Name of the Daughters as Heirs at Law, cut down Timber for Maintenance, and *three Months after a Son is born*, who lived about nine Months *and died*. It ſeems the Poſſeſſion of the Mother ſhall be ſuch a Poſſeſſion of the Son as to carry the Eſtate from the Daughters to the Heir of the Son. But Ld. Cowper thought it a Caſe of ſo much Compaſſion, that he ſaid he would give the Plaintiff, (Heir of the Infant) no Relief (as to the removing Terms for Years kept on Foot by the Daughters though the Truſts were ſatisfied, by which Terms the Plaintiff was hindered bringing Ejectments at Law) unleſs it ſhould appear that the Daughters were otherwiſe provided for. Ch. Prec. 280. pl. 225. Paſch. 1709. Whitcomb v. Whitcomb.

62. A *Reverſion in Fee expectant on an Eſtate for Life* is not ſufficient to make a Poſſeſſio Fratris to exclude the Iſſue by a ſecond Venter. Certified by the Juſtices of C. B. Mich. 1712. on a Point referred by the Maſter of the Rolls for their Opinion; Mich. 11. Ann. in Caſe of Rawlegh v. Holland.

(L) To the *Half Blood.*

Of what Eſtate.

Fol. 629.

1. AN Eſtate Tail **may deſcend to the half Blood, notwithſtanding an actual Seiſin in the half Blood before, for there he comes in by the Statute de Donis, and ſo as Heir to the Donee.** * 37 Aſſ. 15. **adjudged.** 32 E. 3. Deſcent 8. **adjudged.** 19 E. 2. Quare Impedit 177.

* Br. Diſcent, pl. 31. cites S. C. ——3 Rep. 41. b in Ratcliff's Caſe S. P.

and this is the Reaſon why Littleton ſays, that Poſſeſſio Fratris de Feodo Simplici facit Sororem eſſe Hæredem. ——Co. Litt. 15 b. S. P.

2. **But an** Eſtate in Fee **ſhall not deſcend from him that is actually ſeiſed in Demeſne of the Eſtate to his Brother, Siſter, or Couſin, of the half Blood.** * 37 Aſſ. 15. **admitted.** † 40 A. 6. **adjudged.**

* Br. Diſcent, pl. 31. cites S. C. ‡ *Mortdanceſtor by a*

Mortdanceſtor against a Woman of Dying ſeiſed of her Anceſtor, the Tenant *pleaded that the Plaintiff is not next Heir*, and it was *found that the Anceſtor had a Son, and this Feme Tenant Daughter by one Venter, and the Plaintiff Son by another Venter, and died ſeiſed, and the Eldeſt Son entered and died without Iſſue, and his Daughter now Tenant entered*, and now *all the Points of the Writ is found for the Plaintiff who is now Heir of his Father* &c But becauſe the *Siſter Tenant to the Heir of the whole Blood has the Land*, therefore notwithſtanding the *Plaintiff was barred* Br. Verdict, pl. 77. cites 40 Aſſ. 6.—Br. Verdict, pl. 101. cites S. C. ——Br. Mortdanceſtor, pl 47. cites S. C.

3. The *Brother muſt be in actual Poſſeſſion*; For Poſſeſſio eſt quaſi pedis Poſitio. 2dly, *De feodo ſimplici*, exclude Eſtates in Tail. 3dly, Facit ſororem eſſe hæredem. So as Soror eſt hæres facta; and therefore ſome

Act muſt be done to make her Heir, and the Younger Son is hæres natus, if no Act be done to the contrary. And albeit the Words are *facit ſororem eſſe hæredem*, yet this *extends to the Iſſue of the Siſter* &c. who ſhall inherit before the Younger Brother. Co. Litt. 15. b.

3 Rep. 42. a. S. P. accordingly by the Reporter near the End Ratcliff's Caſe.—Cro. C. 601. pl. 4. Hill. 16 Car. S. P. was moved in Parliament, and reſolved accordingly by all the Juſtices.

4. *Dignities* whereof no other Poſſeſſion can be had but ſuch as deſcend (as to be a Duke, Marquis, Earl, Viſcount, or Baron) to a Man and his Heirs, *there can be no Poſſeſſion of the Brother to make the Siſter to inherit*, but the Younger Brother being Heir (as Littleton ſaith) to the Father, ſhall inherit the Dignity inherent to the Blood, as Heir to him that was firſt created Noble. Co. Lit. 15. b.

(L. 2) To take away an Entry. In what Caſes.

1. IT ſeems that a *Uſurpation within the Year* cannot be an Interruption, and a Deſcent cannot toll Entry of the Lord who enters for *Mortmain*; For he has no Right of Entry, but only a Title of Entry, which may be taken any Time within the Year. Br. Quare Impedit. pl. 40. cites 18 E. 3. 121.

2. If a Man *levies a Fine and after dies ſeiſed before Execution*, yet the Entry of the Conuſee upon the Heir is lawful, as well after the Year as within the Year; e contra of Re-entry and dying ſeiſed after Execution had. Br. Diſcent, pl. 46. cites 33 E. 3. and Fitz. Title 4. and 14.

3. *But* if a *Man enters upon the Tenant pending the Writ and dies ſeiſed*, and the *Demandant recovers*, yet the Recoveror cannot enter upon this Deſcent, and yet the Tenant and his Feoffee ſhall be bound notwithſtanding the Deſcent in them, for they are in the Per, contra of the Diſſeiſor; for it is admitted to be an Entry without Title, for otherwiſe it ſhould abate the Writ. Br. Diſcent, pl. 46. cites 33 E. 3. and Fitzh. Title, 4. 14.

4. Where a Man has *Iſſue two Sons and dies ſeiſed*, the *Eldeſt* Son *being beyond Sea*, and the *Youngeſt Son enters and dies ſeiſed*, and ſo *to the fourth Degree*, and the *Eldeſt dies and his Iſſue to the ſeventh Degree*, and *the other continues for eighty Years*, and the Iſſue who came of the Eldeſt Son enters, his Entry is lawful by reaſon of the Privity of the Blood; per Wichenham and Tankerville, quod nullus negavit. But *e contra, if the Eldeſt had entered, and the Youngeſt had diſſeiſed him and died ſeiſed*, the Entry ſhall be tolled. Note, a Diverſity, for in the one Caſe, *where the Eldeſt does not enter, the Youngeſt has Colour as Heir*; contrary where the Eldeſt does enter. Br. Entre cong. pl. 6. cites 40. E. 3. 24.

5. A Deſcent *within the Year after Alienation in Mortmain* does not take away the Entry within the Year, for it is *only Title* of Entry, and *not Right of Entry*; for upon Right of Entry he may have an Action. Br Entre cong. pl. 13. cites 47 E. 3. 11.

6. If a *Baſtard purchaſes in Fee and is diſſeiſed*, and the *Diſſeiſor gives in Tail by Fine* the *Remainder over in Fee*, the *Tenant in Tail dies without Iſſue*, and he in *Remainder enters*, there the Entry of the Diſſeiſee is lawful. Br. Entre cong. pl. 17. cites 3 R. 2.

7. If an *Infant be a Diſſeiſor, and another* Man *diſſeiſes and dies ſeiſed*, and *his Heir* is *in by Deſcent*, the Entry of the firſt Diſſeiſee is taken away;

away; *but if the Infant enters* or recovers the firſt Diſſeiſee may enter, and ſo ſee that the Entry of one ſhall give Advantage to a Stranger. Br. Entre congeable pl. 38. cites 4 H. 6. 2. 3.

8. If J *enfeoff a Man upon Condition*, and the *Feoffee is diſſeiſed*, and *the Heir of the Diſſeiſor in by Deſcent*, *or* the *Feoffee makes a Feoffment over* and the *Heir of the ſecond Feoffee is in by Deſcent*, yet J. may enter upon the Deſcents for the Condition broken, for ſuch Deſcent does not take away my Entry; for I *have no other Remedy*, nor no Action *but only Entry*; per Newton, Br. Entre cong. pl. 34. cites 21 H. 6. 17.

9. *But* where *my Tenant for Life aliens in Fee*, there I may have an Action; for there if a Deſcent be had I cannot enter, but am put to my Action; quod nota. Per Newton, Br. Entre cong. pl. 34. cites 21 H. 6. 17.

10. In Treſpaſs the *Defendant juſtified, inaſmuch as W. was ſeiſed in Fee and Leaſed to one Alice at Will*, by which *he as Servant of A. and by her Command entered* &c. and gave Colour, to which the *Plaintiff ſaid that S. was ſeiſed and died ſeiſed, and the Land deſcended to the Plaintiff as Couſin Heir, and ſhewed how, by which he entered and was ſeiſed till the Defendant did the Treſpaſs*, & adjournatur. Br. Titles pl. 42. cites 33 H. 6. 49.

11. Deſcent to J. N. as Heir, *where the King has Title*, does not toll his Entry; Per Littleton. Br. Diſcent, pl. 60. cites 35 H. 6. 37.

12. If a Man *recovers* againſt another, and after there are *three or four Deſcents* before his Entry, yet he may enter upon the Deſcents, becauſe the *Recovery binds the Blood and diſproves the Title of the Tenant.* Br. Diſcent, pl. 37. cites 6 E. 4. 11.

If a Man *recovers* againſt J. by Judgment and after J. dies ſeiſed, the Entry of the Recoveror upon the Heir of J is lawful; for the Poſſeſſor is bound by the Judgment; contrary if Execution had been had, and after J. had re-entered and died ſeiſed for this is a *Diſſeiſin after Execution.* Br. Diſcent, pl. 45. cites 33 E. 3. and Fitzh. Title, 3.

13. Dying ſeiſed *in Tail* tolls the Entry, but *not where he dies without Iſſue of his Body*, for then *there is no Deſcent*, per Fairfax. Br. Traverſe per &c. pl. 266. cites 21 E. 4. 65.

14. Where a *Fine and Recovery is pleaded in bar in Aſſiſe, dying ſeiſed after this in him or his Heir againſt whom the Fine or Recovery was had*, is no Title, for the Entry is lawful upon them; But *contra* by Fiſher, *if* the Fine or Recovery *be executed*, and after he, who confeſſes or loſes, and enters dies ſeiſed, this tolls the Entry; *Quære* hoc. Br. Titles, pl. 37. cites 5 H. 7. 30.

15. If a Man be *diſſeiſed* and *goes beyond Sea, or is impriſoned after*, and Deſcent is had he cannot enter. Per all the Juſtices. Br. Entre congeable, pl. 91. cites 9 H. 7. 24.

16. *Contrary* if he was *within Age at the Time of the Diſſeiſin, and after goes beyond Sea* or is impriſoned. Per all the Juſtices, and Serjeants at Law. Br. Entre congeable, pl. 91. cites 9 H. 7. 24.

17. Nota per omnes, That in *Aſſiſe of Rent*, if the *Plaintiff makes Title by dying ſeiſed of his Father, and Deſcent to him*, this is not material of Rent in Groſs, Quod Nota. And therefore it ſeems that it ſhall not be any Bar in Aſſiſe of Rent in Groſs. Br. Titles, pl. 64. cites 10 H. 7. 23.

18. 32 *H.* 8. *cap.* 23. *Whereas divers have entred by Strength and Force, and without Title &c. The Dying ſeiſed of any Diſſeiſor, having no Right or Title, ſhall not be ſuch Deſcent in Law to take away the Entry of* * *ſuch, as at the Time of the Deſcent had lawful Title of Entry, except ſuch Diſſeiſor hath had peaceable Poſſeſſion five Years next after the Diſſeiſin committed, without Entry or continual Claim of ſuch Perſons as have lawful Title.*

The *Feoffee of a Diſſeiſor* is out of the ſaid Statute, and remains as at the Common Law.

But to a Diſſeiſor, the Statute is taken favourably for the Advancement of the Ancient Right. For whether the *Diſſeiſin* be *without Force*, or with Force, *it is within the Statute* Co. Litt. 238. a.

* And albeit the Statute ſpeaks of him that at the Time of ſuch Deſcent had Title of Entry &c. or

or his Heirs, yet the *Succeſſors of Bodies Politick or Corporate*, ſo you hold yourſelf to a Diſſeiſin, are within the Remedy of this Statute; for the Statute extends clearly to the Predeceſſor being diſſeiſed; and conſequently without naming his Succeſſor extends to him; for he is the Perſon that at the Time of ſuch Deſcent had Title of Entry. Co. Litt 238. a.

But if a Man makes a Leaſe for Life, and the *Leſſee for Life is diſſeiſed, and* the *Diſſeiſor die ſeiſed within Five Years*, the Leſſee for Life may enter; *But if he dies before he does enter*, it is ſaid, that the *Entry of him in Reverſion is not lawful*, becauſe his Entry was not lawful upon the Diſſeiſor at the Time of the Deſcent, as the Statute ſpeaks. Co Litt. 238. a.——Pl C. 47. Arg. S. P.

But if Leſſee for Life had died firſt, and *then the Diſſeiſor had died ſeiſed*, he in the Reverſion had been within the Remedy of the Statute; becauſe he had Title of Entry at the Time of the Deſcent as the Statute ſpeaks, and ſo within the expreſs Letter of the Statute, albeit the Diſſeiſin was not immediate to him, and the like is to be ſaid of a Remainder &c. Co. Litt. 238. a.

It is ſaid, that *Abators and Intruders* are out of this Statute, becauſe the Statute is penal, and extends only to a Diſſeiſor, and that was the moſt Common Miſchief. Co. Litt. 238. a.——Pl. C. 47. a. Mich. 4 E. 6. S. P. Arg

This Statute *extends not to any Feoffee or Donee of the Diſſeiſor* immediate or mediate, but they remain ſtill at the Common Law Co. Litt. 256. a.

The *Preamble has the Words of Diſſeiſin with Force*; *and the Purview helps ſuch Diſſeiſins*; yet this Statute is expounded by Equity to *extend alſo to Diſſeiſins without Force*; for the Miſchief is equal; and the Statute provides againſt the Miſchief which was at Common Law; ſuch was this Diſſeiſin laſt mentioned. The Diſſeiſor dies ſeiſed within two Days after the Diſſeiſin, without Entry or Claim made; now neither the Diſſeiſee nor his Heir can enter upon the Heir of the Diſſeiſor. Jenk. 226. pl. 88.

Note, that it is ruled in the Sergeant's Caſe, that where a Common Perſon *leaſed* Land *for Years, rendering Rent with Clauſe of Re-entry*, and *after grants the Reverſion over*, and the Tenant attorns, the *Grantee may re-enter for the Condition broken by this Statute* by expreſs Words. Br. Entre congeable, pl. 139 cites 4 M. 1.

So of the *Grantees of King* E. 6 and all other Heirs to King H. 8. by the Equity of this Statute, which provided Remedy for the Patentees of King H. 8. and for Grantees of Common Perſons. Br Entre Cong. pl. 139. cites 4 M. 1.

19. A. ſeiſed of Land in Knight Service, leaſed it to J. S. Habend to J. S. and J. N. for their Lives rendering Rent, then A. *deviſed* it *to M. for Life, Remainder to W. R. in Fee*, which was void for a third Part, and died. *B. the Heir of A.* by Attorney, *enter'd and infeoffed J. N. who died ſeiſed.* J. N. before the Feoffment was in Poſſeſſion, and claimed to be in as Leſſee, and paid the Rent to M. But being *no Party to the Leaſe*, it was void as to him, and that he was not Tenant at Will, when the Attorney enter'd and infeoffed him, and ſo was not in Poſſeſſion for his Leſſor M. but if he was *Tenant at Will*, his taking the Feoffment of a Stranger determined his Will, and ſo his Entry cannot reduce the Poſſeſſion to M Quacunque Via, it is a Deſcent, and tolls the Entry. Cro E. 115. pl. 16. Mich. 30 & 31. Eliz B R. Reynold v. Kingman and Brown.

Ow. 141. S. C. The Caſe was this, a Man ſeiſed of

20. Deviſee by a *Deviſe* hath but a Title of *Entry* which ſhall not be bound by any Deſcent, *as Entry for Mortmain* or for *Condition broken*. Le. 210. pl. 293. Mich. 31 & 32 Eliz. C. B. Mathewſon v. Trot.

Land in Socage, deviſed it to his Younger Son and died ſeiſed, the Elder Son enters and dies ſeiſed, and his Heirs enters, and the Younger Son enters upon him, the Queſtion was, if his Entry be taken away by this Deſcent. Judgment was given by Anderſon, that this Deſcent does not take away the Entry of the Deviſee.

S. P. Cro. C. 200. for then he might not maintain any Action, never having had any Seiſin and ſo ſhould be without Remedy, where there is only a Deſcent and no binding Matter of Barr.

21. If *Tenant pur auter Vie continues in Poſſeſſion after the Death of Ceſty que Vie*, He is but Tenant at Sufferance, and his Deſcent ſhall not take away an Entry This was ſaid by Wray to be held at an Aſſembly of all the Juſtices, to which Gawdy agreed, and that 18 E. 4. 25. is not Law. Cro. E. 238. pl. 5. Trin. 33 Eliz. B. R. in Caſe of Allen v. Hill.

22. Deviſe

22. Deviſe in Fee to his Heir, with a *Limitation over*, on Non-payment of Legacies, and Deſcent in the Interim, ſhall not toll the Entry of the Deviſees, for it is not as a Deſcent *by a Stranger* after a Deviſe *before the Entry of Deviſee*, which perhaps tolls the Entry, becauſe it is not as an immediate Deviſe, but it is Quaſi a Deviſe on a Limitation, or upon a Condition broken, which no Deſcent ſhall take away or prejudice. Cro. E. 919. pl. 14. Hill. 45 Eliz. B. R. Hainſworth v. Petty.

23. If one *diſſeiſes another in Time of War*, which is *called Occupation*, and dies ſeiſed alſo in Time of War, Diſſeiſee may enter. Hawk. Co. Litt. 334.

Co. Litt S. 412.—In Times of *Domeſtick Wars* when the Courts of Juſtice are not open, the Deſcent gives no Right of Poſſeſſion, *though the Diſſeiſin was done in Time of Peace*, for it were in vain for a Diſſeiſee to exert his Right of Poſſeſſion, when the Courts of Juſtice are not open; nor can there be any ſuch Thing as the Act of Law to give a Right of Poſſeſſion when the Law itſelf is ſilent; but in Times of *Foreign War*, when there is Juſtice and Peace at Home, a Deſcent will give a Right of Poſſeſſion; for to encourage Enterprizes in ſuch War was ſuch Privilege given to the Heir of the Diſſeiſor. Gilb. Treat. Ten 31. 32.

24. No dying ſeiſed (*where the Tenements comes to another by Succeſſion*) ſhall take away the Entry of any Perſon &c. *as of Prelates, Abbots*, Priors, Deans, or of the Parſon of a Church, *or* of *other Bodies Politick* &c. albeit there were 20 dyings ſeiſed, and 20 Succeſſors, this ſhall not put any Man from his Entry. Litt. S. 413.

A Succeſſion does not give a Right of Poſſeſſion, as a Deſcent does; for a *Succeſſor is in by his own Act*; for it is by his own concurrent Act, that he comes to be inſtalled into the Rights of his Predeceſſor, and therefore he can have no more than he had; but ſince the Predeceſſor had a naked Poſſeſſion, and not the Jus Poſſeſſionis, the Succeſſor can have no more. Beſides, the Succeſſor pays no Relief, unleſs by Grant or Preſcription; for Eccleſiaſtical Lands were not relieved into the Hands of the Lord for Want of a Tenant being given in Free-Alms, or to do Service by Proxy; and *ſince the Lands are not relieved into the Hands of the Succeſſor for a Conſideration paid, he doth not acquire a Right of Poſſeſſion.* Beſides there is no Reaſon to encourage the Predeceſſor to dare in War. who either went not at all, or elſe by Proxy; and therefore no Reaſon ſuch Succeſſion ſhould get a Right of Poſſeſſion. Gilb. Treat. of Ten. 32.

25. A *Diſſeiſor makes a Leaſe to a Man and his Heirs during the Life of J. S.* and the *Leſſee dies, living J. S*, this ſhall not take away the Entry of the Diſſeiſee. 3 Wms's Rep. 368. in a Note of the Reporter. cites 1 Inſt. 239.

26. Deſcents which toll Entries are two Sorts, viz. where the Deſcent is *in Fee, or in Fee Tail*. Co. Litt 385.

27. If a *Diſſeiſor dies ſeiſed*, and *his Heir enters, and endows his Wife of the third Part*, the Diſſeiſee may enter on that, for ſhe is in by her Husband, and the *Law judges no mean Seiſin betwixt Husband and Wife*. Hawk. Co. Litt. 326.

28. If a Diſſeiſor has Iſſue, and *entred into Religion*, by Force whereof the Lands deſcend to his Iſſue, this does not toll the Entry of the Diſſeiſee. Litt. S. 410.

29. If a dying ſeiſed takes not away the Entry of him that Right has *at the Time of the Deſcent*, It ſhall not by any Matter *Ex Poſt Facto* take away his Entry. Co. Litt. 241. b.

30. A Deſcent which tolls Entry *ought to be an immediate Deſcent*; and therefore if a Feme Diſſeiſoreſs take Husband, and has Iſſue and dies, and after the Husband dies, the Deſcent to the Iſſue does not take away Entry, becauſe the Interpoſition of Tenant by Curteſy does impede it. Per Holt Ch. J. at Niſi Prius. 1 Salk. 241. pl. 1. Hill. 6 W. & M. Carter v. Taſh.

Litt. S. 394. S. P. and though at the End of the Section it is added, that the contrary is held, an Addition

Paſch. 9 H. 7. per tot. Cur. and Mich. 37 H. 6. yet Ld. Coke ſays, that this is and to be paſſed over, and that at this Day this Caſe of Littleton is holden for clear Law.—— And Ld. Coke ſays, that here was a Deſcent of a Reverſion at the Time of the Dying ſeiſed:

for the Eſtate of a Tenant by the Curteſy had Commencement by having of Iſſue and is conſummate by the Death of the Wife, ſo as the Fee and Franktenement did not after the Deceaſe of the Wife deſcend to the Heir, and albeit the Tenant by the Curteſy dies afterwards, and that the Franktenement is caſt upon the Heir, ſo as now he has the Fee and Franktenement by Deſcent, yet becauſe the Heir came not to the Fee and Franktenement at once immediately after the Deceaſe of the Wife, ſuch a mediate Deſcent ſhall not take away the Entry of the Diſſeiſee. On the other Side, an immediate Deſcent may take away an Entry for a Time, and immediately may be avoided by Matter ex Poſt Facto, as hath been ſaid. Co. Litt. 241. b.

31. If a Man be diſſeiſed and the *Diſſeiſor dies in peaceable Poſſeſſion* immediately after ſuch Diſſeiſin, *the Heir acquires jus poſſeſſionis, if the Diſſeiſee ſuffers the Anceſtor quietly to enjoy*; for the preſumptive Right is then in the Heir; *but if* the Diſſeiſee has *re-entered within a Year and a Day before ſuch Deſcent*, then *the Heir doth not acquire the jus poſſeſſionis.* Firſt, becauſe there is *no Laches in the Diſſeiſee*, and the Act of Law would do Wrong and Injury (which it cannot do) if it ſhould alter the Right when the Diſſeiſee has done, what in him lay, to continue the Right of Poſſeſſion. Secondly, Becauſe there is no Preſumption that the Diſſeiſor had Right if the Diſſeiſee continues the Claim; for the *Law cannot preſume the Right of Poſſeſſion to be derelict contrary to the manifeſt Act of the Diſſeiſee.* Thirdly, The Lord ought not to take the Heir for his Tenant; and there is ſufficient Warning for the Anceſtor in his Life-time not to do the voluntary Service, nor for the Heir after his Deceaſe to pay the Relief. Gibb. Treat. of Ten. 33.

(M) *To take away* an *Entry.*

In what Caſes *where* the Entry is *given by a Record.*

* Fitzh. Entre Congeable, pl. 35. cites S. C. —— Br. Entre Congeable pl. 35. cites S. C. ——

† Br. Diſcent, pl. 37. cites S. C.

1. If a Man recovers againſt another that is ſeiſed in Fee, and after the Recoveree dies ſeiſed, and it deſcends to his Heir, yet this Deſcent ſhall not take away the Entry of the Recoveror, becauſe he had but a Title of Entry, and the Entry is to execute the Judgment, and ſo relates to it, being executory againſt the Heir that is privy to the Judgment that it binds the Blood. Contra, * 49 E. 3. 23. b. 7 H. 7. 14. b. 16 H. 7. 8. b. agreed clearly per Curiam. † 3 E. 4. 7. ‡ 6 E. 4. 11. b. 3 H. 7. 3. per Browne. 5 H. 7. 31. b. || 21 H. 6. 17. b.

that tho' there are three or four Deſcents before his Entry, yet he may enter upon the Deſcents, becauſe the Recovery binds the Blood and diſproves the Title of the Tenant. —— Fitzh. Mordancefto, pl. 3. cites S. C.

|| Br. Barr. pl. 26. cites S. C. —— Co. Litt. 237. b. 238. a. S. P and cites ſame Caſes.

2. So if the Recovery be againſt Tenant in Tail that dies ſeiſed, this Deſcent to the Iſſue ſhall not take away the Entry of the Recoveror, for the Cauſe aforeſaid. 33 E. 3. Entry Congeable 51.

3. So if I acknowledge the Right to another by Fine, and he grants and renders it to me again, and after dies ſeiſed, this Deſcent ſhall not take away my Entry, becauſe the Fine was executory; (it ſeems 33 E. 3. Entry Congeable 51. is intended of a Fine Come ceo which is executed.)

Br Entre Congeable, pl. 104. cites S. C. and Brooke ſays, Et ſic

4 If a Man recovers againſt A. who after dies, having Iſſue Baſtard-Eigne and Mulier-Puiſne, and the Baſtard enters, and dies ſeiſed, and this deſcends to his Iſſue, this Deſcent ſhall not take away the Entry of the Recoveror, for the Continuance of the Baſtard hath made

made him as Heir, and ſo privy to the Recovery. 5 H. 7. 2. But quære, the Iſſue himſelf cannot baſtardize his Father.

vide, that after Recovery, the Entry is lawful upon him that comes in as Heir to the Tenant who loſt, for this Title is bound; But contra if Diſſeiſor enters and dies ſeiſed; Note the Diverſity, for he is not in properly as Heir. ——Ibid. pl. 133 cites S. C. & S. P. accordingly by Fairfax and Keble; but this was denied by others; Brooke ſays the Reaſon ſeems to be becauſe they are not Heir; and that ſo it ſeems, that after the Recovery, if one diſſeiſes the Tenant before Execution and dies ſeiſed, and his Heir enters, that the Entry of him who recovered is taken away.

5. If a Man recovers Land, and after a Stranger to the Recovery dies ſeiſed, yet this ſhall not take away the Entry of the Recoveror, becauſe it was but a Title, and the Title relates to execute the Recovery of the Judgment.

See the Notes to pl. 4.

6. If a Man recovers againſt another, and enters and ſues Execution, and after the Recoveree diſſeiſes him, and dies ſeiſed, this Deſcent ſhall take away the Entry of the Recoveror, for the Recovery was executed, and cannot be executed again, and this is a Puiſne Title. 3 E. 4. 7. Contra, * 10 H. 7. 5. b. Quære, 7 H. 7. 13. 5 H. 7. 31. b.

* Br. Titles, pl. 63 cites S. C. Huſſey Ch. held that a Man ſhall not make Title after an Act of Parliament, Fine or Recovery, unleſs by Matter of later Time; for by ſuch Act againſt his Father, if he enters again and dies ſeiſed, and his Heir enters, this will not make a Title for the Heir, without ſhewing Title ſince the Recovery &c.—— Kelw. 45. b. pl. 4. Trin. 17 H. 7. it was held for clear Law in C. B. as well by all the Bench as the Bar, that ſuch Diſſeiſin and Deſcent after the Recovery executed ſhall not toll the Entry of him that recovered; for the Heir of the Recoveree is privy and bound by the Recovery, but *otherwiſe it is of a Fine*, and in Margin cites all the ſame Caſes in the Plea of Roll, in H. 7's Time ——Kelw. 170. a. pl. 2. Mich. 6 H. 8. S. P. held accordingly; but that if a Stranger enters and dies ſeiſed, then the Recoveror is put to his Scire Facias, per Guy Palmes, but the Book ſays, Tamen Quære —— Co. Litt. 237. b. 238. a. ſays, that if after the Execution of the Recovery, the *Recoveree diſſeiſes the Recoveror and dies ſeiſed*, this Deſcent ſhall take away the Entry of the Recoveror, but otherwiſe if it be before Execution.——*Deſcent before Execution* ſhall not take away the Entry of the Recoveror, becauſe the Title is bound and he can have no other Remedy. Br. Entre Congeable, pl. 34 cites 21 H. 6. 17. per Newton.——Co. Litt. 238. a. in Principio S. P. that if after Execution the Recoveree had diſſeiſed the Recoveror and died ſeiſed, this Deſcent ſhall take away the Entry of the Recoveror within the Expreſs Words of Littleton; and that ſo it is in Caſe of a *Fine*.

7. If a *Man recovers againſt one who has alien'd pending the Writ*, and *the Alienee dies* his Heir within Age, the Demandant may enter upon the Heir within the Year; for by the Judgment *the Title of the Feoffor is bound*. Per Thirning and Tirwhit. Br. Entre Congeable, pl. 18. cites 2 H. 4. 16, 17.

If a Man *recovers* Land and the *Tenant after dies ſeiſed and* ſo *ſuffers ſeveral Deſcents*, yet he who recovered may enter, for the *Title is bound*, and ſo by Conſequence upon the Heir of the Alienee of him who loſt by the Recovery; for he cannot be in a better Condition than the Tenant who loſt, per Nele Serjeant, which was not denied. Br. Entre Congeable, pl. 116. cites 6 E. 4. 11.

8. A Recovery is had *againſt Tenant for Life, where the Remainder is over in Fee*. Tenant for Life dies; he in the *Remainder enters before Execution*, and died ſeiſed. The Entry of the Recoverer is lawful, becauſe he is *privy in Eſtate*. Otherwiſe it is, if the Deſcent had been after Execution. Co. Lit. 238. a.

(N) *Of what* Things a Deſcent *ſhall take away an Entry.*

4 Rep 23. a pl. 5. Mich. 35 & 36 Eliz. B. R. the C. P. adjudged.

1. IF a Copyholder in Fee in Facto upon an Admittance dies ſeiſed of a Copyhold, and it deſcends to his Heir, **yet it** ſhall not take away the Entry of another that has Right **to the Copyhold. Mich. 15 Ja. B. R. between** *Lee and Browne*, **agreed per Curiam, upon Evidence at the Bar.**

Gravenor v. Todd. ——Poph. 33. 35. Gravenor v. Brook, S. C. that he had no Right to be Copyholder of it, and therefore cannot die ſeiſed of it as a Copyholder, and by the Dying ſeiſed of a Copyholder at Common Law, it ſhall be no Prejudice to him that has Right; for he may enter: But here coming in by Admittance of the Lord at the Court, the Occupation cannot be tortious to the Lord, and therefore was no Deſcent at Common-Law by the Copyholder's De Facto dying ſeiſed; becauſe it was only an Occupation at Will.—— Deſcent of a Copyhold ſhall not take away an Entry. Mar. 6. pl. 13. Paſch. 15 Car.——See the Caſe of Joyner v. Lambert at tit. Copyhold. (D. b) pl. 9.

2. King R. 2. had *Land in Ward* by Deſcent from King E. 3. For Chattle ſhall deſcend in Caſe of the King, contrary of a common Perſon, and *granted the Lands by Letters Patents to W. for Life, the Remainder to J. in Fee.* Br. Aid del Roy, pl. 28. cites 7 H. 4. 41.

3. It was held that Deſcent *of a Rent does not take away an Entry*, but he may diſtrain be it *Parcel of a Manor* or not, but *otherwiſe* it ſeems to be *if the Deſcent be of the Manor.* Br. Entre cong. pl. 98. cites 5 E. 4. 6.

4. If a Man receives my *Rent in groſs* without Authority and dies ſeiſed thereof, yet I may after diſtrain; and *contra, where* the Rent *is Parcel of a Manor* and he receives it and enters into the Demeſnes and dies ſeiſed by Diſſeiſin; but if he diſſeiſes me of the Demeſne, and dies ſeiſed without Receipt of the Rent, there I may diſtrain. Note, a Diverſity, for he is not my Diſſeiſor but at my Pleaſure. Br. Entre cong. pl. 131. cites Littleton Tit. Attorments.

5. Where a Man is *ſeiſed of a Manor and gives Parcel of it in Tail, rendering Rent, and is diſſeiſed of the Manor*, and the *Tenants of the Manor and the Tenant in Tail pay their Rents to the Diſſeiſor, who dies ſeiſed*, this does not toll the Entry nor Diſtreſs of the Rent reſerved upon the Gift in Tail, for *by the Gift this Land is ſevered from the Manor for the Time*, and the Reverſion remains in the Donor, and the Rent is incident to it, and therefore by the Seiſin of the Donee in the Land, the Donor may diſtrain him for the Rent. Br. Entre cong. pl. 131.

6. *So* of a *Leaſe for Life or Years of Land Parcel of a Manor rendering Rent*, the *Payment* of the Rent *to a Stranger* is no Bar to the Leſſor to diſtrain for his Rent, ſo long as the Tenant continues Poſſeſſion in the Land demiſed &c. Br. Entre cong. pl. 131.

7. Deſcents of *Inheritance which lie in Grants*, as *Advowſons, Rents, Commons in Groſs* &c. which are Inheritances incorporeal, do not put him that Right hath to an Action. Co. Litt. 237. b.

(N. 2.) To

(N. 2) To take away an Entry.

Of what Eſtates.

1. DESCENT *of Rent ſhall not take away the Diſtreſs of the Diſſeiſee*, be the Rent Parcel of a Manor or not, by the Opinion of the Court. But per Littleton tit Diſcent, if it be *Parcel of a Manor, and the Tenant attorns*, this ſhall take away the Diſtreſs of the Diſſeiſee, for there it is of the Nature of the Land *contrary of a Rent * in Groſs.* Br. Diſcent, pl. 63 cites 5 E 4. 6.

* Br Diſcent, pl. 66. cites 8 E. 1.

2. *Stranger erects a Shop* in a vacant Piece of Ground *in the King's Manor* and enjoys it, paying no Rent, the King *grants the Manor to A.* who never enters into it or takes any Rent for the Shop; the Occupier of the Shop dies in Poſſeſſion and his Son enters; per 4 Juſtices it is no Deſcent, but Manwood and Wray, Serjeants, e contra. D. 266. b. pl. 10. Anon.

Marg. Ibid. cites Plow. Quæres 381. that no Poſſeſſion is gained thereby—— and cites to the ſame Purpoſe 31 Eliz. B. R. that it was agreed upon Evidence that in this Caſe the *Lord may grant over his Intereſt without Entry* upon the Occupier, but if the Lord *enters*, and the other keeps Poſſeſſion, then it is otherwiſe, for then it is a *Diſſeiſin.*

3. Deſcents *in Tail* which take away Entries are, as if a Man be diſſeiſed, and the *Diſſeiſor giveth the ſame Land to another in Tail*, and the *Tenant in Tail hath Iſſue and dieth of ſuch Eſtate ſeiſed*, and the *Iſſue enters*, in this Caſe the Entry the *Diſſeiſee* is taken away and he is *put to ſue* againſt the Iſſue of the Tenant in Tail *a Writ of Entry ſur Diſſeiſin.* Litt. S. 386.

4. Note, that in ſuch Deſcents which take away Entries, it behoveth that a Man *dies ſeiſed in his Demeſne as of Fee or of Fee Tail*; for a dying ſeiſed for *Term of Life*, or for Term of *another Man's Life*, doth never take away an Entry. Litt. S. 387.

If a *Diſſeiſor, at the Time of his Death, has not the Freehold in him, it cannot be caſt upon his Heir*; for then there is no Danger that the Freehold ſhould want a Poſſeſſor; therefore the Law creates no Title to ſuch Poſſeſſion in the Heir at Law; for it were incongruous that the Law ſhould ſuppoſe the Right of Poſſeſſion in the Heir, when the Poſſeſſion is in another at the Death of the Anceſtor. The Law will not afterwards create him a new Title, in Prejudice of the Perſon that as the Right of Propriety. Gilb. Treat of Ten. 19.

If the Diſſeiſor therefore makes a Leaſe for Life, he parts with the Poſſeſſion, and cannot transmit to the Heir, ſince he had parted with it at the Time of his Death, and the *Deſcent of a Reverſion will not make a Right Poſſeſſion*, for nothing deſcends to the Heir in Reverſion, but the Right of the Reverſion and that is a Right againſt all other Perſons but the Diſſeiſee. For ſince only the Right deſcends, the Heir can be in no better Caſe than the Diſſeiſor was at the Time of his Death; and therefore when Tenant for Life dies, he has only the naked Poſſeſſion, as the Diſſeiſor had it. But if the Diſſeiſor had died in Poſſeſſion, the Law, for the Reaſon aforeſaid, caſting the Poſſeſſion on the Heir, makes it a Right; for that is properly a Right which a Man comes to by the Act of the Law; and ſince the Heir in ſuch Caſe would come to the Poſſeſſion by the Act of the Law it muſt be called a Right of Poſſeſſion; and *it could not be a Right of Poſſeſſion, if he could not defend it againſt all Aggreſſors.* Therefore in ſuch Caſe the Right of Entry is taken away from all others; and hence the *Diſtinction came* to be made *between Jus Poſſeſſionis and Jus Proprietatis.* Gilb. Treat of Ten. 19, 20.

5. If he in the *Reverſion diſſeiſes his Tenant for Life*, and dies ſeiſed; this Deſcent ſhall take away the Entry of the Tenant for Life. Co. Litt. 239. a.

S P. Br. Entre Congeable, pl. 92. cites 9 H. 7 24. per Fairfax.

The Diſſeiſor is ſeiſed in Fee, Br. Entre Congeable, pl. 92. cites 9 H. 7. 24. per Fairfax, and this Caſe was agreed per tot. Cur. by good Advice.

6. *So* it is if there be *Tenant for Life, and the Remainder in Tail, the Remainder in Fee*, and *Tenant in Tail diſſeiſes the Tenant for Life*, and dies ſeiſed. This ſhall take away the Entry of the Tenant for Life. Co. Litt. 239. a.

If a *Diſſeiſor makes a Leaſe for Life* and then *dies ſeiſed of the Reverſion*, this takes not away the Entry of the Diſſeiſee. And ſo if he makes a *Leaſe for his own Life and dies*, the Diſſeiſee may enter, for though the Fee and Freehold deſcended from the Diſſeiſor, yet he died not ſeiſed thereof. *But* if he only makes a *Leaſe for Years, or ſuffers Execution of a Judgment in Debt and dies*, the Diſſeiſee cannot enter. Hawk Co. Litt 325.

7. Deſcent *of a Reverſion* or *Remainder*, does not take away an Entry. So as in thoſe Caſes which take away Entries by Force of Deſcents, it behoveth that he dies *ſeiſed of Fee and Freehold, or of Fee Tail and Freehold* at the Time of his Death; or otherwiſe ſuch Deſcent doth not take away an Entry. Litt. S. 388.

To a Title of Entry for Condition broken no Deſcent ſhall take away Entry; Per Walmſley. Ow. 141. Obiter 32 & 33 Eliz. in Caſe of Mathewſon v. Trott — In the Caſe of a Feoffment upon Condition, there is no Diſtinction between the *Right of Poſſeſſion and* the Right of *Propriety*, but both Rights *are in the Feoffee till the Condition broken, and Entry for ſuch Breach*; and *afterwards both Rights are in the Feoffor*; therefore the Deſcent does not take away the Entry, ſince the Poſſeſſion and the Propriety deſcends in the ſame Manner; viz under the Condition that it was at firſt granted; and the Poſſeſſion is not caſt upon the Heir while the Propriety is in Somebody elſe, as in the former Caſes, and it is the Deſcent of a naked Poſſeſſion to an Heir at Law, that forms a *Jus Poſſeſſionis*, diſtinct and abſtracted from the *Jus Proprietatis*. But here both Rights are united at the Time of the Deſcent, and if the Feoffor in this Caſe could not aſſert his Claim by an Entry he could have no Remedy either for his Jus Poſſeſſionis or Jus Proprietatis, which are not here ſeparate or diſtinct; for till he enters to take Advantage of the Breach of the Condition, both Rights are in the Feoffee, becauſe *the Solemnity of the Feoffment cannot be determined but by an Act of Notoriety*, and becauſe the Poſſeſſion and Right are not here ſeparate or diſtinct, it is called by a different Name, viz not a Right, but a Title of Entry. Gilb. Treat. of Ten. 22, 23.

8. If a Man be *ſeiſed* of certain Land *in Fee or* in *Fee Tail upon Condition*, to render certain Rent, or upon other Condition, albeit ſuch Tenant ſeiſed in Fee or in Fee Tail, *dieth ſeiſed*, yet *if the Condition be broken in their Lives, or after their Deceaſe*, this ſhall not take away the Entry of the Feoffor or Donor, or of their Heirs, for that the Tenancy is charged with the Condition, and the State of the Tenant is Conditional in whoſe Hands ſoever it cometh &c. Litt. S. 391.

9. Alſo if ſuch *Tenant upon Condition be diſſeiſed*, and the *Diſſeiſor dies thereof ſeiſed*, and *the Land deſcends to the Heir of the Diſſeiſor*, now the Entry of the Tenant upon Condition, who was diſſeiſed, is taken away. Yet if the *Condition be broken*, the Feoffor or the Donor which made the Eſtate upon Condition, or their Heirs, may enter Cauſa qua ſupra. Litt. S. 392.

10. If the *Diſſeiſor makes a Leaſe to a Man and to his Heirs during the Life of J. S.* and the *Leſſee dies, living J. S.* this ſhall not take away the Entry of the Diſſeiſee, becauſe he that died ſeiſed had but a Freehold only; and Heirs in that Caſe were added to prevent the Occupant, for the Heir in that Caſe ſhall not have his Age as it was adjudged in Lamb's Caſe. Co. Litt. 239. a.

11. A *Leaſe is a Covenant Real*, that binds the Poſſeſſion of Lands into whoſe Hands ſoever afterwards they come, if the Lands be not evicted by a Superior Title; but the Termor has not the Freehold in him, but holds the Poſſeſſion as Bailiff of the Freeholder, Nomine alieno by Virtue of the Obligation of the Covenant. Therefore if ſuch *Termor is ouſted, and the Freeholder diſſeiſed*, the *Diſſeiſor has the naked Poſſeſſion* bound by the Covenant, and if afterwards a Deſcent is caſt, the *Heir of the Diſſeiſor has the Right of Poſſeſſion*, bound alſo by the Covenant; for the Heir of the Diſſeiſor has only the Right of Poſſeſſion which was in the Diſſeiſee, and that was bound by that Covenant, and therefore it muſt be *bound by the* ſame *Covenant in the Hands of the Heir* of the Diſſeiſor; and were it otherwiſe, the Right of the *Termor* would be in-

was

tirely deſtroyed; for he *cannot have a Right of Poſſeſſion diſtinct from the Right of Propriety.* Gilb. Treat. of Ten. 30, 31.

(N. 3) Deſcent to toll an Entry.

Bound thereby Who; and where they claim by the ſame Title.

1. IF *Tenant for Years holds over* his Term, he is Tenant at Sufferance, and his Deſcent ſhall not take away Entry; but if Tenant *for Term of another's Life* holds over his Term, he is an Intruder and his Deſcent ſhall take away Entry. Quod fuit conceſſum per Dyer. Ow. 35. Mich. 13 and 14 Eliz. Anon.

2. A. *deviſed Lands to B.* and dies; *A Stranger enters and died ſeiſed* before any Entry by Deviſee, now is the Deviſee without Remedy. Arg. 2 Le. 147. pl. 182. Trin. 30 Eliz. S. P. ſeems admitted. Cro. E. 920. Hill 45 Eliz. B. R. Per Cur.——Ow. 96. Per Coke Arg.

3. There is a Diverſity between *a Right for the which the Law gives a Remedy by Action*, and *a Title*, for the which the Law gives no Remedy by Action but *by Entry only*. The Feoffee upon Condition in this Caſe has a Right to the Land, and therefore his Entry may be taken away becauſe he may recover his Right by Action. Co Litt. 240. a.

4. *But* the Feoffor or Donor that have *but a Condition*, their Title cannot be taken away by any Deſcent, becauſe they have *no Remedy by Action to recover the Land*, and therefore if a Deſcent ſhould take away their Entry, it ſhould bar them for ever,; and the Law is all one, whether the Deſcent were *before the Condition broken or after*. Co. Litt. 240. a.

5. *Another Reaſon* wherefore a Deſcent ſhall not take away the Entry of him that has a Title to enter by Force of a Condition &c. is, for that the *Condition remains in the ſame Eſſence that it was at the Time of the Creation of it*, and cannot be diveſted or put out of Poſſeſſion, as Lands and Tenements may. Co. Litt. 240. b.

6. If a *Woman has Title to enter Cauſa Matrimonii Prælocuti* no Deſcent ſhall take away her Entry; becauſe ſhe has but a Title and no Remedy by Action. Co. Litt. 240. b.

7. If a *Diſſeiſor makes Gift in Tail, the Remainder in Fee* and the Donee dies *without Iſſue*, leaving his Wife *Privement encient* with a Son. He in the Remainder enters, and after the Son is born, who enters into the Land, this Deſcent ſhall not take away the Entry of the Deſſeiſee, becauſe the Iſſue comes not to the Land immediately by Deſcent after his Father's Deceaſe. Co. Litt. 241. b.

8. If *one dies ſeiſed in Fee or in Tail, and leaves two Sons*, and *the Younger*, whether of the Whole or Half Blood, *abates and has Iſſue and dies*, yet *the Elder or his Heir may enter*, for it ſhall be intended, that the Younger did not ſet up a new Title, but that he claimed as Heir to his Father in the Elder Brother's Abſence, and that it was his Intent to preſerve the Poſſeſſion againſt Strangers; And for this Reaſon, one Brother ſhall not have Mortdanceſter againſt the other. And the Law is the ſame if there be divers Deſcents, or if the Eldeſt Brother enters into Borough-Engliſh Land. Hawk. Co. Litt. 327.

But if the *Youngeſt Son makes a Feoffment in Fee*, and the *Feoffee dies ſeiſed*, that Deſcent ſhall take away the Entry of the Eldeſt, in reſpect that the Privity of the Blood fails Co. Litt. 242. b

If a Man had Iſſue Baſtard eigne, and Mulier Puiſne, and the *Baſtard in the Life of the Father has Iſſue and dies*, and then the *Father dies ſeiſed*, and the *Son of the Baſtard enters as Heir* to his Grandfather, and *dies ſeiſed*, this Deſcent ſhall bind the Mulier. Co. Litt. 244. b.

9. If

Possessio fratris must be Vacua when the Youngest Son enters by Abatement; Therefore if

9. If the *Younger Son* of a Man *enters by Abatement and dies seised*, this does doth not toll the Entry of his Elder Brother; But if the Eldest Son enters and is seised, and the Younger Brother disseises him, and dies seised, having Issue, the Elder Brother cannot enter. Litt. S. 396, 397.

after the Decease of the Father a Stranger first enters, and abates, upon whom the Youngest Son enters, and disseises him; and dies seised; This Descent shall bind the Eldest, for he entered by Disseisin, and not by Abatement. Co. Litt 242. b.

When a Younger Brother enters in this Case, he does not enter to get a Possession distinct from that of the Elder Brother, but to preserve the Possessions of the Father in the Family, that no Body else abates. For since this is the most Charitable Interpretation that can be made of this Action, and by such a Construction it is just and rightful, the Law shall not intend it to be a wrongful Act or Disseisin, and by Consequence the Possession of the Younger Brother becomes that of the Elder Brother, and then if there be not a Possession distinct, and separated from the Right, the Descent cannot make a right Possession distinct from the Right of Propriety; for it were incongruous that the Ancestor should be construed to possess in another's Right, in order to do no Injury, and the Heir should be construed to possess in his own Right, in order to do Injustice to the Elder Brother. Besides no Laches can be imputed to the Elder Brother, since the Younger entred and possessed for him. But if the Younger Brother in this Case had made a Feoffment in Fee, and the Feoffee had died seised, this Descent had taken away the Entry, because then the Younger Brother could not be interpreted to enter to preserve the Estate of the Elder, but in order to make the Advantage of it for himself. So in this Case Littleton put, If the Elder Brother had entered, then if the Younger had entered upon him, this had been in Destruction of the Elder Brother's Possession, and therefore the Younger gets a Possession distinct from that of the Elder Brother, and his Heir a distinct Right of Possession, and it is the Laches of the Elder Brother, that he did not enter to restore his Possession. Gilb. Treat. of Ten. 24, 25.

If one Coparcener Enters and claims the whole Land and makes a Feoffment in Fee, and

10. If a *Man has two Daughters and dies*, the *Eldest entreth into all* the Lands, *claiming all to her* &c. and *has Issue and dies seised*, and the Issue enters, and dies, leaving Issue, and such second Issue enters, yet as to one Moiety the Youngest Sister may enter; But *if both Sisters had been once seised*, and the Eldest had disseised the Youngest of her Part, the Youngest Sister nor the Heirs cannot enter. Litt. S. 398.

takes back an Estate to her and her Heirs, and *has Issue, and dies seised*, this Descent shall take away the Entry of the other Sister, because by the Feoffment, the Privity of the Coparcener was destroyed. Co Litt. 243. b.

If one Coparcener enters into the Whole, it is only in Preservation of the Estate of the other; but if he disseises the other after her Entry, there she gets a Possession distinct from that of her Sister and the Descent will take away the Entry, causa qua supra. Gilb. Treat. of Ten. 26.

11. If *after the Decease of the Father a Stranger does first enter and abate*, upon whom the *Youngest Son enters and disseises him, and dies seised*. This Descent shall bind the Eldest; for he entred by Disseisin, and not by Abatement. Co. Litt. 242. b.

12. If a Man be seised of Land in the Nature of *Borough-English*, and has Issue two Sons and dies, and the Eldest before any Entry made by the Youngest, enters into the Land by Abatement, and dies seised; this shall not take away the Entry of the Youngest Brother. Et sic de Similibus. Co. Litt. 242. b. 243. a.

13. *Lands were given to the Husband and Wife, and to the Heirs of their two Bodies*, they *had Issue Daughters*, the *Wife died*, the *Husband had Issue by another Wife four Sons, and died*, the *Eldest Son abated and died seised*, this Descent did take away the Entry of the Daughters, because they claimed not by one Title. Co. Litt. 242. a. b.

14. If the *Father makes a Lease for Life*, and *has Issue two Sons and dies*, and the *Tenant for Life* dies, and has Issue two Sons, and dies, and the Tenant for Life dies, and the *Youngest Son intrudes, and dies seised*, this Descent shall not take away the Entry of the Eldest. But if the Father had made a *Lease for Years*, it had been otherwise, because the Possession of the Lessee for Years makes an actual Freehold in the Eldest Son. Co. Litt. 243. a.

FH
MVSEVM
BRITANNICVM